Report for the Atlantic Policy Congress of First Nations Chiefs Secretariat

Indigenous Participation and the Use of Indigenous Knowledge under the *Impact Assessment Act*: An Overview with Policy Recommendations

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January 29, 2020

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1. SUMMARY

In August 2019, the Government of Canada's new *Impact Assessment Act* ("the *IAA*" or "the Act") came into force, replacing the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*").

The *IAA* establishes new processes for assessing the environmental and sociocultural impacts of major projects that fall within the federal government's jurisdiction. Unlike *CEAA 2012*, the *IAA* incorporates several statements and requirements reflecting the federal government's duty to consult, its commitment to fully implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*" or "the UN Declaration"), and its objective to incorporate Indigenous knowledge as an evaluative tool in assessments under the Act. The Act's preamble also affirms the federal government's commitment to fostering reconciliation with Indigenous peoples.

Government policy statements describe the *IAA*'s reconciliatory ambitions this way:

> Reconciliation needs to be at the centre of all aspects of the Government of Canada's relationship with Indigenous peoples. The approach of including Indigenous peoples in impact assessment, such as through the early identification of potential impacts of projects on Aboriginal and treaty rights, or the development of Indigenous-led studies, reflects the Government of Canada's commitment to advancing reconciliation through a renewed, nation-to-nation, Inuit-Crown and government-to-government relationship based on the recognition of rights, respect, cooperation, and partnership. Participation of Indigenous peoples in impact assessment aligns with the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and supports the Government of Canada's aims to secure free, prior and informed consent for decisions that affect Indigenous peoples' rights and interests.
>
> The integration of Crown Consultation into impact assessment also supports these objectives by providing tools and opportunities for the effective and meaningful participation of Indigenous peoples in the assessment of projects that may adversely affect their rights and interests.[1]

These legislative and policy statements represent significant differences from the approach taken under *CEAA 2012*, and they are encouraging in many respects; however, the *IAA* offers few details about the practical ways in which Indigenous participation, Crown consultation with Indigenous groups, and the use of Indigenous knowledge will be conducted and supported in *IAA* processes.

To elaborate the federal government's obligations and commitments under the *IAA*, the Impact Assessment Agency of Canada ("IAAC" or "the Agency") has developed interim policy guidance addressing Indigenous participation, Crown consultation, and collaboration with Indigenous peoples in *IAA* processes. At present, this policy guidance appears primarily in the *Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act* ("the *Practitioner's Guide*"), of which the following chapters are especially relevant:

1.9 Overview: Indigenous Engagement and Partnership Plan
3.1 Policy Context: Indigenous Participation in Impact Assessment
3.2 Guidance: Indigenous Participation in Impact Assessment
3.3 Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples
3.4 Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples
3.5 Guidance: Collaboration with Indigenous Peoples in Impact Assessments
3.6 Indigenous Knowledge under the Impact Assessment Act: Procedures for Working with Indigenous Communities

[1] Impact Assessment Agency of Canada, *Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act*, "Interim Policy Context: Indigenous Participation in Impact Assessment".

3.7 Protecting Confidential Indigenous Knowledge under the Impact Assessment Act

Although a stated purpose of the policy guidance presented in the *Practitioner's Guide* is "to provide the public, proponents and Indigenous peoples with information on how the Impact Assessment Agency of Canada [...] will engage Indigenous peoples throughout the impact assessment process for designated projects", the policy suite shares some of the *IAA*'s shortcomings in that it provides insufficient clarity about the ways in which Indigenous participation, Crown consultation, and the use of Indigenous knowledge will be conducted and supported in *IAA* processes.

The Atlantic Policy Congress of First Nations Chiefs Secretariat ("the APC") has been engaging in the development of the *IAA* and its related policies for some time and has made several submissions providing recommendations for improvement. This report, which was commissioned by the APC and prepared on its behalf, assesses the current status of the *IAA* policies in light of the APC's prior submissions on these matters and identifies several concerns.

In brief, the report finds that the policy guidance presented in the *Practitioner's Guide*:

- does not impose clear and consistent standards to support Indigenous participation in *IAA* processes;
- does not explain clearly who will lead Crown consultation in all *IAA* processes and explain how Crown consultation will intersect with other activities relevant to the Act;
- does not explain clearly the distinctions between Crown consultation and other opportunities for Indigenous engagement, participation, and collaboration under the Act;
- does not explain clearly how different kinds of Indigenous rights, interests, and contributions—not all of which are protected under section 35 of the *Constitution Act, 1982*—will be considered, weighed, and accommodated in *IAA* processes;
- does not impose clear and consistent requirements for efforts to secure the free, prior, and informed consent of Indigenous peoples in all *IAA* processes;
- does not include clear frameworks for the consideration and protection of Indigenous knowledge in *IAA* processes;
- does not address the need for Indigenous knowledge training for *IAA* report-writers and decision-makers; and,
- does not adequately address dispute resolution processes that could be implemented under the Act.

Section 155 of the *IAA* states that two objects of the IAAC are to develop policy related to the *IAA* and consult with Indigenous peoples on policy issues related to the Act.[2] It is understood that the Agency intends to continue developing *IAA* policy guidance in collaboration with Indigenous communities and organizations, and further efforts in that regard are encouraged.

Although the *IAA* and its policy suite offer significant improvements over *CEAA 2012*, the Act and the impact assessment regime it creates remain colonial law and continue to prioritize the Crown's legal interests over Indigenous laws and Indigenous rights. Although it is possible to amend Canadian laws so as to genuinely foster reconciliation, success will depend upon the Crown's willingness to move beyond the minimum requirements of

[2] See *Impact Assessment Act*, SC 2019, c 28 at sections 155(h)-155(i).

its current constitutional and international legal obligations to create robust, transparent, and genuinely decolonial processes that move well beyond the status quo.

2. *IAA* ASSESSMENT PROCESSES AND THE *PRACTITIONER'S GUIDE*

There are three core assessment processes under the *IAA*: **impact assessments** of designated activities, **regional assessments**, and **strategic assessments**.

Impact assessments may be carried out by the Agency itself or by project-specific review panels whose members are appointed by the Agency and who operate under terms of reference established by the Minister of Environment and Climate Change ("the Minister"). Most impact assessments are triggered by the activities listed within Canada's *Physical Activities Regulations*. Two examples of activities listed within those regulations are:

- exploratory oil drilling, testing, and abandonment in areas set out in exploration licences issued in accordance with the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation*; and,

- the construction, operation, decommissioning, and abandonment of new hydroelectric generation facilities with individual production capacities of 200 megawatts or more.[3]

Activities listed within the *Physical Activities Regulations* are known as "designated activities", and those activities automatically trigger the impact assessment process unless other regulations exclude them from that process. Additionally, subsection 9(1) of the *IAA* gives the Minister power to designate physical activities—and thus require impact assessments for those activities—that are not listed within the regulations.

Regional assessments may be carried out by the Agency itself or by assessment-specific regional assessment committees established by the Minister. Whereas impact assessments are project-specific, regional assessments assess the potential impacts of multiple projects in a single study area. Canada's first regional assessment was the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador ("the Newfoundland and Labrador regional assessment"), and it was designed to assess the potential impacts of up to 100 new exploratory oil and gas projects in a large area off the eastern shore of Newfoundland and Labrador.

Sections 112(1)(a.2) and 112.1 of the *IAA* allow the Minister to make regulations excluding certain physical activities or classes of physical activities from the list of designated activities in the *Physical Activities Regulations*.[4] Activities excluded from the regulations' list of designated activities do not require impact assessments under the *IAA*. Because the Government of Canada views regional assessments as an efficient way to assess the potential impacts of multiple projects in a single area, regional assessments can be used to bypass the requirements for project-specific impact assessments concerning the drilling, testing, and abandonment of offshore exploratory wells, as well as those addressing the construction, operation, decommissioning, or expansion of offshore wind power generation facilities. In the government's view, if sufficient information is gathered during a regional assessment, there is no need to duplicate that work by requiring individual impact assessments for relevant projects proposed in the study area.

[3] The full list of designated activities is set out in the Physical Activities Schedule of the *Physical Activities Regulations* SOR/2019-285 ["*Physical Activities Regulations*"].
[4] Section 2(2) of the *Physical Activities Regulations* identifies the activities that may be excluded. Those activities are the drilling, testing, and abandonment of offshore exploratory wells and the construction, operation, decommissioning, and expansion of offshore wind power generation facilities.

The Newfoundland and Labrador regional assessment was used as the basis for regulations established under sections 112(1)(a.2) and 112.1 of the *IAA*, and those regulations allow exploratory oil and gas drilling projects to go forward in the regional assessment study area without first being assessed through project-specific impact assessments. A regional assessment of offshore exploratory oil and gas drilling in waters surrounding Nova Scotia could be used in the same way. This raises significant concerns, as regional assessment processes may address Indigenous rights and interests inadequately and yet lead to the removal of opportunities to participate in project-specific impact assessments.

Strategic assessments may be carried out by the Agency or by strategic assessment committees established by the Minister. Strategic assessments are internal assessments conducted to ensure that when federal departments and agencies consider policies, plans, or programs that could affect the environment, those potential environmental impacts are assessed.

Notably, most of the policy guidance presented in the *Practitioner's Guide* pertains to impact assessments of designated activities and does not establish clear standards for regional and strategic assessments. For example, the Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter indicates that its contents apply specifically to impact assessments of designated projects. Somewhat differently, the corresponding Interim Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter states that its guidance applies to all impact assessments conducted under the *IAA* and that its "concepts" are also applicable to regional and strategic assessments. This suggests that the guidance presented in the chapter reflects the Agency's perspective on best practices but may not be used to establish clear standards for regional and strategic assessment committees established under the Act. Likewise, the Protecting Confidential Indigenous Knowledge under the Impact Assessment Act chapter indicates that although its contents reflect the Agency's policy commitments and views on best practices, review panels and regional and strategic assessment committees will have discretion to implement alternative policies as they see fit.

The application of diverse policies and standards concerning Indigenous participation and the use of Indigenous knowledge in impact, regional, and strategic assessments will create undue and unnecessary burdens for Indigenous groups engaging in *IAA* processes. Without clear and consistent standards that apply to all assessment processes under the Act, Indigenous groups will be forced to navigate new policy contexts and assess their adequacy each time a new review panel or regional or strategic assessment committee begins its work.

Because the Agency has limited power to impose policy requirements on review panels or regional or strategic assessment committees established under the *IAA*, the policy guidance contained in the *Practitioner's Guide* cannot guarantee that Indigenous participation and the use of Indigenous knowledge will be supported adequately in all *IAA* processes. Not least for this reason, we recommend that Cabinet Ministers collaborate with the Agency and Indigenous groups to create clear and consistent standards supporting Indigenous participation and the respectful use of Indigenous knowledge in all *IAA* processes and impose those standards in one or more Cabinet Directives or through other appropriate means.

> **RECOMMENDATION 1:** Cabinet Ministers should collaborate with the Agency and Indigenous groups to impose clear and consistent standards supporting Indigenous participation and the respectful use of Indigenous knowledge in all *IAA* processes.

3. THE DUTY TO CONSULT AND INDIGENOUS ENGAGEMENT, PARTICIPATION, AND COLLABORATION IN *IAA* PROCESSES

3.1 Fulfilling a Constitutional Imperative

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the First Nation, Inuit, and Métis peoples of Canada. Canada's courts have played the primary role in defining the

legal import of section 35, and decades of litigation have created a large and complex body of case law shaping the field. In this way, Canada's constitutional common law continues to evolve and inform the Government of Canada's relationships with Indigenous peoples.

In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida*") the Supreme Court of Canada ("SCC") held that whenever the Crown has real or constructive knowledge of an Aboriginal claim or right and contemplates conduct that could affect that right adversely, the Crown has a duty to consult the Indigenous peoples concerned. As a result of subsequent court decisions reiterating and expanding on the SCC's decision in *Haida*, there is now widespread understanding that the Government of Canada has a constitutional duty to consult and, if necessary, accommodate Indigenous peoples before making decisions that could adversely affect asserted or established rights that are protected by section 35 of the *Constitution Act, 1982*.

The Crown's duty to consult is a constitutional imperative that is separate and distinct from any engagement, collaboration, or public participation processes that may be created under legislation like the *IAA*. When the duty to consult is triggered, meaningful, good faith consultation is not optional, and the SCC has made it clear that project approvals granted without adequate consultation must be quashed when challenged.[5]

Although the Crown's duty to consult is separate and distinct from engagement, collaboration, and public participation processes established under legislation like the *IAA*, Canada's courts accept that the duty can be met in whole or in part through regulatory processes, if those processes are adequate.[6] Throughout the *Practitioner's Guide*, the phrase "Indigenous participation" is often used as an umbrella term that merges Indigenous participation under the *IAA* with Crown consultation activities, and that language reflects the IAAC's stated intention to integrate Crown consultation with impact assessment processes. Because Canada's courts accept that the Crown can meet its duty to consult by creating legislative regimes and regulatory processes that offer adequate opportunities for Indigenous participation and engagement, along with adequate means to accommodate Indigenous interests when necessary, the Crown will almost certainly wish to use the Indigenous participation opportunities established under the *IAA* as forms of Crown consultation. In some cases, participation opportunities under the *IAA* and corresponding engagement by the IAAC may be enough to meet the minimum consultation requirements that Canada's courts have prescribed, but, in other cases, those processes and the IAAC's policies may not go far enough. Canada's constitutional law makes it clear that when regulatory processes cannot provide adequate consultation and accommodation for Indigenous peoples, the Crown must go further and engage beyond those processes to ensure that its duty is met.[7]

Commentary throughout the *Practitioner's Guide* tends to imply that, in the IAAC's view, Indigenous participation opportunities under the *IAA* and IAAC policies guiding Agency engagement with Indigenous peoples will suffice to meet the Crown's constitutional duty to consult. This raises concerns about the guidance and training that Agency staff and other government practitioners will receive as they engage with Indigenous peoples who are taking part in *IAA* processes and who require Crown consultation because their rights are stake.

If the Crown intends to rely on Indigenous participation opportunities under the *IAA* as forms of Crown consultation, IAAC staff and other government practitioners taking part in those activities must be trained to understand all that Crown consultation requires, and they must be prepared to ensure that the Crown's constitutional imperative is fulfilled.

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[5] See *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, at paragraph 24, where the SCC stated: "Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review".

[6] See, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paragraph 51; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraphs 22, 30-31; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paragraphs 4-5, 32.

[7] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraphs 22, 30-31, 39.

> **RECOMMENDATION 2:** If the Crown intends to rely on Indigenous participation opportunities under the *IAA* as forms of Crown consultation, IAAC staff and other government practitioners taking part in those activities must be trained to understand all that Crown consultation requires, and they must be prepared to ensure that the Crown's constitutional imperative is fulfilled.

Another factor affecting Crown consultation under the *IAA* is the reality that Canada's courts allow the Crown to delegate procedural aspects of Crown consultation to industry proponents, and the courts recognize that this is often done in environmental assessment processes.[8] The Crown must keep in mind, however, that even when procedural aspects of consultation have been delegated to proponents, the duty remains its own, and the Crown is always responsible for ensuring that the full scope of the duty is met.

Because the Crown's duty to consult can be met in whole or in part by regulatory processes, and because procedural aspects of consultation can be delegated to proponents, the SCC has emphasized that the Crown has a duty to ensure that Indigenous groups engaging in consultation know how consultation will be carried out.[9]

The Policy Context: Indigenous Participation in Impact Assessment chapter of the *Practitioner's Guide* states:

> The Government of Canada takes a "Whole of Government" approach to Crown consultation in the context of impact assessments to ensure that Indigenous groups are meaningfully consulted and involved in the assessment of projects that may adversely impact Indigenous communities and their rights.
>
> For all impact assessments, the Agency integrates the Government of Canada's Crown Consultation activities into the impact assessment process to the greatest extent possible [...]. The Agency leads the consultation process and coordinates participation of other federal authorities or lifecycle regulators as appropriate, enabling a "one window" point of contact for Indigenous groups throughout the process. The Agency will be responsible for coordinating Crown consultations from the Planning phase to the issuance of the Decision Statement.

These statements indicate that the IAAC will lead Crown consultations in impact assessments of designated projects and coordinate the "whole of government approach"; however, the subsequent Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter raises several questions that are not addressed adequately by the policy suite on the whole. That chapter states that the IAAC is responsible for "conducting or administering impact assessments under the IAA, and for coordinating consultations with Indigenous groups that may be affected by a designated project", and it goes on to say:

> An assessment of potential impacts on the rights of Indigenous peoples will typically require cooperation between the rights-holding Indigenous community, the proponent of the designated project, the Agency, other federal authorities and, in many cases, the government of another jurisdiction. The roles and responsibilities of each party may vary from one impact assessment to another, depending on the circumstances.
>
> If an Indigenous community is interested in doing so, they should lead the assessment of impacts on their rights as they are best placed to understand how their rights and their relationship with the landscape may be impacted by the project. In such cases, the Agency would work with the Indigenous community on

[8] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paragraph 53.
[9] See *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraph 23, where the SCC stated: "because the honour of the Crown requires a meaningful, good faith consultation process [...], where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner".

> the assessment while coordinating the process with other federal authorities and the proponent, as needed.
>
> Other federal authorities have an important role to play in contributing technical information or knowledge within their mandate to inform the assessment of potential impacts flowing from the project. Other federal departments should be involved in the assessment process as early as possible, in order to contribute to the early identification of issues and to provide advice within their mandate on the assessment approach, the evaluation of potential impacts, and the development of potential mitigation and/or accommodation measures.
>
> The proponent's role is to provide information about their project and participate in discussions as the assessment of impacts on rights progresses throughout the impact assessment process. The proponent is responsible for undertaking studies and preparing the impact statement [...] and is encouraged to work collaboratively with the potentially affected Indigenous communities in this work. As the owner and designer of the project, the proponent's participation in the assessment of impacts on rights is also important for developing possible mitigation measures.

The multi-party participation described in these paragraphs is in line with Canadian courts' conception of delegated and/or collaborative engagement in Crown consultation processes; however, the vagueness of the IAAC's language in these paragraphs and throughout the rest of the chapter is concerning.

Throughout these paragraphs and the rest of the Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter, the IAAC does not explain clearly how "assessments of impacts on rights" will meet or intersect with the Crown's constitutional duty to consult, nor does the Agency explain who will bear the primary responsibility for leading Crown consultations in all cases. The chapter states that the IAAC will play a coordinating role in consultations and may have recourse to the Consultation and Accommodation Unit at Crown-Indigenous Relations and Northern Affairs if necessary, but it also states that Indigenous communities themselves may lead the assessments of impacts on their rights. There is also very little to guide proponents or Indigenous communities in understanding how proponents' engagement and collaboration with Indigenous communities may be characterized by the Crown as procedural aspects of consultation that go towards the Crown's duty to consult. Indeed, the paragraph copied above which describes the proponent's role in *IAA* processes tends to imply that proponents' participation in "discussions" and "collaboration" with Indigenous communities is separate from formal consultation processes. This does not reflect the reality that proponents' contributions are typically framed as serving the Crown's duty to consult.[10]

As noted above, the Crown has a legal obligation to ensure that Indigenous groups and communities engaging in consultation know how that consultation will be carried out.[11] Although the *IAA* and *Practitioner's Guide* attempt to integrate the Crown's consultation obligations with the assessment processes and policies established under the Act, and although a stated intention of the *Practitioner's Guide* is to provide the public, proponents, and Indigenous peoples with information about how the IAAC will engage Indigenous peoples in *IAA* processes, the Act and its policy suite fail to explain clearly how the constitutional imperative of Crown consultation will be fulfilled in *IAA* processes. We therefore recommend that the IAAC amend the *Practitioner's Guide* to state clearly who will lead Crown consultations in impact assessments and how, and also to explain for all prospective parties how consultation may intersect with other activities carried out during project development and impact assessment processes.

[10] Although the chapter later refers briefly to the Crown's ability to rely on proponent's mitigation and accommodation to fulfill the duty to consult, thus implying that the proponent's contributions may help the Crown to meet its legal obligations, these comments are similarly brief, vague, and insufficient to provide proponents and Indigenous communities with clear guidance.
[11] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraph 23.

RECOMMENDATION 3: The IAAC should amend the *Practitioner's Guide* to state clearly who will lead Crown consultations in impact assessments and how, and also to explain for all prospective parties how consultation may intersect with other activities carried out during project development and impact assessment processes.

To ensure that the IAAC meets its obligation to provide relevant information to Indigenous peoples engaging in Crown consultation, we also suggest that the Agency adopt a rigorous practice of ensuring that parties' respective roles in Crown consultation are made perfectly clear as early as possible in all instances.

Moreover, although the *IAA* and *Practitioner's Guide* suggest that the Agency will lead Crown consultation in all impact assessments—including impact assessments carried out by review panels—the *IAA* and *Practitioner's Guide* do not clearly explain who will lead Crown consultations during regional or strategic assessments conducted by committees, nor do they explain how consultation will intersect with other committee processes.

To improve transparency, enhance public understanding of all *IAA* processes, and meet its legal obligation to provide relevant information to Indigenous peoples engaging in Crown consultation, we therefore recommend that the Agency clarify who will lead Crown consultations in regional or strategic assessments conducted by committees and explain how consultation will intersect with other committee processes.

RECOMMENDATION 4: The IAAC should clarify who will lead Crown consultations in regional or strategic assessments conducted by committees and explain how consultation will intersect with other committee processes.

3.2 Indigenous Engagement, Participation, and Collaboration beyond the Minimum Requirements of the Duty to Consult

Canada's courts describe the duty to consult as having a reconciliatory purpose, as it "seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown".[12] It is important to keep in mind, however, that the consultation requirements imposed by Canada's courts represent the bare minimum of what is required to recognize and protect Indigenous rights. True reconciliation cannot be achieved if the Crown aims simply to meet the minimum constitutional requirements that Canada's courts have set out. More expansive engagement with Indigenous communities—engagement that is robust, relationship-oriented, and committed to advancing reconciliation on nation-to-nation bases—is necessary.

It is noteworthy that although the *IAA* and *Practitioner's Guide* seek to integrate the Crown's duty to consult with the assessment processes that the Act establishes, they also go further in some respects by requiring consideration of Indigenous interests and contributions that do not fall squarely within the common law definitions of constitutionally protected Aboriginal and treaty rights. This is positive because it suggests the government's willingness to go beyond the minimum requirements of the duty to consult; however, in this regard as well, vagueness and lack of clarity throughout the *Practitioner's Guide* raise serious concerns.

The *IAA*'s incorporation of diverse Indigenous interests and contributions—some of which may not relate to Aboriginal or treaty rights as Canada's courts define those terms—is apparent in key provisions of the Act. For example, the subsection 22(1) list of factors that must be considered in the impact assessment of a designated project includes, among other things:

> (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*[.]

[12] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraph 19; see also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 34 at paragraph 34.

The subsection 63(d) list of factors that must inform the Minister's or the Governor in Council's public interest determination with respect to a designated project includes the same provision.

This provision, and others like it throughout the *IAA*, distinguishes between two categories of impacts that are relevant to Indigenous peoples:

- a broad and general category of impacts on Indigenous groups; and,
- a more specific category of impacts on Aboriginal and treaty rights that are protected under Canada's constitutional common law.

The same distinction is made throughout the *Practitioner's Guide* as well, most notably in the repeated use of phrases such as "Indigenous rights and interests" and "impacts on Indigenous peoples and their rights".

Neither the *IAA* nor the *Practitioner's Guide* explain if and how asserted or established Aboriginal and treaty rights, which are protected by the *Constitution Act, 1982*, will be treated differently from the other Indigenous interests and impacts on Indigenous peoples that must be considered in *IAA* processes. This may cause confusion and undermine the participation of Indigenous groups that have limited experience with federal assessment processes or formal consultations.

For example, the text box addressing Accommodation, Mitigation, and Complementary Measures in the Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter of the *Practitioner's Guide* states:

> **Accommodation, Mitigation, and Complementary Measures**
>
> Accommodation, mitigation and complementary measures share a common aim: to avoid, minimize, or compensate for potential adverse impacts that may result from a project. The distinction between the different types of measures is the scope and legal basis of each.
>
> **Accommodation** refers specifically to a measure to avoid, minimize or compensate for adverse impacts on rights that is owed based on the Crown's duty to consult. Accommodation is part of the duty to consult, grounded in the constitutional obligations of the Crown, and is not limited to the impact assessment process.
>
> **Mitigation** refers more generally to modifications or additions to a project that are proposed in the course of an assessment in order to avoid or reduce a potential adverse impact (of any type, not necessarily on rights).
>
> **Complementary measures** are not part of the project, but that are proposed to offset or compensate for adverse effects of the project.

As the information contained in this text box implies, accommodation measures differ from mitigation measures in that accommodation measures, as the Crown understands them, flow directly from the Crown's constitutional duty to consult. Under Canada's constitutional common law, only constitutionally protected Aboriginal and treaty rights trigger the Crown's duty to consult. Moreover, the accommodation requirements that flow from the duty to consult differ according to the strength and nature of the asserted or established rights in question.[13] These nuances are not explained clearly in the *Practitioner's Guide*.

[13] The *Practitioner's Guide* alludes to this reality but does not address it at length. Specifically, the Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter notes that "the impact assessment process is not a rights

The *IAA*'s incorporation of diverse Indigenous interests and contributions in *IAA* processes is a positive development; however, without clear policies to explain how different kinds of Indigenous rights, interests, and contributions will be considered, weighed, and accommodated in *IAA* processes, the Act and its policies risk sowing confusion, dissatisfaction, and distrust.

In many ways, these concerns reflect a deeper problem that the APC has addressed in prior submissions on the *IAA*, which is that the *IAA* includes Indigenous rights, interests, and contributions as some among many factors that must be considered in Agency, ministerial, and Governor-in-Council decision-making but does not explain whether and how those factors should be prioritized.

For these reasons, we recommend that the Agency amend its policy guidance to clearly explain how different kinds of Indigenous rights, interests, and contributions will be considered, weighed, and accommodated in *IAA* processes. Moreover, as even the strongest policy guidance cannot anticipate every eventuality, we recommend that the Government of Canada work proactively to support Indigenous communities and organizations in building internal engagement capacity and expertise.

> **RECOMMENDATION 5:** The IAAC should amend its policy guidance to clearly explain how different kinds of Indigenous rights, interests, and contributions will be considered, weighed, and accommodated in *IAA* processes.
>
> **RECOMMENDATION 6:** The Government of Canada should work proactively to support Indigenous communities and organizations in building internal engagement capacity and expertise.

4. *UNDRIP* AND INDIGENOUS PARTICIPATION IN *IAA* PROCESSES

The *IAA*'s preamble reiterates the Government of Canada's commitment to implement *UNDRIP* domestically, and the *Practitioner's Guide* refers to that commitment repeatedly. Although the UN Declaration addresses broad spectrums of Indigenous rights and corresponding state responsibilities, some of its most familiar and significant articles are those that discuss the free, prior, and informed consent of Indigenous peoples.

The Government of Canada's interpretation of *UNDRIP* is that the UN Declaration requires genuine, meaningful, and good faith *efforts* to secure Indigenous peoples consent but does not necessarily require the *actual receipt* of Indigenous consent when proposed actions will affect Indigenous rights and interests. This interpretation of *UNDRIP* is reflected throughout the *Practitioner's Guide*, notable passages of which include:

- the Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples chapter's statement that "the Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources" (itself a reiteration of one of the principles set out in the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*);

determination process" and then goes on to state: "While analysis of strength of claim by the Crown may be necessary when considering potential accommodation in accordance with the duty to consult, rights as described by the Indigenous community can be accepted for the purpose of dialogue and analysis in the impact assessment process". It is not clear how "dialogue and analysis" will lead to satisfactory outcomes for Indigenous communities when the Crown assesses the strengths of their claims, and the corresponding accommodation obligations that flow from them, as less than the communities themselves perceive.

- the Policy Context: Indigenous Participation in Impact Assessment chapter's statement that the Agency "consults with and encourages the participation of Indigenous peoples in the impact assessment of projects for a variety of reasons", including "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";

- the Policy Context: Indigenous Participation in Impact Assessment chapter's statement that "[a]pproaches to participation will be developed with communities with the aim of securing consent through processes based on mutual respect and dialogue"; and,

- the Policy Context: Indigenous Participation in Impact Assessment chapter's statement that the participation of Indigenous peoples in impact assessment "aligns with the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and supports the Government of Canada's aims to secure free, prior and informed consent for decisions that affect Indigenous peoples' rights and interests".

Policy statements like these that affirm the federal government's intent to "work towards securing" Indigenous consent fall short of what many believe to be *UNDRIP*'s legal requirements; however, they do represent some improvement on the policies that were in place under *CEAA 2012*. It is important to note, however, that the *IAA* itself does not impose express obligations to work towards securing Indigenous peoples' free, prior, and informed consent before making decisions that could affect them, and policy statements like these have limited legal power.

It is also noteworthy that all of the policy statements quoted above refer primarily to Indigenous participation in impact assessment processes, and this raises concerns about the guidance that regional and strategic assessment committees will receive regarding the implementation of *UNDRIP* requirements and principles. We therefore reiterate again the importance of establishing clear and consistent standards that apply to all assessment processes under the *IAA*.

Additionally, as discussed above, the *Practitioner's Guide* refers regularly to "Indigenous rights and interests" without explaining clearly if and how different kinds of rights and interests will be distinguished and treated differently. This raises special concerns with respect to *UNDRIP* implementation—for example, the last of the four statements quoted above asserts the Government of Canada's aim "to secure free, prior and informed consent for decisions that affect Indigenous peoples' rights and interests" but does not explain if all Indigenous rights and interests will inspire equally determined efforts to build consensus and secure Indigenous peoples' free, prior, and informed consent.

Indigenous groups have good reason to fear that Agency, review panel, or committee efforts to secure free, prior, and informed consent may vary widely depending on the rights and interests at stake. Canada's constitutional common law already accommodates varying standards in connection with different kinds of Aboriginal and treaty rights—most notably by associating consent requirements with Aboriginal title or express treaty agreements alone—and the diverse Indigenous interests and contributions that the *IAA* welcomes into impact, regional, and strategic assessment processes could easily inspire more.

As stated above, the *IAA*'s incorporation of diverse Indigenous interests and contributions is a positive development, but just as Indigenous groups deserve to know how different kinds of Indigenous rights, interests, and contributions will be considered, weighed, and accommodated in *IAA* process, so too must they know how varying rights, interests, and contributions will be understood in the context of *UNDRIP* implementation. We therefore recommend that Cabinet Ministers collaborate with the Agency and Indigenous groups to impose clear and consistent requirements for efforts to secure the free, prior, and informed consent of Indigenous peoples in all *IAA* processes.

RECOMMENDATION 7: Cabinet Ministers should collaborate with the IAAC and Indigenous groups to impose clear and consistent requirements for efforts to secure the free, prior, and informed consent of Indigenous peoples in all *IAA* processes.

5. THE USE AND PROTECTION OF INDIGENOUS KNOWLEDGE IN *IAA* PROCESSES

One of the most significant differences between the *IAA* and *CEAA 2012* is the *IAA*'s incorporation of Indigenous knowledge as an evaluative tool in impact, regional, and strategic assessments. In prior submissions on the *IAA* and its policies, the APC identified several significant shortcomings concerning the use and protection of Indigenous knowledge in *IAA* processes. Among other things, the APC noted that the *IAA*:

- does not provide clear frameworks for the consideration of Indigenous knowledge, but simply lists Indigenous knowledge as one among many factors that must be considered in key decision-making;

- does not impose requirements for report-writers or decision-makers to receive training in relevant Indigenous knowledge systems, and therefore fails to ensure that Indigenous knowledge will be properly understood and applied; and,

- creates broad exceptions to the general prohibition against disclosing confidential Indigenous knowledge.

All of these concerns remain relevant today. The following commentary briefly reiterates concerns that the APC has raised with respect to the use and protection of confidential Indigenous knowledge. The Government of Canada should also reconsider APC recommendations concerning clear frameworks for the consideration of Indigenous knowledge and Indigenous knowledge training for report-writers and decision-makers.

RECOMMENDATION 8: The Government of Canada should reconsider previous APC recommendations concerning clear frameworks for the consideration of Indigenous knowledge and Indigenous knowledge training for report-writers and decision-makers.

The *IAA* anticipates that Indigenous knowledge will be provided to the Agency, review panels, and regional and strategic assessment committees during all *IAA* processes, and it requires the consideration of all Indigenous knowledge provided. Because *IAA* processes are public processes, the expectation is that the Indigenous knowledge provided during an *IAA* process will be made available to the public along with all other relevant information unless the Indigenous peoples providing the knowledge assert that it is confidential.

Subsection 119(1) of the *IAA* prohibits the Minister, the Agency, review panels, and regional and strategic assessment committees from knowingly disclosing or permitting the disclosure of confidential Indigenous knowledge without written consent; but subsection 119(2) creates three exceptions to that prohibition. Under subsection 119(2), confidential Indigenous knowledge may be disclosed if: (a) it is publicly available; (b) the disclosure is necessary for the purposes of procedural fairness and natural justice or for use in legal proceedings; or (c) the disclosure is authorized in the prescribed circumstances.

In earlier submissions on the *IAA* and its policies, the APC raised several concerns about the subsection 119(2) exceptions, and, among other recommendations, argued that:

- disclosure based on public availability will be problematic if the Indigenous knowledge in question was previously disseminated without consent, so the phrase "publicly available" should be interpreted to mean "available through an official source", and decisions to disclose under this

exception should be subject to scrutiny and confirmation by the Indigenous communities concerned; and,

- what is necessary for the purposes of procedural fairness and natural justice is a legal determination that should be made by a court or tribunal, not the Agency itself, so when the Agency is not the party seeking disclosure, the Agency's policy should be to resist disclosure until disclosure is ordered.

The Protecting Confidential Indigenous Knowledge under the Impact Assessment Act chapter of the *Practitioner's Guide* indicates that the APC's concerns with respect to the public availability exception are being addressed to some extent. The chapter states:

> Prior to disclosing confidential Indigenous knowledge under this exception, the Agency must discuss with the Indigenous community what knowledge should be considered to be publicly available. If the Agency intends to proceed with disclosure, it will consult the community and provide the community with an opportunity to respond.

The Agency's commitment to discussing "what knowledge should be considered to be publicly available" is positive and may help to ensure that Indigenous knowledge previously disseminated without consent is not disseminated further; however, the Agency also appears to be saying that it has the ultimate right to decide what will or will not be disclosed. This is concerning, and it does not fulfill the purpose of the prohibition set out in subsection 119(1). Moreover, this passage refers to the Agency alone and does not address how others such as the Minister, review panels, and regional and strategic assessment committees are expected to interpret this exception.

We also note with apprehension that the APC's concerns regarding the "necessary for the purposes of procedural fairness and natural justice" exception are not assuaged by the policy guidance provided in the *Practitioner's Guide*. The Protecting Confidential Indigenous Knowledge under the Impact Assessment Act chapter makes it clear that the Agency, the Minister, review panels, and regional and strategic assessment committees will consider themselves empowered to decide what is necessary for the purposes of procedural fairness and natural justice. The chapter states:

> If the Agency, review panel, committee or Minister is of the opinion that disclosure of confidential Indigenous knowledge is necessary for procedural fairness and natural justice, before making a disclosure, it must consult the Indigenous community and the person or entity to whom it is proposed to be disclosed about the scope of the proposed disclosure and any potential conditions on the disclosure.

The consultation requirement discussed in this passage is an express obligation set out in subsection 119(2.1) of the *IAA*, but the Act does not require disclosure to be based on the opinion of the Agency, the Minister, a review panel, or a regional or strategic assessment committee. It appears that the APC's concerns regarding this exception have been overlooked, and we therefore recommend that the Government of Canada reconsider the APC's position that what is necessary for the purposes of procedural fairness and natural justice is a legal determination that should be made by a court or tribunal, not the Agency, the Minister, a review panel, or a regional or strategic assessment committee.

> **RECOMMENDATION 9:** The Government of Canada should reconsider the APC's position that what is necessary for the purposes of procedural fairness and natural justice is a legal determination that should be made by a court or tribunal, not the Agency, the Minister, a review panel, or a regional or strategic assessment committee.

It is noteworthy that section 108 of the *IAA* protects the Agency, the Minister, and persons acting under their direction or on their behalf from civil and criminal proceedings arising from "the disclosure in good faith of any record or any part of a record or any Indigenous knowledge under this Act". This provision extends significant

legal protection to government practitioners and decision-makers engaging with Indigenous communities in *IAA* processes, and it limits Indigenous communities' opportunities to seek redress when confidential Indigenous knowledge is disclosed without their consent. Given the breadth of the exceptions provided in subsection 119(2) and the Agency's interpretation of them in the *Practitioner's Guide*, it is concerning to see a significant power imbalance developing with respect to the use and protection of confidential Indigenous knowledge provided in *IAA* processes.

As the *IAA* recognizes, Indigenous knowledge can contribute enormously to impact, regional, and strategic assessment processes, and everyone benefits when Indigenous knowledge is used to ensure that the environmental and sociocultural impacts of proposed activities are properly assessed and understood. Notably, Indigenous peoples have no obligation to share their Indigenous knowledge, and receiving it is a privilege. To create a climate in which Indigenous knowledge can be shared *in* confidence *with* confidence that it will be protected, the Agency and Cabinet Ministers should collaborate with Indigenous groups to improve the policies described in Protecting Confidential Indigenous Knowledge under the Impact Assessment Act and ensure that the concerns of Indigenous communities and organizations are fully met.

> **RECOMMENDATION 10:** The IAAC and Cabinet Ministers should collaborate with Indigenous groups to improve the policies described in Protecting Confidential Indigenous Knowledge under the Impact Assessment Act and ensure that the concerns of Indigenous communities and organizations are fully met.

6. BUILDING INDIGENOUS GROUPS' CAPACITIES

Many of the concerns addressed throughout this report demonstrate the importance of proactive and consistent funding to support Indigenous groups in their efforts to build internal capacity and expertise with respect to *IAA* processes and the provision of Indigenous knowledge.

The Policy Context: Indigenous Participation in Impact Assessment chapter of the *Practitioner's Guide* states that the Agency's Funding Program and Indigenous Capacity Support Program are currently available: the former is used to provide funding for project-specific impact assessments; the latter supports "greater awareness and education for Indigenous groups on the impact assessment process in advance of a project review". These funding streams may not be sufficient to assist Indigenous groups in building permanent capacity with respect to *IAA* processes and the provision of Indigenous knowledge, and we therefore recommend that the Government of Canada consult with Indigenous communities and organizations to ensure that funding needs are fully understood and met.

> **RECOMMENDATION 11:** The Government of Canada should consult with Indigenous communities and organizations to ensure that funding needs related to internal capacity building with respect to *IAA* processes and the provision of Indigenous knowledge are fully understood and met.

7. UPHOLDING COLLABORATIVE PROCESSES

While collaboration with and inclusion of Indigenous peoples in *IAA* processes is detailed in the Guidance on Collaboration with Indigenous Peoples in Impact Assessment chapter of the *Practitioner's Guide,* it is not clear how the commitment to collaboration will result in meaningful consideration of Indigenous interests when project decisions are made by the Minister or Governor in Council under subsection 60(1)(a) or section 62 of the *IAA*.

The Guidance on Collaboration with Indigenous Peoples in Impact Assessment chapter of the *Practitioner's Guide* states:

> At the end of an assessment process, the results of Indigenous communities' internal decision making processes may also inform the Minister or Cabinet's considerations. This could be reflected in the Impact Assessment Report and the Crown Consultation and Accommodation Report, and may be addressed in the reasons for decision issued by the Minister. Where a collaborative process has been undertaken, the Minister may consider providing a direct response to the Indigenous community, reflecting areas of agreement, modification, or divergence in the federal decision. This would align with some modern treaties and land claim agreements, whereby Ministers are required to respond to recommendations from review boards or committees, indicating reasons for accepting, rejecting or modifying recommendations, and providing opportunities for the committees to reply.

Subsections 65(2) and 63(d) of the *IAA* make it clear that the detailed reasons provided with a decision statement must address "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*". The policy guidance cited above indicates that the Minister may go beyond these legal requirements by addressing Indigenous contributions more robustly and communicating directly with Indigenous communities; however, the policy guidance suggests that the Minister is not committed to doing so.

Indigenous communities expend enormous capacity and work to engage in *IAA* processes. To improve ministerial accountability to Indigenous peoples, project decisions by the Minister or Governor in Council under subsection 60(1)(a) or section 62 of the *IAA*, and the corresponding reasons required by subsection 65(2), should not only address how the decision has taken into account "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*", but should also address all contributions made by Indigenous groups—including any results of Indigenous communities' internal decision-making—during the assessment process. Furthermore, the Minister should commit to communicating directly with Indigenous communities whenever collaborative processes have been undertaken.

> **Recommendation 12:** Project decisions by the Minister or Governor in Council under subsection 60(1)(a) or section 62 of the *IAA*, and the corresponding reasons required by subsection 65(2), should not only address how the decision has taken into account "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*", but should also address all contributions made by Indigenous groups—including any results of Indigenous communities' internal decision-making—during the assessment process. Furthermore, the Minister should commit to communicating directly with Indigenous communities whenever collaborative processes have been undertaken.

8. DISPUTE RESOLUTION

While the Guidance: Collaboration with Indigenous Peoples in Impact Assessments chapter of the *Practitioner's Guide* suggests that collaboration agreements between the Agency and Indigenous communities may address dispute resolution,[14] more detail and clarity on this is necessary. Often the end result of disputes relating to impacts on Aboriginal or treaty rights, including Aboriginal title, is that the dispute is taken to court. Opportunities to engage in Indigenous dispute resolution processes or to apply Indigenous laws and principles to ensure accommodation is meaningful should be further explored and ideally articulated in collaboration agreements.

[14] Specifically, the chapter states: "The Agency and Indigenous communities may wish to discuss a process for identifying and resolving disagreements that could arise in the conduct of the impact assessment or during the decision making phase".

Recommendation 13: There is a need to further articulate dispute resolution processes within the policy suite and include Indigenous dispute resolution mechanisms in collaboration agreements.

9. EVALUATION OF THE APPLICATION OF THE POLICY SUITE

Canada's first regional assessment was conducted under the anticipated structure of the *Impact Assessment Act*, as it began in 2018, before the *IAA* was in force. As discussed above, that regional assessment covered exploratory oil and gas drilling in a large offshore area east of Newfoundland and Labrador. To date, there has been no evaluation of how Indigenous knowledge was incorporated into the Ministerial response and into the streamlined regulations. In order to test whether or not the interim policies are working, the Agency should review the process together with the Indigenous governments, communities, and organizations that participated in the process.

Recommendation 14: The Government of Canada should build capacity within the Agency and within Indigenous organizations so that the implementation of the interim policy suite can be assessed and evaluated as it is developed and applied.

10. CONCLUSION

The policy suite put forward in the *Practitioner's Guide* could encourage significant progress with respect to Indigenous participation and the use of Indigenous knowledge in *IAA* processes, but it also demonstrates that the Government of Canada's interests have been prioritized and protected in several key areas. Indigenous peoples have the right to see their perspectives reflected in the policies that will affect their participation and the recognition of their rights in *IAA* processes. The recommendations presented in this report identify priorities for amendments to the interim *IAA* policies and the development of additional policies to help ensure that the rights of Indigenous peoples in Atlantic Canada, and beyond, are upheld.

11. SUMMARY OF RECOMMENDATIONS

This summary organizes the recommendations made in this report thematically in order to highlight similar and recurring shortcomings throughout the *Practitioner's Guide*.

Setting Consistent Requirements and Standards

Cabinet Ministers should collaborate with the IAAC and Indigenous groups to impose clear and consistent standards supporting Indigenous participation and the respectful use of Indigenous knowledge in all *IAA* processes.

Cabinet Ministers should collaborate with the IAAC and Indigenous groups to impose clear and consistent requirements for efforts to secure the free, prior, and informed consent of Indigenous peoples in all *IAA* processes.

Identifying Responsibilities in Crown Consultation Processes

If the Crown intends to rely on Indigenous participation opportunities under the *IAA* as forms of Crown consultation, IAAC staff and other government practitioners taking part in those activities must be trained to understand all that Crown consultation requires, and they must be prepared to ensure that the Crown's constitutional imperative is fulfilled.

The IAAC should amend the *Practitioner's Guide* to state clearly who will lead Crown consultations in impact assessments and how, and also to explain for all prospective parties how consultation may intersect with other activities carried out during project development and impact assessment processes.

The IAAC should clarify who will lead Crown consultations in regional or strategic assessments conducted by committees and explain how consultation will intersect with other committee processes.

Clarifying the Nature of Diverse Interests and Rights

The IAAC should amend its policy guidance to clearly explain how different kinds of Indigenous rights, interests, and contributions will be considered, weighed, and accommodated in *IAA* processes.

Considering and Protecting Indigenous Knowledge

The Government of Canada should reconsider previous APC recommendations concerning clear frameworks for the consideration of Indigenous knowledge and Indigenous knowledge training for report-writers and decision-makers.

The Government of Canada should reconsider the APC's position that what is necessary for the purposes of procedural fairness and natural justice is a legal determination that should be made by a court or tribunal, not the Agency, the Minister, a review panel, or a regional or strategic assessment committee.

The IAAC and Cabinet Ministers should collaborate with Indigenous groups to improve the policies described in Protecting Confidential Indigenous Knowledge under the Impact Assessment Act and ensure that the concerns of Indigenous communities and organizations are fully met.

Building Capacity

The Government of Canada should work proactively to support Indigenous communities and organizations in building internal engagement capacity and expertise.

The Government of Canada should consult with Indigenous communities and organizations to ensure that funding needs related to internal capacity building with respect to *IAA* processes and the provision of Indigenous knowledge are fully understood and met.

The Government of Canada should build capacity within the IAAC and within Indigenous organizations so that the implementation of interim *IAA* policies can be assessed and evaluated as they are developed and applied.

Composing and Communicating Final Decisions

Project decisions by the Minister or Governor in Council under subsection 60(1)(a) or section 62 of the *IAA*, and the corresponding reasons required by subsection 65(2), should not only address how the decision has taken into account "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*", but should also address all contributions made by Indigenous groups—including any results of Indigenous communities' internal decision-making—during the assessment process. Furthermore, the Minister should commit to communicating final decisions to Indigenous communities directly whenever collaborative processes have been undertaken.

Resolving Disputes

There is a need to further articulate dispute resolution processes within the policy suite and include Indigenous dispute resolution mechanisms in collaboration agreements.