

The Honourable John P. Manley, P.C., O.C.  
President and Chief Executive Officer

L'honorable John P. Manley, C.P., O.C.  
Président et chef de la direction

August 28, 2017

The Honourable Catherine McKenna, P.C., M.P.  
Minister of Environment and Climate Change  
200 Sacré-Cœur Boulevard, 2<sup>nd</sup> Floor  
GATINEAU, Québec  
K1A 0H3

The Honourable Dominic LeBlanc, P.C., M.P.  
Minister of Fisheries and Oceans  
200 Kent Street  
OTTAWA, Ontario  
K1A 0E6

The Honourable James G. Carr, P.C., M.P.  
Minister of Natural Resources  
580 Booth Street, 21<sup>st</sup> Floor  
OTTAWA, Ontario  
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The Honourable Marc Garneau, P.C., M.P.  
Minister of Transport  
330 Sparks Street  
OTTAWA, Ontario  
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Dear Ministers,

I am writing on behalf of the Business Council of Canada to provide views in response to the government of Canada discussion paper “Environmental and Regulatory Reviews”. We support the government’s efforts to ensure that Canada maintains high standards of regulatory oversight and that major projects undergo a rigorous, fact-based and efficient review of their potential impact prior to government approval.

At the same time, it is critical that any new framework for environmental assessment and project approvals increases investor confidence in the ability of the federal government to make timely decisions. Otherwise, important economic developments, with many spin-off benefits for society, could be lost. Canada is in an intense global competition for

capital and talent, and we cannot risk having project proponents conclude that the risks and uncertainties of investing in Canada are too great. Were that to happen, many advanced resource, low-carbon and renewable energy projects, which could help Canada meet its climate change goals, could easily be lost.

We will assess the government's eventual reforms under four criteria: 1) will they increase public confidence in decision making? 2) will they provide sufficient clarity on the requirements that project proponents must satisfy to achieve a successful outcome? 3) will the process yield timely and clear results, that are unlikely to be overturned on political or legal grounds?; and 4) do they position Canada to be an attractive destination for investments in major resource projects?

In terms of the key principles outlined in the discussion paper:

- We support meaningful public involvement in the assessment process, including ensuring that those directly affected have an adequate voice. However, a balance must be sought to ensure the entire process does not become unwieldy and prone to unacceptable delay.
- We support meaningful and timely engagement of Indigenous peoples in projects and decisions that directly affect their interests.
- We support evidence-based decision making reflecting sound science and incorporating relevant Indigenous knowledge.
- One project – one assessment must continue to be a guiding principle, both as to how they are handled among multiple department/agencies within the federal government, and also with respect to overlapping provincial/territorial jurisdiction.

There are several areas where the discussion paper suggests significant reform which in turn raise important questions about how these new procedures would operate in practice:

- A single government agency would be given responsibility for guiding and conducting impact assessments. For energy projects currently governed by the National Energy Board, the Canadian Nuclear Safety Commission or the offshore energy boards, the paper proposes assessments conducted jointly between the new agency and the responsible regulatory authority. We remain to be convinced that this idea will be a significant improvement over the status quo.

At the very least, the specialized regulatory agencies should take the lead in undertaking joint assessments to ensure that their unique technical expertise is appropriately reflected in the decision-making process. Further, such joint assessments should only apply to those very large and complex projects which merit such a high degree of regulatory scrutiny.

- That same agency would also have authority to coordinate consultation with Indigenous communities for designated projects. We see merit in having a single vehicle through which early engagement and consultation can take place. It will be important for the government to clarify the role of the agency relative to other federal departments, particularly Indigenous and Northern Affairs Canada and with respect to provincial and territorial governments. Critical to the effort will be clarity for project proponents on how the government intends to accommodate Indigenous interests.
- The paper suggests broadening the scope of the assessment to include environmental, economic, social and health impacts in individual project reviews. The reality is that many project reviews in the past have considered a range of factors beyond merely the bio-physical. However, there may be questions of health or social impact that are outside the scope of a particular project. If this idea is to proceed, the government must be prepared to develop clear criteria on the scope of this broader assessment and how such factors are to be considered. As well, it will be necessary to recognize that some impacts are quantifiable according to present practice, while broader parameters will tend to be more subjective in nature. Clarifying how these various factors will be assessed is critical if project proponents are to understand what hurdles they need to meet and plan accordingly. The government also will have to ensure that agency staff has appropriate training and expertise to undertake and manage these broader assessments.

An important issue that requires further discussion and clarity is how the transition will be undertaken between the institutions and processes which exist today and what is proposed to be created. It will easily require two years, and quite possibly much longer, to undertake major amendments to four pieces of legislation, promulgate the necessary regulations, guidelines and operating practices, create a new agency and hire and train the necessary additional staff. Canada cannot afford several years of uncertainty. In this interim period, project developers must have clarity on the rules that will govern, and be assured that decisions will be timely and not subject to further review and/or modification.

The attached annex provides our comments on a number of the more specific proposals described in the discussion paper.

In closing, let me reiterate that Canada's business leaders stand ready to work with you and your federal colleagues in the pursuit of a reformed assessment process that meets Canadians' expectations for a prosperous economy and a healthy environment. As the government moves ahead, it must ensure that more engagement, consultation and process actually leads to the intended outcome – better decision-making and broader public support for those decisions. Only then will we be able to attract the investors and innovators that are critical to Canada's leadership role in the pursuit of sustainable economic development.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Manly". The signature is fluid and cursive, with the first name "John" written in a larger, more prominent script than the last name "Manly".

## ANNEX

**Meaningful public participation.** Availability of comprehensible information is critical to public confidence in the regulatory system. Interested parties should be afforded reasonable opportunities to review relevant information about proposed projects in an easily accessible format and to provide comments thereon. There is a significant opportunity to make greater use of modern communication techniques, such as online portals, to allow interested Canadians to share their views. They also should be able to make submissions on the scope of issues to be addressed at relevant stages of the process. And we support proposals that would increase transparency regarding the rationale for licensing decisions and enhancing public access to information about ongoing monitoring and compliance with project requirements.

**Elimination of the NEB's "standing" test.** We have significant concerns with what appears to be an elimination of any criteria for determining the ability of parties to participate in the formal hearing process. The primary rule should be to ensure participation by those who will be directly affected or who have relevant information and expertise to impart. There should be broad scope for public submissions to a hearing panel and online comments, and summaries of the comments received should be made available. There also is room for improvement in how regulatory agencies explain their decisions and describe how they dealt with the concerns raised. We envision a much simpler screening process to ensure that a range of points of view are heard, without overwhelming the panel process. One idea could be to encourage parties to pool their submissions where they are likely to raise the same substantive issues.

**Early planning and engagement.** We support the idea of early planning and engagement with interested parties prior to formal launch of the assessment process. Indeed, this is increasingly the norm in terms of how project proponents conduct themselves. While the agency and other relevant authorities can provide advice and guidance on the timing and approach to engagement, the overall design of the project must remain firmly in the hands of the proponent. Among other things, this would include the undertaking of specific scientific or environmental analyses and the assessment and design of specific mitigation measures. In the pre-assessment phase, the focus will be on engagement of Indigenous peoples and communities likely to be directly affected, to understand their potential concerns and issues and to take those into consideration in design of the project. In some cases, this engagement will be directed by existing community cooperation agreements and/or existing impact benefit agreements with local Indigenous communities.

**High quality scientific information and data.** We are broadly in the agreement with the idea to make scientific and technical information more rigorous and more accessible. However, it is important to ensure that decisions are based on high quality information and that studies and reports meet recognized professional standards. During the

assessment planning phase the agency and the project proponent should agree on the scope of scientific and technical examination, and the methodologies to be used. We also believe there is scope to better inform the public by making available plain language summaries of the key scientific and technical studies.

**Strategic and regional assessments.** We are broadly supportive of government undertaking these kinds of assessments. Strategic assessments offer the opportunity to address broader policy issues, such as consistency with the direction of climate change policy, rather than trying to address them within a single project assessment. Similarly, regional assessments might better address the issue of cumulative effects in a particular geographic location, airshed or watershed. However, these have the potential to be resource-intensive and multi-year undertakings. The federal government needs to devote significant resources to them, and work cooperatively with other jurisdictions (provincial/territorial/local/Indigenous as appropriate), industry and relevant stakeholders to ensure widespread agreement on their final form. As well, completion of individual project reviews should not have to await finalization of these broader assessments.

**Impacts on Indigenous Peoples.** We support the recommendation that legislation be amended to explicitly require assessment of any significant impacts on Indigenous peoples. Proponents of major resource projects, including many Business Council members, are keenly aware of the obligation to understand and be sensitive to the needs and expectations of Indigenous communities. Much progress has been made in recent years and companies are adopting strategies aimed at early engagement with local Indigenous communities and more active involvement throughout the life cycle of a project, through planning, design, construction and ongoing operation. Yet there are almost always questions that are vital to the interests of these communities that only governments can answer. Much more needs to be done to both reflect the principle of genuine consultation and to develop the capacity of Indigenous communities to participate actively and effectively in the regulatory process. Business is more than willing to do its part, but the fundamental responsibility is one that only governments, federal and provincial, can discharge. We are prepared to support the idea raised in the discussion paper, that a single government agency with increased capacity be given responsibility to coordinate consultation and accommodation.

The Supreme Court of Canada has recently provided further guidance on the scope of Indigenous consultation and accommodation. These cases again illustrate the importance of early engagement, that due consideration be given to the rights granted by treaties and that the degree of consultation and accommodation is related to the significance of the impact on recognized rights. They also underscore the proposition that while the proponent and the government must always consider ways to minimize the impact to the largest extent possible, the decision in the end is one governed by the overall public interest.

**Decision-making on projects.** We support the proposal to retain the discretion of Ministers and the Cabinet to decide on whether specific projects are in the overall interest of the people of Canada.

**Legislated timelines for project assessments.** It is critical that legislated timelines be maintained and, except in exceptional situations, be rigorously applied. Proponents need to be able to envision a clear path forward to the end of the project for planning purposes. This also will be critical to maintaining investor confidence in Canada's regulatory system.

**Review and update of the Project List.** We support the project list approach to determining which projects require assessment and on the basis of those with the greatest potential impact in areas of federal jurisdiction. Any amendment to the list should be developed in partnership with stakeholders and the provinces/territories and should proceed according to clearly defined criteria.

**Cooperation with jurisdictions.** We are heartened to see the acknowledgement of the need for more comprehensive cooperation with other jurisdictions (provincial, territorial, Indigenous) in order to support the principle of "one project – one assessment". We also support the proposal to make clear in the law that substitution of provincial/territorial authorities is appropriate where there is alignment with federal standards. As well, the agency should be given the mandate to proactively develop cooperation agreements with relevant jurisdictions.

**Policy dialogues outside of project hearings.** It is extremely important that the federal and provincial governments work together to establish appropriate venues through which stakeholders can participate in substantive policy discussions. This will avoid the tendency to try and hold individual project assessments accountable for broader societal issues and impacts. The Pan-Canadian Framework for Clean Growth and Climate Change and Generation Energy represent important opportunities to ensure broader issues of the overall direction of Canadian policy on energy and resource development, maintaining a healthy environment and protection and promotion of Indigenous interests receive due consideration and thoughtful engagement.

**National Energy Board governance.** We agree with the proposal to separate the roles of Chair and CEO, as well as the creation of an executive board to provide strategic direction to the NEB. We also see the value in creating separate hearing commissioners to participate in project reviews and in broadening the array of skills and expertise among these commissioners, including more Indigenous representation. Maintaining the National Energy Board in Calgary makes sense, as does the proposal to eliminate the residency requirement for Board members and hearing commissioners. And we see merit in investigating more streamlined dispute settlement procedures as an alternative to some formal adjudicative procedures.

**Energy information agency.** The federal government should work with the provinces/territories and stakeholders to further development of a stand-alone energy information agency. It would be responsible for collecting and analyzing pertinent energy information that is vital to the national interest. However, given limited resources there is a need to carefully prescribe the new agency's areas of focus and leverage existing capacity within the several federal and provincial agencies which now collect energy information.