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The Honourable Arif Virani
Minister of Justice and Attorney General of Canada

The Honourable Steven Guilbeault
Minister of Environment and Climate Change

April 12, 2024

Dear Ministers,

I have been keenly engaged in the development of environmental assessment law in Canada since 1975. This engagement includes having participated in the first EARP public hearing in 1975 over the Wreck Cove hydro project, resigning on principle in June 1988 when the former Minister of Environment ignored the guidelines order requirement under EARP to approve the Rafferty Alameda dams, a decision that was found to violate his legal obligations by the Federal Court of Canada on a legal challenge from the Canadian Wildlife Federation. Prior to leaving my role as Senior Policy Advisor to the Minister, I had steered the beginning of permission to legislate CEAA through the "machinery of government" process as it then existed in PCO.

After 1994, once CEAA was legislated, I have led a number of court challenges, in the Federal Court, to decisions to ignore environmental assessment requirements notably in Sierra Club of Canada's challenge to the Chretien government's decision to fund and build CANDU reactors in China, to the Transport Minister's decision to ignore EA requirements in the case of NWPA over the Bounty Bay aquaculture development, in which our application in the matter of mandamus was successful.

As well I have, generally on behalf of Sierra Club of Canada, been granted intervenor status in many CEAA reviews, including over the oilsands development of the Kearl project, Sydney Tar Ponds, Mackenzie Gas Pipeline, Shell Jackpine oil sands expansion, Canadian Resources oil sands, James Bay Great Whale project, NATO low-flights over Labrador over Manitoba Hydro's development Wuskwatim, the federal-provincial

panel on the Digby Neck Quarry case (2006), the NEB review under the gutted process post C-38 in spring 2012 of the Kinder Morgan pipeline, among many other projects. In opposing the C-38 (2012) repeal of the original Canadian Environmental Assessment Act (with support from the Liberals, BQ and NDP) I brought forward over 400 amendments leading to a round of non-stop voting over a 24 hour period at Report Stage over which period I never once left my seat in order to defend all amendments. Sadly to no avail.

The current law, C-69 tragically maintained the Harper administration's architecture for EA, now framed as IA. The critical change Harper made and which C69 preserved was to massively reduce the number of projects and decisions subjected to any federal review by replacing predictable, constitutionally bullet-proof criteria with a discretionary "designated project list." C-38 also allowed energy regulators for the first time to lead EAs, a move rejected by the expert panel.

It appears that current internal thinking is to maintain the designated project list approach.

My fundamental question is "WHY?" Why would this government risk the tricky foundation of discretionary justifications of "effects in federal jurisdiction" as opposed to the criteria based approach of the 1983 CEAA, as modernized over time to 2012, and with further refinements as strongly recommended by the expert panel led by Johanne Gelinas as established by the Hon Catherine McKenna.

The designated project list approach risks unconstitutional ultra vires declarations while simultaneously allowing hundreds, if not thousands, of projects within federal jurisdiction to have no EA at all.

As a matter of raw politics, the risk of rushing through quick and dirty fixes to C-69 in the spring budget implementation act risks an enormous media and public backlash for failure to consult Indigenous peoples and settler culture Canadians. To protect your government from that political backlash, I beg you to embrace the recommendations of the expert panel and its 2017 report. That panel visited every province and territory and heard in in-person hearings from thousands of participants. It heard from Indigenous peoples and organizations coast to coast to coast. Amending C69 to meet the panel's approach will significantly strengthen and improve EA. Robust constitutional underpinnings to review projects like Ontario's highway 413 are critical.

The key is to go back to the recommendations of the High Level Expert Panel. Here are some of their key points supporting the points in this memo:

"Federal interests include, at a minimum, federal lands, federal funding and federal government as proponent as well as Species at Risk, fisheries, marine plants, migratory birds, greenhouse gases, indigenous peoples (etc.)" (p. 18, emphasis added)

These federal interests include, at a minimum, federal lands, federal funding and federal government as proponent, as well as:

1. species at risk;
2. fish;
3. marine plants;
4. migratory birds;
5. Indigenous Peoples and lands;
6. greenhouse gas emissions of national significance;
7. watershed or airshed effects crossing provincial or national boundaries;
8. navigation and shipping;
9. aeronautics;
10. activities crossing provincial or national boundaries and works related to those activities; or
11. activities related to nuclear energy.

The careful consideration and incorporation of federal jurisdiction is the starting point from which to answer the question of when federal IA should apply.

The Panel recommends that federal interest be central in determining whether an IA should be required for a given project, region, plan or policy.

"The IA authority should be established as a quasi-judicial tribunal empowered to undertake a full range of facilitation and dispute resolution processes." (p.5)
And at p. 51, described as CRTC-like tribunal.
"...have time limits and cost controls that reflect the specific circumstances of each project rather than the current 'one size fits all' approach." (p.5)
(and related comment) CEAA2012 "imposed unrealistically short timelines for the review of long complex documents by interested parties." (p.12)

" It [CEAA 2012] vastly reduced the number of projects subject to review…assessment applies to far more than projects that fill the nightly news…could deal effectively with many less controversial projects." (p.12)

Regarding the energy regulators, the panel recommended no role at all for the NEB (CER), CNSC, or the Off-Shore Boards:
"The power to make IA decisions is aligned with the independence of the authority…with regard to projects, the federal system prior to 2012 had decades of experience delegating final authority to CNSC and NEB…" (p. 50-51)

I appreciate the opportunity to work with you in the critical work in repairing federal environmental reviews.

Sincerely,

Elizabeth May, O.C.
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Leader of the Green Party of Canada

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