Paul First Nation Industry Relations Corporation
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Introduction

Heartland Expansion Project

Enabling Indigenous Participation in Impact Assessment

The Policy Document states:

The Agency consults with and encourages the participation of Indigenous peoples in the impact assessment of projects for a variety of reasons, including:

1) to promote communication, relationship-building, cooperation and partnership with Indigenous peoples with respect to impact assessments;
2) to meet the Crown's common law duty to consult by ensuring respect and protection of the rights of the Indigenous peoples of Canada recognized and affirmed in section 35 of the Constitution Act, 1982;
3) to ensure that impact assessments take into account Indigenous knowledge, cultural considerations and customs along with scientific information and other evidence; and
4) to meet statutory and contractual obligations in addition to policy and good governance considerations, which includes working towards securing the free, prior and informed consent of Indigenous peoples for projects that are in the public interest.

For a variety of reasons, Canada and the Impact Assessment Agency fails to meet up to its own policies not to mention jurisprudence with respect to the duty to consult and the duty to accommodate.

Regulatory Review

After careful review and assessment of the regulatory performance of the Impact Assessment Agency and its predecessor (Canadian Environmental Assessment Agency), it is clear the regulator has failed in its duties to Indigenous communities in Alberta and elsewhere.

The Paul First Nation notes multiple flaws within the IAAC process.

Item #1 – Lack of Regulatory Tools

In assessing regulatory quality, there are a number of factors which should be considered as part of this process. Transparency, Accessibility and Congruency should all be factors to review the work of the IAAC.

As it currently stands, the ***Impact Assessment Act***[1] lists one tool as a regulator. Article 16(1) of the Act states:

> 16 (1) After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must decide whether an impact assessment of the designated project is required[2].

As the Paul First Nation has noted in numerous consultations and engagements with CEAA and now the IAAC, this tool is a blunt hammer. Either a project requires a full-blown environmental impact assessment (EIA) or it does not. If the IAAC makes a determination under Article 16(1) that no impact assessment is required, then Indigenous communities are not given a meaningful opportunity to address any legal or regulatory issues with respect to a proposed project.

Unless or until an EIA is required, the Paul First Nation is not provided any capacity support or access to the proposed site of the project to do an assessment to determine the severity of impact by the project. The Paul First Nation notes that adequate consultation capacity is an expectation identified by the courts as a requirement of adequate consultation. There are major regulatory gaps at this stage of the process which are fundamentally inconsistent with reconciliation.

In the past, the Paul First Nation has advocated for the development of additional tools for determining whether a full EIA is required. The following are specific types of assessments that should occur prior to the IAAC deciding that an EIA is required:

1) Archaeological Impact Assessment
2) Heritage Impact Asssessment
3) Treaty Rights Impact Assessment
4) Health Impact Assessment
5) Socio-Economic Impact Assessment
6) Cumulative Impact Assessment
7) Fish & Fish Habitat Assessment
8) Aquatic Species at Risk Impact Assessment
9) Migratory Birds Impact Assessment

[1] *Impact Assessment Act*, SC 2019, c 28, s 1.
[2] *Impact Assessment Act*, SC 2019, c 28, s 1, s. 16(1).

The Paul First Nation notes that this list is not exhaustive. There may be other assessments that Paul First Nation or other Nations may have an interest in participating in prior to a decision being made. The Paul First Nation notes that neither CEAA, nor the IAAC, has ever formally responded to these concerns.

Issue 2 – Gap in Consultation/Engagement

In the *Tsleil-Waututh* decision, the Federal Court of Appeal noted an expectation that the Crown would meet a standard of meaningful dialogue:

> …Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes—someone able to respond meaningfully to the applicants' concerns at some point in time[3].

In our recent engagement, we raised the regulatory gaps in the IAAC process, but the IAAC representatives merely noted that we had "brought that up before". They otherwise provided no comment. The Paul First Nation needs to meet with more than just notetakers. The IAAC needs to send a sufficiently senior representative that can respond meaningfully to our concerns. The Paul First Nation respectfully requests meetings with senior IAAC representatives so that we can receive a meaningful response to our concerns with respect to IAAC regulatory gaps. Despite numerous requests, the IAAC and its predecessor CEEA, continue to ignore their duty to engage and consult meaningfully.

Issue 3 – Informed, Evidence-Based Decision-Making

There have been numerous cases at the federal level that look at environmental impact assessments. They note a high degree of deference to the regulators to interpret their own statutes and make decisions[4]. It has also been noted that there are limits to this deference.

In the *Greenpeace Canada* decision, Russell J. noted the following when talking about adverse environmental effects:

> In other cases, an analysis of potential effects was conducted based on preliminary or baseline data that must be verified or augmented through further study or analysis […]This

[3] *Tsleil-Waututh Nation* v. *Canada (Attorney-General)* (2018 FCA 153), at para. 599.
[4] Greenpeace Canada v Canada (Attorney-General), 2014 FC 463; Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans), [2000] 2 F.C. 263, [1999] F.C.J. No. 1515; Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage), [2001] 2 F.C. 461, [2001] F.C.J. No. 18, McLean v. British Columbia (Securities Commission), 2013 SCC 67, among others.

> is the purpose of follow-up programs as defined in s. 2(1), but as noted elsewhere in this judgment, such programs are not to be used where no baselines or thresholds exist.
>
> It seems to me that a conceptual distinction can be drawn between situations where the Panel concludes, despite a degree of uncertainty, that significant adverse environmental effects are unlikely to occur based upon:
>
> (a) Reliance upon an established standard or practice and the likelihood that the relevant regulatory structures will ensure compliance with it; or
>
> (b) Confidence in the ability of regulatory structures to manage the effects of the Project over time[5].

Based on the direction from Russell J., it is clear the regulator is owed some deference with respect to their decision-making, except where there is no clear established standard or practice being implemented by the regulator or there are questions about the ability of regulatory structures to manage effects of a Project over time.

Archaeology – Specific Concern

The Heartland Expansion Project will be carried out in area that has proven to be rich in archaeological artifacts. Every project in the region that has included field components to an archaeological impact assessment has discovered artifacts. This is entirely consistent with the information provided by Paul First Nation Elders. Despite the direction of Elders, and the claim of the IAAC to include Indigenous Knowledge within decision-making, gaps remain.

To our knowledge, no archaeological impact assessments on the site in question have been carried out. Certainly, if there has been any archaeological impact assessment, there has been no involvement by the Paul First Nation, its Elders or monitors. The identification of an archaeological site requires field work. Mitigating a 10 m x 10 m site will be significantly different from a 50 m x 1000 m site, and the severity of impact will differ based on the size of the site. Should the IAAC determine that no EIA is required, then no further protections will be taken by the IAAC around the artifacts at the proposed site. Once again, the IAAC will employ a familiar trade-off: benefits for the proponent and their investors, the national, provincial and local economies will benefit from this project, and Indigenous communities will suffer the destruction of another Indigenous site of significance.

[5] Greenpeace Canada v Canada (Attorney-General), 2014 FC 463 at para. 279-280.

There are no standards for how proponents will conduct their archaeological impact assessment. On the low end, proponents will simply do a search with the province on the provincial database. Should the search produce no record of registered sites, many proponents will stop. If the IAAC attempted to review the provincial process, they would learn that in instructions to proponents that a search of a database is not ultimately determinative. Canada and Alberta have never conducted comprehensive field assessments to locate or identify the size and magnitude of the archaeological site in the Heartland region.

UNDRIP Considerations

The Preamble to the *Impact Assessment Act* notes:

> Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples[6]

The Impact Assessment Agency, through the Preamble, has already been directed by Parliament to consider the implementation on the Rights of Indigenous Peoples. Despite this direction, there was no mention of this direction within the engagement with IAAC on this project. When asked about the implementation of UNDRIP the IAAC representatives were not able to provide any meaningful comments. Like mentioned earlier, the IAAC needs to send sufficiently senior representatives who can meaningfully comment on questions and concerns from Nations. They should not be sending mere notetakers who cannot speak to the IAAC's process for the inclusion of Indigenous knowledge.

The entire process for Impact Assessment needs to be fundamentally altered to take into account all of the considerations brought forth by UNDRIP.

The Paul First Nation has repeatedly requested information regarding the process for determining impact to rights. On Dec. 8, the Paul First Nation IRC finally received a response to this information request. The email included the following:

> As promised, here is the link to the Impact Assessment Agency of Canada's guidance document on assessing impacts to rights: Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples - Canada.ca. Also, here is the link to the associated policy context for the guidance for your reference: Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples (canada.ca).

[6] Impact Assessment Act, SC 2019, c 28, s 1.

Given that the Paul First Nation literally received this yesterday, we will refrain from the more fulsome response that we had originally planned. We would simply note that any assessment on the rights and interests of the Paul First Nation has to be led by the Paul First Nation. This includes all assessments carried out under s. 7 of the *Impact Assessment Act*, as well as any impact, regional or strategic assessments undertaken by the Crown. We would also note with some concern that the IAAC has developed no competency standards around the term "impact assessment practitioner".

Clarity between s. 7 of the Impact Assessment Act & Section 35(1) of the Constitution Act, 1982

It is not clear what the difference in process between assessing impacts under a section 7 analysis, or even whether one is required under section 7. The Paul First Nation would note that there is considerable overlap between impact assessments under section 7, section 35(1), and various provisions of the UNDRIP. This requires a more robust response from the IAAC to ensure that Indigenous Knowledge is included.

Preliminary Conclusions

There are substantive issues with respect to this project, as well as procedural issues with respect to the consultation and engagement with the Paul First Nation. The IAAC needs to engage with the Paul First Nation around the broader process questions raised in this document and in previous engagements with CEAA.

We do not have sufficient information to provide informed consent. We do not see sufficient information from which the IAAC can make an informed, evidence-based decision whether this project should require an EIA. We do not see sufficient information around formal commitments by the IAAC or the proponent to ensure partnership on this project. When the IAAC inevitably provides their approval for this project, we do not see sufficient regulatory tools or oversight to ensure that harm is prevented to Indigenous rights and interests, not to mention the protection of Indigenous sites of significance.