

BY EMAIL TO: iaac.gazoduq.aeic@canada.ca

July 24, 2020

Gazoduq Project
Impact Assessment Agency of Canada
160 Elgin St, 22nd Floor
Ottawa, ON, K1A 0H3

**RE: PROPOSED GAZODUQ PROJECT – COMMENTS ON DRAFT TERMS OF REFERENCE FOR THE INTEGRATED REVIEW PANEL
REF. NO. 80264**

Please be advised that the Canadian Environmental Law Association (CELA) has been retained as counsel for Kebaowek First Nation in relation to the above-noted matter.

We have been instructed by our client to submit the attached comments on the draft Terms of Reference (TOR) dated May 15, 2020 for the Integrated Review Panel that will assess and report upon the Gazoduq Project. These comments are preliminary in nature, and Kebaowek First Nation reserves the right to file further or supplementary comments as may be appropriate.

However, please note that this submission does not indicate or signify that our client has attorned to the jurisdiction of the Agency, Integrated Review Panel or Parliament under the *Impact Assessment Act (IAA)*. To the contrary, these comments are being provided to the Agency under protest by Kebaowek First Nation for several reasons.

First, our client submits that the planning phase of the impact assessment process has been conducted by the Agency in an inadequate and hasty manner. In short, despite some time-limited extensions of certain deadlines, the planning phase has not involved any meaningful federal engagement with Kebaowek First Nation that satisfies the Crown's duty to consult and accommodate. Indeed, it appears to our client that the Agency is primarily interested in rushing through the planning phase in order to meet its own administrative deadlines, rather than taking the time to ensure the Gazoduq impact assessment is sufficiently robust and protective of Kebaowek First Nation's rights under section 35 of the *Constitution Act, 1982*.

Second, the Agency has offered – and our client has reluctantly accepted – participant funding in the amount of \$5,000 to facilitate participation by Kebaowek First Nation in this stage of the planning phase. This quantum is wholly insufficient for its intended purpose, and does not provide our client with the capacity to retain the full suite of advisors, technical consultants, and subject matter experts needed to properly review and comment upon the draft TOR and related documentation.

Canadian Environmental Law Association

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Third and most importantly, this submission to the Agency is without prejudice to our client's outstanding request for the immediate passage of a regulation under the *IAA* that enables the Minister to enter into an agreement under section 114(1)(e) of the *IAA* to designate Kebaowek First Nation as a "jurisdiction" within the meaning of the Act, and to authorize Kebaowek First Nation to exercise certain powers, duties or functions in relation to assessment of the Gazodug Project's potential impacts on the traditional territory of our client.

Unfortunately, despite repeated requests by Chief Haymond on behalf of Kebaowek First Nation, this key regulation has not been made to date. Moreover, to our knowledge, there are no clear targets or timelines for making the requested regulation. In the meantime, the impact assessment for the Gazodoq Project continues to proceed over the jurisdictional objections of Kebaowek First Nation.

In these circumstances, our client submits that any further delay in the promulgation of the regulation is both unjustifiable and unconscionable. Accordingly, Kebaowek First Nation respectfully requests that the final decision on the draft TOR be deferred until such time as the long-overdue regulation has been issued under the *IAA*. In our opinion, the federal Cabinet's continuing failure or refusal to make this regulation potentially jeopardizes our client's section 35 rights.

Please contact the undersigned if you have any questions or require any further information about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

<Original signed by>

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Kerrie Blaise
Northern Services Counsel

Richard D. Lindgren
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cc. Chief Lance Haymond, Kebaowek First Nation
Melanie Sanschagrin, IAAC Crown Consultation Lead

**COMMENTS OF KEBAOWEK FIRST NATION
TO THE IMPACT ASSESSMENT AGENCY OF CANADA
RE: DRAFT TERMS OF REFERENCE FOR THE INTEGRATED REVIEW PANEL
FOR THE GAZODUQ PROJECT**

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Date: July 24, 2020

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**COMMENTS OF KEBAOWEK FIRST NATION
TO THE IMPACT ASSESSMENT AGENCY OF CANADA
RE: DRAFT TERMS OF REFERENCE FOR THE INTEGRATED REVIEW PANEL
FOR THE GAZODUQ PROJECT**

PART I - INTRODUCTION

(a) Overview

The Canadian Environmental Law Association (“CELA”) has been retained as counsel for Kebaowek First Nation (“KFN”) in relation to the impact assessment of the Gazoduq Project under the *Impact Assessment Act* (“IAA”).¹

CELA has been instructed by KFN to review and comment on the draft Terms of Reference (“TOR”) dated May 15, 2020 that have been proposed for the Integrated Review Panel (“Panel”) that will be established for the Gazoduq Project pursuant to the *IAA*.² In addition, the draft TOR appends the Canada-Quebec Cooperation Agreement that outlines how the federal and provincial assessment processes will be coordinated in relation to the Gazoduq Project.

The following comments on the draft TOR are being submitted by CELA on behalf of KFN without prejudice to our client’s outstanding request for an *IAA* regulation that enables the federal Environment Minister to enter into an agreement under section 114(1)(e) of the *IAA* to designate KFN as a “jurisdiction” within the meaning of the Act, and to authorize KFN to exercise certain powers, duties or functions in relation to assessment of the Gazoduq Project’s potential impacts on KFN’s traditional territory.

Despite repeated requests to federal officials by CELA and Chief Lance Haymond on behalf of KFN, this key regulation has not been made to date, and there is no clear timeframe for the issuance of the requested regulation. In the meantime, the planning phase of the impact assessment process for the Gazodoq Project has continued to proceed with undue haste despite the jurisdictional objections of KFN.

Our client views this alarming situation as clearly inconsistent with the federal objective of advancing reconciliation, and it does not satisfy the Crown’s duty to consult and accommodate KFN’s concerns. Moreover, the continuing absence of the regulation potentially jeopardizes our client’s rights under section 35 of the *Constitution Act, 1982*.

¹ *Impact Assessment Act*, SC 2019, c 28, s 1

² Impact Assessment Agency of Canada, “Gazoduq Project (Reference No. 80264), online: <https://iaac-aeic.gc.ca/050/evaluations/proj/80264>

While our client awaits the requested regulation, KFN intends to utilize this opportunity to provide its preliminary views to the Impact Assessment Agency of Canada (“IAAC”) on the inadequacy of the draft TOR. However, KFN is compelled to reiterate that the submission of these comments by counsel does not mean that KFN accepts the legal validity or efficacy of the fast-tracked planning phase of the impact assessment process in this case.

For the reasons outlined below, our review of the draft TOR has identified a number of key gaps, considerable uncertainty, and other problematic or ambiguous provisions. Accordingly, on behalf of KFN, CELA submits that the draft TOR should not be finalized, approved or implemented in its present form. Moreover, our client requests that a final decision on the draft TOR should be deferred until such time as the long-overdue regulation has been issued under the *IAA*.

Recommendation 1: The decision by the Minister under section 47(1) of the *IAA* regarding the draft TOR should be deferred until such time as the regulation requested by KFN has been issued under the *IAA*.

(b) Background

The proponent is proposing to construct and operate a new 780 km natural gas pipeline (and related infrastructure) stretching from Ramore in northeastern Ontario to Saguenay in southern Quebec. The purpose of the project is to connect an existing natural gas transmission facility in Ontario to a proposed natural gas liquefaction facility in Quebec.

The proposed pipeline route does not transect the 20 hectare KFN community reserve, but it does extend across and through the unceded, inherent and Aboriginal rights and title territory of KFN and other Algonquin First Nations in what is now the provinces of Ontario and Quebec. At present, there are almost 1,000 registered members of KFN, most of whom live off-reserve. KFN is part of the Algonquin Anishinabeg Nation Tribal Council.

Because KFN is interested in, and potentially affected by, the Gazoduq Project, KFN has found it necessary to intervene in the *IAA* process despite severe timing, fiscal and capacity constraints experienced by our client.

For example, KFN has submitted comments on the injudicious commencement of the planning phase,³ the shortcomings of the proponent’s initial project description,⁴ the need to pause or suspend the planning phase,⁵ and the necessity of issuing the *IAA* regulation to serve as the condition precedent for developing an appropriate and equitable Indigenous Engagement and

³ Letter dated October 31, 2019 from KFN to Minister McKenna and IAAC.

⁴ Letter dated November 26, 2019 from KFN to Minister Wilkinson and IAAC.

⁵ Letter dated December 12, 2019 from KFN to Minister Wilkinson.

Participation Plan.⁶ Under separate cover, KFN has submitted comments on the Tailored Impact Statement Guidelines (“TISG”) and Indigenous Engagement and Partnership Plan. In addition, KFN representatives have met with IAAC officials and corresponded with the proponent about these matters.

Accordingly, these comments on the draft TOR should read in conjunction with KFN’s prior submissions in relation to the Gazoduq Project, including our client’s ongoing requests for an IAA regulation, as discussed above.

PART II - COMMENTS ON THE DRAFT TERMS OF REFERENCE

(a) Description of the Project

In its comments on the proponent’s initial project description, KFN highlighted the importance of ensuring that the impact assessment process includes a robust cumulative effects analysis of all components and ancillary activities associated with the overall undertaking, not just the pipeline.

However, based upon the “Description of the Project” contained in the draft TOR, it appears that KFN’s comments have not been accommodated adequately or at all. As a practical matter, this indicates that the Review Panel’s impact assessment will be focused largely (if not exclusively) on the pipeline’s effects on matters within federal jurisdiction. At the same time, the Saguenay facility remains the subject of a separate assessment under the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”), which is currently in the environmental impact statement stage.⁷

In our client’s view, the Gazoduq pipeline itself has no independent utility or purpose, and it would not be constructed (or even needed) but for the proposed Liquid Natural Gas (LNG) facility in Saguenay. In short, there is a clear functional, technical and financial connection between the pipeline and the LNG facility. In these circumstances, KFN submits that assessing only the pipeline’s effects is a classic example of “project splitting” (by co-proponents) that should not be countenanced under the IAA or CEAA 2012. Accordingly, the draft TOR should be amended to expressly include consideration of the environmental, health, social, and economic impacts of the pipeline and the proposed LNG facility.

Recommendation 2: The draft TOR should be amended to ensure that the direct, indirect and cumulative environmental effects of the proposed pipeline and the LNG facility are considered by the Review Panel.

⁶ Letter dated May 8, 2020 from KFN to IAAC.

⁷ See <https://iaac-aeic.gc.ca/050/evaluations/proj/80115>.

We further note that the draft TOR briefly refers to the Tailored Impact Statement Guidelines, which were finalized and issued last week for the Gazoduc Project.⁸ On this point, KFN refers to and relies upon its separately filed comments on the TISG, which, in KFN's submission, require additional improvement and clarification when it is implemented by the proponent and supervised by the IAAC and Review Panel.

(b) Scope of Assessment by the Review Panel

Section 3.1 of the draft TOR sets out the intended scope of assessment by the Review Panel. However, as currently drafted, section 3.1 mirrors section 22 of the *IAA* and simply restates the mandatory factors which must be considered in the impact assessment of a designated project. We submit this approach is deficient for the reason it adopts a 'check box' approach instead of delineating or particularizing how the Review Panel will exercise its mandate within the assessment process.

The integration of environmental factors into federal decision-making remains a central purpose of federal EA law and this must be reflected in the scope of the Review Panel's decision making.⁹ Therefore, KFN recommends that additional clarity is required in relation to the assessment carried out by the Review Panel.

Recommendation 3: Prescriptive detail is required setting out how the *IAA*'s section 22 factors will be applied and interpreted in reference to this designated project. Section 3.1 of the TOR should also specify the nature, scope and extent of information required in meeting these considerations.

Similarly, section 3.2 of the draft TOR requires greater explanation to explain how, in instances of overlap between the factors to be considered under the *IAA* and the *Canadian Energy Regulator Act (CERA)*, the Review Panel will not substitute findings under one act for the other.

Recommendation 4: In instances of overlapping 'factors to be considered' between the *IAA* and *CERA*, there must be greater transparency and depth in analysis. Complementary factors should lead to greater robustness in decision making and not a substitution of findings under one Act for the other.

(c) Mandate of the Review Panel

Section 4.2 states that the Review Panel must ensure that the impact assessment takes into account scientific information, Indigenous knowledge, and community knowledge. This is also a stated

⁸ Draft TOR, page 3. See <https://iaac-aeic.gc.ca/050/documents/p80264/135390E.pdf>.

⁹ B. Hobby, "Canadian Environmental Assessment Act: an Annotated Guide" (2019, Toronto: Thomson Reuters).

purpose of the *IAA* per section 6(1)(j). As a guiding purpose of the *IAA*, consideration of Indigenous knowledge should attract greater consideration in the TOR. As drafted, section 4.2 of the draft TOR does not meet this threshold, and should therefore be amended to require the Review Panel demonstrate how Indigenous knowledge will be taken account within its authority.

While section 4.9 sets out the type of information the Review Panel will accept in further of its consideration of Indigenous knowledge, KFN requests the provision provide greater detail regarding the intent of the provisions. That is, rather than accepting information regarding “the location, extent and exercise”¹⁰ of Treaty rights or the “potential seriousness of potential impacts,”¹¹ our client submits that section 4.9 should reference the rationale for this information gathering.

Recommendation 5: Section 4.9 of the draft TOR should be amended as follows:

- 4.9. In order to advance reconciliation, the Review Panel shall collaborate to the extent possible during review and consultation processes with Indigenous communities and accept as part of the impact assessment [...]

Further, while section 4.10 of the draft TOR attempts to outline how Indigenous communities will be engaged in order to meaningfully participate, it is unclear how this participation will feed into the Review Panel’s fulfillment of sections 4.2 of the draft TOR and s. 6(1)(j) of the *IAA*, which requires Indigenous knowledge to be taken into account. We therefore recommend section 4.10 of the draft TOR be amended to read that hearing locations and their timing be carried out in ways which respect KFN’s communal and traditional practices. Additionally, engagement should not burden KFN, but rather be a benefit in terms of local capacity building, project management, and the oversight of traditional knowledge and its proposed uses and application by the Review Panel.

Recommendation 6: Section 4.10 of the draft TOR should be amended as follows:

- 4.10. The Review Panel will ensure that Indigenous communities and Nations are provided an opportunity to meaningfully participate in the impact assessment process through means respectful of their law and practices, including, but not limited to the following:

[...]

h. means which do not burden but rather are of benefit to local capacity building, project management and the oversight of traditional knowledge.

¹⁰ Draft TOR section 4.9(a).

¹¹ Draft TOR, section 4.9(c).

Section 4.3(d) of the draft TOR should also be amended to reference all factors set out in section 22(1) of the *IAA* and reproduced at section 3.1 of the draft TOR. This reference is necessary to ensure the Review Panel's report is as comprehensive in scope as their mandate intends. Otherwise, information regarding impacts on Indigenous rights may be received but an accompanying response and analysis by the Review Panel in support of its conclusions and recommendations not required.

Recommendation 7: Section 4.3(d) of the draft TOR should be amended as follows:

4.3(d) prepare a report with respect to the impact assessment that:

[...]

vi. sets out how all the factors enumerated in section 22(1) of the *IAA* were expressly considered in the Review Panel's analyses, conclusions and recommendations.

In addition, KFN is concerned that section 4.3(d) of the draft TOR simply replicates, without further elaboration or explanation, section 51(1) of the *IAA*. In essence, this approach appears to severely constrain the Review Panel's mandate by failing to require Panel members to evaluate, report upon, and make recommendations to the Minister on the critically important decision-making factors in section 63 of the *IAA* (e.g. contribution to sustainability, impacts on Indigenous rights under section 35 of the *Constitution Act, 1982*, climate change commitments, etc.). Unless the draft TOR expressly directs the Review Panel's report to contain recommendations on the section 63 factors, then the Minister or Cabinet will likely have an inadequate evidentiary basis for making an informed decision under the *IAA*.

Recommendation 8: Section 4.3(d) of the draft TOR must be amended to clarify that the Review Panel is required to evaluate, report upon, and make recommendations in relation to the decision-making factors set out in section 63 of the *IAA*.

Lastly, a number of provisions within section 4 of the draft TOR state that the Review Panel will consider impacts on the rights of Indigenous peoples. However, building upon our client's comments above and as further detailed below regarding "Principles of Indigenous Engagement and Participation," the draft TOR lacks the necessary comprehensiveness and instructional guidance regarding how the impacts will be interpreted and applied.

(d) Cooperative Process with Quebec

Section 4.13 of the draft TOR refers to the Canada-Quebec Cooperation Agreement, which is appended to the draft TOR. We presume that this arrangement has been framed as a “cooperative” process in light of section 39(2) of the *IAA*, which appears to prohibit joint assessments with other jurisdictions if the project is regulated under the *CERA*.

In any event, the existence of a cooperation Agreement between Canada and Quebec is further evidence of the need for jurisdictional agreements between Canada and Indigenous communities, including KFN. Without such an agreement in place, which demonstrates a commitment to reconciliation and integration of Indigenous and Crown legal traditions, KFN will not have requisite statutory foundation for cooperation and partnership with Canada in relation to the assessment process.

In response to the Canada-Quebec Cooperation Agreement (Appendix 1 of the draft TOR), KFN provides the following specific comments.

First, section 7.10 of the Agreement should be amended so that there “must”, not “may”, be consultation with Indigenous communities.

Recommendation 9: Section 7.10 of the Agreement should be amended as follows:

7.10 [...] The BAPE Panel and the Federal Review Panel must, however, consult Indigenous communities within the framework of their respective mandates.

Second, section 7.12 of the Agreement is silent on how “consistency” between the Parties will be achieved. Whether this requires unanimity in the Parties’ respective decision-making, or whether there is an opportunity for dissenting opinions or conclusions as between the Parties, should be expressly set out in the provision.

Recommendation 10: Section 7.12 of the Agreement should be amended to clarify whether “consistency” between the Parties means that they can still reach different findings, conclusions or conditions at the outcome of the cooperative process.

Third, section 11 of the Agreement fails to consider the ability of KFN, other Indigenous communities and members of the public to meaningfully engage in light of COVID-19 and accompanying participation barriers. This section should be revised to set out what contingencies and flexibility will be available within the cooperative assessment process.

Recommendation 11: Section 11 of the Agreement should be amended to specify contingency measures and other flexible options for addressing the potential continuation of COVID-19 constraints on the ability of Indigenous communities and members of public to meaningfully participate in the cooperative assessment process.

Fourth, the Agreement fails to mention whether all materials will be made available in French *and* English. On this point, it should be noted that English is the primary language spoken within KFN. Thus, KFN recommends the addition of a new provision which removes this potential language barrier within the cooperative assessment process:

Recommendation 12: The Agreement should be amended to specify that:

All Notices, Participation Guides and communications from the Parties shall be made fully available in French and English.

(e) Impact Assessment Process

In order to restore public trust and confidence in the assessment process, one of the four areas of focus addressed by the Expert Panel tasked with reviewing Canada's environmental assessment process was removing any notion of bias on the part of responsible authorities that undertake assessments. To this end, the Expert Panel advised that the new impact assessment process must avoid conflicts of interest and protect against bias in order to facilitate the re-building of public trust.

In these circumstances, KFN is therefore disappointed by the lack of attention provided in the draft TOR on methods or safeguards that reduce the potential for conflicts and real or perceived bias. As drafted, section 5.7 of the TOR simply states that "persons appointed to the Review Panel must be unbiased and free of any conflict of interest."

In our view, section 5.7 should be amended to set out that the Review Panel has an ongoing duty to disclose conflicts, whether real or perceived, throughout the duration of the impact assessment process. Direction should also be set out which defines how candidates will be vetted and upon what basis it will be demonstrated that Panel members are free of conflicts and bias.

Recommendation 13: Section 5.7 of the draft TOR should be amended as follows:

- 5.7. The persons appointed to the Review Panel must be unbiased and free from any conflict of interest relative to the Project and have knowledge or experience relevant to the Project's anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment.

Persons appointed to the Review Panel have an ongoing duty to disclose any personal, professional, financial or other conflict of interest or bias for the duration of the assessment process.

In response to the public hearing process set out in section 5.38 of the TOR, we request the Agency review these provisions in light of COVID-19 and prescribe additional methods which will allow the public and Indigenous communities to participate. The COVID-19 pandemic has given rise to sudden and unprecedented changes and without question, created significant barriers to meaningful engagement.

Recommendation 14: As a result of COVID-19, contingencies and flexibility must be built into the information-gathering and public hearing process to ensure full, effective and equitable participation.

Section 5.7 of the draft TOR indicates that upon the filing of the proponent's Impact Statement, the IAAC will conduct a 30-day review of the documentation for "major deficiencies," and the IAAC "may" consult Indigenous communities and the public during this timeframe. KFN submits that 30 days is too short for this threshold review by the IAAC in conjunction with relevant federal departments, and the review period should be extended to at least 75 days. In addition, Indigenous and public consultation by the IAAC regarding the adequacy of the Impact Statement must be mandatory, not optional.

Recommendation 15: Section 5.7 of the draft TOR must be amended to provide the IAAC with at least 75 days to review the Impact Statement filed by the proponent, and to impose a mandatory duty on the IAAC to consult Indigenous communities and the public on the sufficiency of the Impact Statement.

Sections 5.11 and 5.12 of the draft TOR go on to provide that if the IAAC's review identifies major deficiencies, it will so advise the proponent and, within 15 days of receipt, the IAAC will review any further information supplied by the proponent to address the identified deficiencies. All of these steps are to be taken within 60 days of the original receipt of the Impact Statement, by which time the IAAC must advise the Review Panel whether the Impact Statement is ready for the Panel's independent review. KFN appreciates that the Impact Statement will be independently scrutinized by the Review Panel, but remains concerned about the draft TOR's lack of specificity about what happens if unsatisfactory answers from the proponent are delivered within these short timeframes.

In our experience, it is not uncommon for multiple information requests and answers to go back and forth between federal authorities and proponents, usually in a time-consuming manner. Accordingly, the draft TOR's timeframes must be extended for the purposes of identifying, addressing and remedying deficiencies in the Impact Statement prior to the Review Panel's work.

Recommendation 16: The timeframes set out in sections 5.11 and 5.12 in the draft TOR must be extended in order to provide realistic timelines for satisfactorily addressing identified deficiencies in the Impact Statement prior to the commencement of the Review Panel's proceedings.

Similarly, sections 5.24 and 5.25 specify the Review Panel's own role in identifying evidentiary gaps and submitting information requests to the proponent. Again, KFN submits that the draft TOR should establish a mandatory (not optional) Indigenous and public comment period on the sufficiency of the proponent's answers, and that the comment period should be not less than 30 days.

Recommendation 17: Sections 5.24 and 5.25 of the draft TOR should be amended to require the Review Panel to establish an Indigenous and public comment period of not less than 30 days in relation to the proponent's answers to information requests made by the Panel.

Section 5.29 of the draft TOR provides that the Review Panel's report must be filed with the Minister within a 345 day period. In our experience, this reporting deadline appears to be unduly optimistic (if not entirely unrealistic), particularly given the extensive length of the pipeline, its proposed route between two adjacent provinces across large swaths of unceded Algonquin territory, and the fact that the related LNG facility is the subject-matter of another separate assessment process. Accordingly, KFN submits that the reporting deadline should be expanded to ensure that the assessment process is sufficiently rigorous, evidence-based, fair, participatory, and respectful of Indigenous rights, interests and lands.

Recommendation 18: The section 5.29 deadline for filing the Review Panel's report with the Minister must be extended and made sufficiently flexible to ensure that the Panel proceedings are rigorous, evidence-based, fair, participatory, and respectful of Indigenous rights, interests and lands.

KFN is concerned about the draft TOR's proposal that the Review Panel will release its own list of potential approval conditions, and then solicit the views of the proponent and other participants about such conditions.¹² The exact timing for the release of these conditions in the Review Panel's process is unclear from the draft TOR, but KFN submits that this apparent chronology should be reversed: parties should first be invited to submit their suggested conditions (together with supporting documentation), and then the Review Panel should, in due course, disclose and consult upon its proposed list after considering the parties' suggestions.

¹² Draft TOR, section 5.35.

In short, the Review Panel should be meaningfully engaging Indigenous communities and members of the public before the Panel's potential conditions are crafted (presumably towards the end of the Panel proceedings, not at the outset).

Recommendation 19: Section 5.35 of the draft TOR should be amended to require the Review Panel to meaningfully engage Indigenous communities and members of the public before compiling and consulting upon a list of potential conditions in case the project is allowed to proceed under the *IAA* and *CERA*.

Finally, the draft TOR indicates that while the Review Panel must act in a procedurally fair manner, its proceedings must emphasize “informality and flexibility in the conduct of the hearings,” including allowing evidence that may not necessarily be admissible in legal proceedings.¹³

KFN agrees that there will undoubtedly be portions of the impact assessment process when it will be appropriate for the Review Panel's information-gathering activities to be conducted in a less formal manner in order to solicit Indigenous and public views about the Gazoduq Project and its impacts. In principle, our client acknowledges that the Review Panel hearing should not be transformed into a highly adversarial civil trial featuring complicated interlocutory stages, unwieldy production/disclosure obligations, or unduly prescriptive evidentiary rules.

On the other hand, KFN submits that certain aspects of the Review Panel hearing (e.g. when factual, technical or scientific evidence is being tendered by the proponent or public officials) must have sufficient rigour and minimum procedural safeguards (e.g. examination and cross-examination of expert witnesses). This is necessary to: (a) achieve the purposes of the *IAA*; (b) to test the evidence adduced by the proponent, federal authorities and other parties; and (c) enable the Review Panel to properly complete its statutory tasks in a fair and credible manner.

In short, the Review Panel is legally compelled to hold statutory hearings, not inconsequential public meetings or casual town hall events. It is beyond dispute that the institutional ability of the Review Panel to provide substantive assistance to decision-makers under the *IAA* will greatly depend on the practice and procedure utilized to conduct the public hearings. In short, a comprehensive and participatory hearing process is the condition precedent for facilitating meritorious and technically sound decisions by the Minister or Cabinet under the *IAA*.

Accordingly, KFN submits that the draft TOR should be amended to ensure that the Review Panel develops appropriate rules of practice that contain a list of basic procedural rights to be exercised by parties in the Review Panel hearings. These rights include, but are not necessarily limited to:

- right to reasonable notice;
- right to representation;

¹³ Draft TOR, section 5.40.

- right to present evidence;
- right to call and examine witnesses under oath;
- right to cross-examine witnesses under oath, and
- right to reply upon Indigenous customary procedures.

Recommendation 20: The draft TOR should be amended to expressly require the Review Panel to develop appropriate rules of practice and procedural safeguards to guide the public hearings conducted by the Review Panel.

(f) Principles of Indigenous Engagement and Participation

On this topic, KFN notes that reconciliation and partnership with Indigenous peoples is one of the stated principles¹⁴ of the *IAA*. Throughout the development and debate surrounding Bill C-69 (which included the *IAA* and the *CERA*), reconciliation was often identified as a key force behind the new legislation.

For example, when addressing the House of Commons in relation to Bill C-69, then Minister of Environment and Climate Change Catherine McKenna outlined how the *Act* would support reconciliation:

[W]e will advance Canada's commitment to reconciliation and get to better project decisions by recognizing indigenous rights and working in partnership from the start. We will make it mandatory to consider indigenous traditional knowledge alongside science and other evidence. Indigenous jurisdictions would have greater opportunities to exercise powers and duties under the new Impact Assessment Act, and we would increase the funding available to support indigenous participation and capacity development relating to assessing and monitoring the impacts of projects.¹⁵

Similarly, then Parliamentary Secretary to the Minister of Environment and Climate Change Jonathan Wilkinson (now the Minister) stated:

[I]ndigenous peoples and organizations have said that Bill C-69 must fully support our government's goal of advancing reconciliation and a renewed relationship based on the recognition of rights, respect, co-operation, and partnership, as well as our commitment to

¹⁴ Impact Assessment Agency of Canada, *Indigenous Participation Under the Impact Assessment Act*, <https://www.metisnation.ca/wp-content/uploads/2020/03/10.45-2-Kyle-IAA-2019-KPV-1.pdf> at page 3.

¹⁵ House of Commons, *Parliamentary Debates*, 14 February 2018, (Catherine McKenna) at 1705 <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-264/hansard>

implement the UN Declaration on the Rights of Indigenous Peoples. This is critically important.¹⁶

Finally, in a June 2019 news release after Bill C-69 received royal assent, the IAAC reiterated the importance of reconciliation in the impact assessment process:

By recognizing Indigenous rights, culture, and interests in project reviews, and working in partnership from the start, the Government of Canada will advance reconciliation, and arrive at better project decisions. This legislation increases opportunities for Indigenous peoples to be active partners and to be consulted in impact assessments from the outset.¹⁷

Nevertheless, despite these lofty governmental statements, KFN submits that to date, the regulatory planning that brought Bill C-69 to assent and the subsequent planning phase for the Gazoduq Project have not lived up to these important federal commitments. This includes the draft TOR, which contains sparse and superficial provisions in section 7 in relation to “Principles of Indigenous Engagement and Participation.”

In particular, section 7 of the draft TOR does not identify the specific principles which will guide the Review Panel’s ‘taking into account of’ Indigenous knowledge,¹⁸ or the assessment of the Gazoduq Project’s potential impacts on the rights of Indigenous people.¹⁹ While the draft TOR purports to defer to the Review Panel the responsibility for developing and applying such principles,²⁰ KFN submits that the principles and methodologies which serve as a foundation for the Review Panel’s work must be set out in the draft TOR (based on input from Indigenous communities) for the purposes of greater certainty, transparency and accountability. Further comments regarding an Indigenous-led impact assessment process are further set out by our client in their comments on the draft TISG.

Similarly, while the Agency’s newly released “Indigenous Engagement and Partnership Plan”²¹ (“IEPP”) for the Gazoduq assessment process enumerates a number of objectives in relation to Indigenous engagement, including that the Agency “seeks the free and informed prior consent of Indigenous peoples,” it is critical that a similar list of objectives be incorporated into the draft TOR. This would not only serve to clarify the role of the Agency and the Review Panel, but also

¹⁶ House of Commons, *Parliamentary Debates*, 5 June 2018, (Jonathan Wilkinson) at 1300
<https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-308/hansard>

¹⁷ Impact Assessment Agency of Canada, *Better rules for major projects become law in Canada: Canada’s new approach to impact assessments is designed to protect the environment and grow the economy* (21 June 2019)
<https://www.canada.ca/en/impact-assessment-agency/news/2019/06/better-rules-for-major-projects-become-law-in-canada-canadas-new-approach-to-impact-assessments-is-designed-to-protect-the-environment-and-grow-the.html>

¹⁸ TOR, s. 4.2 and 4.3

¹⁹ TOR, s. 4.7, 4.8, 4.9

²⁰ Draft TOR, s. 7.1

²¹ Online: <https://iaac-aeic.gc.ca/050/documents/p80264/135392E.pdf>

demonstrate the Agency's ongoing commitment to rebuilding trust within all components and stages of Canada's environmental assessment process.

As our client has noted in their submission on the IEPP, objectives for Indigenous engagement should not be developed absent discussion with affected Indigenous communities. The lack of cohesion and coordination by the IAAC with Indigenous communities again reaffirms our client's request for an *IAA* regulation that enables the federal Environment Minister to enter into an agreement under section 114(1)(e) of the *IAA* to designate KFN as a "jurisdiction" within the meaning of the Act.

Recommendation 21: The IEPP should be incorporated by reference into the draft TOR, and the following non-exhaustive list of statements be added as a provision within section 4 in order to further a transparent and collaborative relationship with Indigenous peoples:

- The Crown acknowledges that Indigenous peoples have a unique worldview and their own value systems and legal traditions;
- The Crown acknowledges that Indigenous knowledge is separate and distinctive from public feedback;
- Indigenous peoples are the guardians, interpreters and collective owners of their cultures and past, present and future knowledge systems; and
- The Crown recognizes the equitable right of all Indigenous people to participate in the impact assessment process and the Agency's process must anticipate and prevent infringements of Indigenous rights, title and treaty interests.

KFN is also concerned by the repeated references to 'sharing of data by Indigenous peoples'²² and 'information presented by Indigenous community'²³ without the accompanying safeguards to ensure the proper use and respect for this knowledge.

Recommendation 22: Section 7 of the draft TOR should be amended to expressly articulate and adopt the following principles:

- Indigenous peoples have control over their cultural heritage and traditional knowledge;
- All research will respect Indigenous people's privacy, dignity, cultural traditions and rights'
- Indigenous communities have the right to determine levels of access to data and information collected, and retain the ability to review the information used in the

²² IEPP, sections 3.2 and 5.

²³ Draft TOR, sections 3.2, 4.2, 4.7, 4.9.

final report and withhold information, shared stories and experiences which are not intended for public visibility;

- Withholding of information by Indigenous peoples does not imply a lack of interest or good faith engagement nor relinquish the Crown's duty to consult and accommodate.

(g) Specialist Advisors to the Review Panel

In addition to our above-noted comments regarding conflicts and bias within the Review Panel, it is also necessary to ensure that any specialist advisors retained by the Review Panel must also be unbiased and free of conflicts of interest. Currently, this is not a requirement set out in the draft TOR.

Recommendation 23: Section 9.2 of the draft TOR should be amended as follows:

- 9.2. The Review Panel may also retain the services of independent nongovernment experts, including Indigenous knowledge holders, to provide advice on certain subjects within these Terms of Reference. Any such information received will be posted to the Public Registry. Persons retained by the Review Panel must be free of bias and conflicts, and have an ongoing duty to disclose any personal, professional, financial or other conflict of interest arising during the IA process.

PART III – CONCLUSIONS

For the foregoing reasons, KFN concludes that the draft TOR should not be approved in its present form. As drafted, the proposed TOR contains a number of fundamental flaws and significant omissions which must be rectified by the Minister pursuant to section 47(1) of the *IAA*. This is particularly true in light of KFN's rights, interests and lands that may be adversely impacted by the Gazodoq Project.

Accordingly, KFN makes the following recommendations:

Recommendation 1: The decision by the Minister under section 47(1) of the *IAA* regarding the draft TOR should be deferred until such time as the regulation requested by KFN has been issued under the *IAA*.

Recommendation 2: The draft TOR should be amended to ensure that the direct, indirect and cumulative environmental effects of the proposed pipeline and the LNG facility are considered by the Review Panel.

Recommendation 3: Prescriptive detail is required setting out how the *IAA*'s section 22 factors will be applied and interpreted in reference to this designated project. Section 3.1 of the TOR should also specify the nature, scope and extent of information required in meeting these considerations.

Recommendation 4: In instances of overlapping 'factors to be considered' between the *IAA* and *CERA*, there must be greater transparency and depth in analysis. Complementary factors should lead to greater robustness in decision making and not a substitution of findings under one Act for the other.

Recommendation 5: Section 4.9 of the draft TOR should be amended as follows:

4.9. In order to advance reconciliation, the Review Panel shall collaborate to the extent possible during review and consultation processes with Indigenous communities and accept as part of the impact assessment [...]

Recommendation 6: Section 4.10 of the draft TOR should be amended as follows:

4.10. The Review Panel will ensure that Indigenous communities and Nations are provided an opportunity to meaningfully participate in the impact assessment process through means respectful of their law and practices, including, but not limited to the following:

[...]

h. means which do not burden but rather are of benefit to local capacity building, project management and the oversight of traditional knowledge.

Recommendation 7: Section 4.3(d) of the draft TOR should be amended as follows:

4.3(d) prepare a report with respect to the impact assessment that:

[...]

vi. sets out how all the factors enumerated in section 22(1) of the *IAA* were expressly considered in the Review Panel's analyses, conclusions and recommendations.

Recommendation 8: Section 4.3(d) of the draft TOR must be amended to clarify that the Review Panel is required to evaluate, report upon, and make recommendations in relation to the decision-making factors set out in section 63 of the *IAA*.

Recommendation 9: Section 7.10 of the Agreement should be amended as follows:

7.10 [...] The BAPE Panel and the Federal Review Panel must, however, consult Indigenous communities within the framework of their respective mandates.

Recommendation 10: Section 7.12 of the Agreement should be amended to clarify whether “consistency” between the Parties means that they can still reach different findings, conclusions or conditions at the outcome of the cooperative process.

Recommendation 11: Section 11 of the Agreement should be amended to specify contingency measures and other flexible options for addressing the potential continuation of COVID-19 constraints on the ability of Indigenous communities and members of public to meaningfully participate in the cooperative assessment process.

Recommendation 12: The Agreement should be amended to specify that:

All Notices, Participation Guides and communications from the Parties shall be made fully available in French and English.

Recommendation 13: Section 5.7 of the draft TOR should be amended as follows:

5.7 The persons appointed to the Review Panel must be unbiased and free from any conflict of interest relative to the Project and have knowledge or experience relevant to the Project’s anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment. Persons appointed to the Review Panel have an ongoing duty to disclose any personal, professional, financial or other conflict of interest or bias for the duration of the assessment process.

Recommendation 14: As a result of COVID-19, contingencies and flexibility must be built into the information-gathering and public hearing process to ensure full, effective and equitable participation.

Recommendation 15: Section 5.7 of the draft TOR must be amended to provide the IAAC with at least 75 days to review the Impact Statement filed by the proponent, and to impose a mandatory duty on the IAAC to consult Indigenous communities and the public on the sufficiency of the Impact Statement.

Recommendation 16: The timeframes set out in sections 5.11 and 5.12 in the draft TOR must be extended in order to provide realistic timelines for satisfactorily addressing identified deficiencies in the Impact Statement prior to the commencement of the Review Panel's proceedings.

Recommendation 17: Sections 5.24 and 5.25 of the draft TOR should be amended to require the Review Panel to establish an Indigenous and public comment period of not less than 30 days in relation to the proponent's answers to information requests made by the Panel.

Recommendation 18: The section 5.29 deadline for filing the Review Panel's report with the Minister must be extended and made sufficiently flexible to ensure that the Panel proceedings are rigorous, evidence-based, fair, participatory, and respectful of Indigenous rights, interests and lands.

Recommendation 19: Section 5.35 of the draft TOR should be amended to require the Review Panel to meaningfully engage Indigenous communities and members of the public before compiling and consulting upon a list of potential conditions in case the project is allowed to proceed under the *IAA* and *CERA*.

Recommendation 20: The draft TOR should be amended to expressly require the Review Panel to develop appropriate rules of practice and procedural safeguards to guide the public hearings conducted by the Review Panel.

Recommendation 21: The IEPP should be incorporated by reference into the draft TOR, and the following non-exhaustive list of statements be added as a provision within section 4 in order to further a transparent and collaborative relationship with Indigenous peoples:

- The Crown acknowledges that Indigenous peoples have a unique worldview and their own value systems and legal traditions;
- The Crown acknowledges that Indigenous knowledge is separate and distinctive from public feedback;
- Indigenous peoples are the guardians, interpreters and collective owners of their cultures and past, present and future knowledge systems; and
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- Indigenous peoples have control over their cultural heritage and traditional knowledge;
- All research will respect Indigenous people's privacy, dignity, cultural traditions and rights'
- Indigenous communities have the right to determine levels of access to data and information collected, and retain the ability to review the information used in the final report and withhold information, shared stories and experiences which are not intended for public visibility;
- Withholding of information by Indigenous peoples does not imply a lack of interest or good faith engagement nor relinquish the Crown's duty to consult and accommodate.

Recommendation 23: Section 9.2 of the draft TOR should be amended as follows:

9.2 The Review Panel may also retain the services of independent nongovernment experts, including Indigenous knowledge holders, to provide advice on certain subjects within these Terms of Reference. Any such information received will be posted to the Public Registry. Persons retained by the Review Panel must be free of bias and conflicts, and have an ongoing duty to disclose any personal, professional, financial or other conflict of interest arising during the IA process.

All of which is respectfully submitted on this 24th day of July, 2020.

<Original signed by>

<Original signed by>

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Northern Services Counsel

Richard D. Lindgren
Counsel

CANADIAN ENVIRONMENTAL LAW ASSOCIATION