Lake Babine Nation's Comments on EA Revitalization Discussion Paper

Tabled by Lake Babine Nation

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A. INTRODUCTION

Lake Babine Nation appreciates the opportunity to comment on BC's EA Revitalization Discussion Paper ("**Discussion Paper**"). This submission

- notes areas of clear alignment between the Discussion Paper and LBN's EA Reform Submissions of May 7, 2018 ("**LBN's Recommendations**");
- discusses the most significant gap between the Discussion Paper and LBN's Recommendations, namely what the new legislation should do to meaningfully protect section 35 rights, establish a strong government-to-government relationship,[1] and implement the principle of free, prior and informed consent from the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**"); and
- identifies other gaps between LBN's Recommendations and the Discussion Paper.

If it would be useful, LBN would be pleased to meet with Crown representatives to discuss these submissions.

B. AREAS OF CLEAR ALIGNMENT BETWEEN LBN RECOMMENDATIONS AND EA REVITALIZATION DISCUSSION PAPER

LBN is pleased to see the Discussion Paper clearly endorse the following features of a new environmental assessment - or as LBN calls it, Impact Assessment ("**IA**") - regime:

- The Discussion Paper proposes that the new legislation expressly allow Crown-Indigenous agreements to depart from the default, legislated EA process, including by establishing joint Crown-Indigenous or Indigenous-led EAs (p. 9). This recommendation is critical to LBN, which is actively negotiating with BC to reclaim its jurisdiction to make decisions in relation to the lands and resources in core areas of its Territory. It is essential that the new regime set the stage for the Crown and Indigenous groups to reconcile their decision-making authorities by agreement, rather than leaving Nations under the *status quo*, whereby the Crown acts as the sole decision-maker. After LBN shared its Discussion Paper with the EAO, BC issued its Draft Principles that Guide Province of British Columbia's Relationship with Indigenous Peoples ("**Relationship Principles**"). LBN supports the Relationship Principles, and notes that new legislation that expressly contemplates

[1] LBN is now emphasizing this objective as well in light of BC's issuance of its draft Principles that Guide Province of British Columbia's Relationship with Indigenous Peoples, and in particular Principles 1 and 4.

agreements to recognize Indigenous decision-making authority in EAs would significantly contribute to the implementation of Principles 1, 2,3,4,5 and 6.

- The Discussion Paper supports strategic and regional assessments, modernized land use planning, advancement of the Cumulative Effects Framework, the implementation of a Climate-Action Strategy, and a new provincial endangered species law. These recommendations align with LBN's call for more pre-IA tools to set the stage for better informed decision-making and Crown-Indigenous consensus building. LBN would simply emphasize three *additional building blocks* for supporting robust IAs and consensus-building: Traditional Ecological Knowledge Studies ("TEKs") and Traditional Land Use Studies ("TLUs") in advance of any EA process rather than in reaction to a particular project, as well as the establishment of additional and resource protection measures in collaboration with Indigenous Nations:
- The Discussion Paper and LBN's Recommendations both support more interaction between the proponent and the Crown/Indigenous groups at every stage of the EA.
- The Discussion Paper and LBN's Recommendation align on the appropriate EA phases that the new law should establish.
- The Discussion Paper recommends that EAs use best available TEK and Western science (p. 19) to inform decision-making, which LBN has also recommended.
- The Discussion Paper and LBN's Recommendation both support EA decisions based first and foremost on the *public interest and the sustainability of projects*, and the EAO and LBN agree on the relevant dimensions of sustainability, i.e. environmental, economic, social, cultural, and health.
- The Discussion Paper mirrors LBN's Recommendations in saying that Indigenous groups should have the opportunity to co-administer or participate in monitoring the projects that get built in their territory (p. 24).

C. BIGGEST GAP: EA PROCESS IMPROVEMENTS MUST BE COMPLEMENTED BY COMMITMENTS TO *OUTCOMES* THAT RESPECT SECTION 35 RIGHTS AND HELP IMPLEMENT COOPERATIVE FEDERALISM WITH INDIGENOUS PEOPLES AND UNDRIP

1. Overview of why EA Reform Must Include Substantive Constraints on EA Decisions

The Discussion Paper embraces the premise that the public interest should drive EA decisions (p. 23). The Supreme Court of Canada has confirmed that "[a] project authorization that breaches

the constitutionally protected rights of Indigenous peoples cannot serve the public interest."[2] The *Environmental Assessment Act* and the Province's current default approach to EAs fail to meaningfully protect section 35 rights.

Although the caselaw *in theory* sets a high threshold for justifying the infringement of any established section 35 rights, *in practice* the Crown is free to ignore the potential for infringement in its EA decision-making. This is because Indigenous groups faced with a development approval they believe violates their already established rights have only one avenue for seeking redress: infringement actions, which are often in practice not viable due to costs and/or the reluctance of courts to grant interlocutory injunctions to put the project on hold pending trial.

Furthermore, while the Supreme Court of Canada recognized the Crown's constitutional duty to consult and accommodate with Aboriginal peoples in 2004 specifically to ensure interim protection for *asserted* but not yet established section 35 rights, the extensive body of consultation caselaw generated so far fails to hold the Crown accountable for its accommodation efforts. As the law currently stands, the courts may critique the consultation *process* and may order further consultation where the process was significantly flawed, but they shy away from assessing whether the *accommodation* that arose from the consultation process yielded meaningful protection for section 35 rights.

Thus, while section 35 and the common law duty to consult and accommodate establish standards for Crown conduct that should in theory protect reasonably asserted and established s. 35 rights, the Crown has not voluntarily assumed its legal duties, and the courts have failed to create real accountability for Crown decisions. Under the current *Environmental Assessment Act* and standard Crown policies, the implementation of section 35 in EA decision-making remains at the pleasure of the Crown.

Crown-Indigenous EA agreements that allow for joint decision-making or Indigenous led EAs will be the surest way to honour and implement section 35 rights in EAs. However, the EA revitalization must also change the default EA rules to foster compliance with the Canadian Constitution in all EAs not governed by such agreements, and ***both procedural reforms and substantive constraints on EA decision-making are required.*** Similarly, BC's Relationship Principles and the Discussion Paper's stated support for implementing UNDRIP require both procedural improvements as well as some substantive constraints on Crown EA decision-making.

[2] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40, at para. 40 (emphasis added).

In summary, while LBN welcomes the more robust EA process proposed in the Discussion Paper, the lack of any proposed substantive constraints on EA outcomes is a significant outstanding shortcoming in the Province's proposal.

The rest of this section expands on why the Crown's current approach to EAs fails to honour the promise of section 35 and explains how LBN's proposed constraints on Crown decision-making would significantly improve outcomes and implement stronger Crown-Indigenous relations and the principle of free, prior and informed consent in a way that reasonably balances Indigenous rights and the well-being of Indigenous communities with other public interests.

2. Detailed Explanation of the Need for Substantive Decision-Making Constraints on Crown EA Decisions

How the Status quo fails to Protect Established Rights

Where section 35 rights are established (that is, proven in court, confirmed in a treaty, or conceded by the Crown to exist), the Crown may only lawfully infringe established rights by complying with the *Sparrow* justification test. To justify an EA approval that would infringe established section 35 rights, the Crown must

i. have a valid, i.e. compelling and substantial, objective; and

ii. carry out its decision-making in a way that is consistent with the fiduciary duty of the government towards Aboriginal peoples.[3]

Whether the Crown has met its fiduciary obligations is a highly fact specific inquiry that includes considerations such as the following:

i. whether there has been as little infringement as possible in order to achieve the desired result;

ii. whether, in a situation of expropriation, fair compensation is available; and

iii. whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.[4]

Unjustified infringements are unconstitutional and fail to uphold the honour of the Crown. It is obvious that *the Crown should never grant an EA approval for a project that unjustifiably infringes established s. 35 rights*. The Province recognizes this fact in its Relationship Principle #7.

[3] *R v Gladstone* [1996] 2 S.C.R. 723, at para. 54, affirming *Sparrow*
[4] *R v Sparrow,* [1990] 1 S.C.R. 1075 at para. 82, affirmed in *Gladstone* at para. 55.

However, the current reality in B.C. is that where Indigenous groups raise concerns that a project will infringe their established rights, the Crown is free to refuse to even discuss this matter in its consultations. In *Prophet River First Nation v. British Columbia (Environment)*,[5] the British Columbia Court of Appeal has encouraged the Crown not to explicitly turn its mind to and discuss with Indigenous groups the potential for section 35 infringements. While the Court correctly reasoned that Ministers making EA decisions cannot make *legal determinations* on whether a project would infringe section 35 rights, it did not require or even encourage the Crown to turn its mind to the issue or engage with the affected Indigenous group about this matter. Instead, the Court stated that where the First Nation perceives an infringement, they can bring an infringement action to court:

> It may be essential in any given case that ministers of the Crown, charged with making the kind of administrative decision made here, recognize Aboriginal claims and the necessity of deep consultation as well as measures of meaningful accommodation to which they give rise. But, while such will be among the considerations to be taken into account in the course of making their decision, they are not required to make a determination of the adequacy of the consultation undertaken and accommodation afforded before exercising their statutory discretion. What is important is that the consultation and accommodation be adequate, not that the Crown determine that to be the case. Whether it is in fact the case is a matter for the court, not the Crown, to decide.[6]
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> …
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> It follows that, not only were the Ministers not required to make a determination of whether the consultation and accommodation were adequate, they were also not required to determine whether the project constituted an unjustifiable treaty infringement before issuing the certificate.[7]

The Court should have encouraged the Crown to proactively meet its constitutional obligations. Moreover, its suggestion that Indigenous groups pursue infringement actions (not even judicial reviews)[8] where they believe that EA approvals infringe their rights is unhelpful: infringement actions are extremely expensive and take years to litigate, and the courts are generally reluctant

[5] *Prophet River,* 2017 BCCA 58
[6] *Prophet River* at para. 31
[7] *Prophet River* at para. 33.
[8] The Court in *Prophet River* expressly rejected judicial reviews as an avenue for litigating infringement claims: para. 24. So it also closed the door to the more timely and less expensive avenue for a court remedy.

to grant injunctions to suspend projects pending those actions.[9] As such, infringement actions not a realistic remedy, and the Crown is fully aware of this fact when it approves controversial projects.

Therefore, as the law in BC currently stands, there is no practical incentive for the Crown to pro-actively meet its obligations under the *Sparrow* justification test. Indeed, the Crown in its land and resource decisions regularly refuses to consult about whether its proposed course of action might infringe section 35 rights, even where the Indigenous Nation expressly raises this concern during consultation.

If the current government is serious about respecting section 35 rights and implementing Relationship Principle #7, the new EA legislation must expressly commit the Crown to pro-actively avoiding unjustified infringements. LBN's proposal is that the new law

i. expressly require the Ministers to consider the potential for projects to infringe established section 35 rights *where an affected Indigenous group raises that concern*;

ii. confirm that Ministers will reject a project where they believe it would or has real potential to unjustifiably infringe section 35 rights (taking into account any advice it has received on this point, including in the EA Report);[10] and

iii. where s. 35 rights are established and the Indigenous group asserts that the project would infringe those rights, require a Crown EA approval to come with reasons that explain whether they view their decision as satisfying the *Sparrow* justified infringement test; in other words, while the Ministers need not take a definite position on whether they think the project would infringe section 35 rights, they should at least be transparent as to whether they believe their decision would satisfy the justified infringement test, and if so, why.

At our June 27 meeting, the EAO suggested that EAs should not become unnecessarily "legal" in their focus, as opposed to focussing on the concrete impacts of the project on affected Indigenous groups. While LBN agrees that concrete impacts are critical, the Crown also needs to take responsibility for its constitutional obligations towards Indigenous peoples, and this will require using a legal lens in the EA where affected Indigenous groups express the concern that the proposed project would infringe their rights.

[9] The Supreme Court of Canada recognized the long time it takes to pursue rights claims and the reluctance of courts to grant injunctions pending resolution of those claims in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 14.

[10] The Ministers would not be making a "legal determination" on infringement. They would simply be determining whether they think an infringement is possible or likely.

However, LBN agrees that where an Indigenous group is not alleging infringement (e.g. because it supports the project), there is no need to assess the potential for unjustified infringement. This modifies LBN's position at p. 14 of its Recommendations, where it states that IAs should always consider the potential for unjustified infringements.

How the Status Quo Fails to Protect Reasonably Asserted Rights

The Supreme Court of Canada established the duty to consult and accommodate in recognition of the fact that s. 35 rights, although "recognized and affirmed" under the Constitution, are vulnerable to being compromised or lost as a result of Crown land and resource prior to being established. Consultation and accommodation are meant to provide interim protection:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[11]

However, the now extensive Canadian body of consultation and accommodation caselaw establishes that the courts are, so far at least, treating the duty to consult and accommodate as a primarily *procedural* obligation. While they are comfortable holding the Crown accountable for clearly deficient decision-making processes, the courts avoid or show significant deference on the question of adequacy of accommodation. The vast majority of the courts' decisions in favour of Indigenous groups have been based on a breach of the duty to consult rather than accommodate. Only a handful of cases have touched on accommodation, and so far the Crown continues to enjoy highly discretionary decision-making authority on whether to approve land and resource activities and if so, on what terms (and of course, the duty to consult caselaw confirms the Crown's *exclusive* decision-making authority, and does not recognize Indigenous decision-making authority).

[11] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 27

Provincial Crown counsel currently rely on the following passages from *Prophet* and *Ktunaxa* to oppose First Nation claims of inadequate accommodation and to argue that the duty to consult and accommodate is a at heart only a procedural right:

> With respect to the appellants' claims regarding the duty to accommodate, it must be remembered that the Crown's consultation and accommodation efforts should not be deemed unreasonable merely because immitigable impacts are identified. As articulated in *Haida Nation*, the identification of such impacts is a factor indicating the requirement of deep consultation and accommodation, but this does not necessarily require that a different substantive outcome be reached: "the focus … is not on the outcome, but on the process of consultation and accommodation".[12]

> The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of "give and take", and outcomes are not guaranteed.[13]

Furthermore, as noted in the passage from *Prophet River* above, the BC Court of Appeal has ruled that the Crown need not turn its mind to whether consultation and accommodation are adequate before making its decision, even where the decision is for a major project that some Indigenous groups strongly oppose: <u>What is important is that the consultation and accommodation be adequate, not that the Crown determine that to be the case. Whether it is in fact the case is a matter for the court, not the Crown, to decide.</u>[14]

Haida Nation has improved the situation of Indigenous groups. The duty to consult and accommodate prompts dialogue with Indigenous groups. It encourages the Crown and proponents to adopt mitigation measures to reduce project impacts on section 35 rights, and to offer economic benefits to Indigenous groups where projects stand to infringe asserted Aboriginal title. ***However, as long as the Crown follows a reasonable consultation process, it remains free to approve projects with major, immitigable impacts on section 35 rights. The duty to consult and accommodate does not protect against real harm to section 35 rights and does not give Indigenous groups any real say in whether projects may proceed. EA outcomes fundamentally remain at the pleasure of the Crown. The improved processes in the Discussion Paper will not change this reality. Substantive decision-making constraints are also required***.

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[12] *Prophet River* at para. 65.
[13] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 5 at para. 114.
[14] *Prophet River* at para. 31

This is why LBN recommends that the new law commit that the Crown will not issue an EA approval where it concludes that the duty to consult and accommodate has not been met. This will require the Crown to at least turn its mind to the duty to consult and accommodate prior to decision-making, which will in turn promote more thoughtful decision-making and create an opportunity for the Crown to pro-actively catch and address any deficiencies in the Crown's approach to consultation and accommodation up to that point.

The more significant constraint on Crown decision-making that LBN proposes is for the Crown to respect an Indigenous group's rejection of a project where certain conditions are satisfied. As stated in LBN's Recommendations, the new law should require the Crown to reject a project where all these circumstances apply:

a) the Indigenous group holds reasonably asserted or established section 35 rights;

b) the EA establishes the project would have serious impacts on section 35 right(s) that cannot be mitigated;

c) the Indigenous group participated in good faith in the EA; and

d) the government of the Indigenous group[15] has made and communicated a formal decision to reject project.

Where three or more Indigenous groups would face serious impacts from a project and a minority oppose the project while a majority support it, Ministers could approve the project where they reasonably conclude that the minority's opposition is not primarily based on environmental or cultural concerns.

The proposed approach would go a long way towards ensuring that section 35 rights are meaningfully accounted for in EA decision-making. LBN's proposal also offers a workable path forward for reconciling Crown-Indigenous decision-making authorities as intended under Relationship Principles (particularly #1 and #4) and implementing the critical UNDRIP principle of free prior and informed consent, as per the Ministers mandate letters and Relationship Principle #6. It would transparently signal to all proponents the importance of meaningfully addressing reasonable section 35 concerns in order to make their project viable. Lastly, it would encourage Indigenous participation in provincial EAs, as the process would finally recognize and honour their own decision-making authority in the cases that matter the most, as opposed to simply validating the Crown's exclusive authority to make EA decisions.

[15] By "government" LBN means the group's lawful decision-makers on section 35 rights matters, which it is up to each Nation to identify pursuant to its inherent right of self-determination.

Setting certain conditions in which the Crown will respect the EA decision-making of Indigenous Nations will not bring development to a halt. LBN, like most Indigenous groups in this Province, is keen to support sustainable economic growth and create job and revenue opportunities.

D. OTHER GAPS BETWEEN LBN RECOMMENDATIONS AND DISCUSSION PAPER

1. Legislation's Application to Established Aboriginal Title

The Discussion Paper is silent about *established Aboriginal title lands*. The current *Environmental Assessment Act* purports to apply to all lands in the Province (not just Crown lands). Since that legislation came into force, Aboriginal title has become a reality in this Province. Therefore, it is time for B.C.'s EA legislation to clarify that it does not apply of its own force on Aboriginal title lands and that its application requires agreement of the Aboriginal title holder.[16]

2. EA Thresholds

As explained in LBN's Recommendations, LBN seeks a new mineral exploration category in the list of EA triggers and lower thresholds for mining projects to trigger EAs. LBN understands that the EAO will propose a new reviewable projects regulation in the fall and looks forward to reviewing and discussing it with the EAO.

LBN is pleased by the Discussion Paper's proposal for the new EA legislation to expressly allow Indigenous groups to request an EA where one is not automatically required, on the basis of serious potential impacts to the well-being of the Nation and/or its section 35 rights. LBN was also happy to hear in the June 27 meeting that the EAO is interested in taking the potential impacts of industrial work camps into account in determining whether a project's adverse impacts are significant enough to warrant an EA.

3. More Interaction between Proponents and Crown & Indigenous Groups

LBN is pleased that the Discussion Paper supports more interactions between the proponent and the Crown/Indigenous groups. What remains unclear is whether the legislation would simply encourage or actually *require* more interaction. LBN believes the proponents should be required to interact more with the Crown and the most affected Indigenous groups. In particular, proponents need to receive feedback about what baseline data is needed. Inadequate baseline data has been a major weakness of past EAs on LBN's Territory, and the problem is very difficult - sometimes impossible - to remedy if it is not caught early on, before a project application is

[16] Of course, projects that straddle Aboriginal title lands and other lands in the Province, or that stand to have significant impacts on non-Aboriginal title lands, may still trigger a full EA under the legislation.

submitted. LBN also sees the need for mandatory sharing by proponents of their draft project application with the Crown and the most affected Indigenous groups, as this will set a clear expectation that proponents need to be open to improving the project application based on Crown and Indigenous concerns (and people are usually more open to improving drafts than final documents).

4. Function of the Readiness Gate/Commencement Decision

LBN agrees with the Discussion Paper's concept of a "Readiness Gate", i.e. a point at which the Crown (and if a consensus is reached, any Indigenous groups participating in the EA) decide whether the review may proceed. However, the Discussion Paper fails to flag this as the appropriate juncture to determine whether a previously rejected project should undergo a second review.

While it will be rare for the proponent of a previously rejected project to seek a new EA, that situation is very problematic if it unnecessarily taxes Crown and Indigenous human and financial resources. The legislation should expressly allow the EAO to refuse to review a project for the second time unless at least one of the following conditions is met:

a) the Project design (e.g. footprint, mitigation measures) has significantly changed such that there is a real possibility of the sustainability analysis differing in a new review;

b) any data gaps that led to the rejection of the project in the first EA have been filled; or

c) any prior objections of a deeply affected Indigenous group that led to the rejection of the project in the first instance have been addressed to the satisfaction of that group.

5. Indigenous Participation in the Working Group/Technical Advisory Group

LBN supports the Discussion Paper in its recommendation that Technical Advisory Groups (or as LBN calls them, "Working Groups") include Indigenous groups. The EAO has explained its interest in securing the consent of affected Indigenous groups as to which ones will be on the Advisory Group. LBN thinks it is important for the new legislation to adopt the principle that participation in the Advisory Group should be limited to the most affected Indigenous groups, since otherwise the role of most affected groups risks being diluted and/or the Advisory Group could become unworkably large.

LBN fully supports the Discussion Paper's concept of Crown-funded, non-binding dispute resolution to help Indigenous groups resolve their disagreements about participation in an Advisory Group (p. 10). If dispute resolution fails, the EAO will need to take responsibility for its process under the default EA rules and be prepared to decide which groups to include in the Advisory Group. The legislation should clarify that the EAO will invite into the Technical Advisory

Group only those Nations that stand to be seriously affected by a proposed project. This does not require any in depth strength of claim assessment: the EAO can simply determine whether the Indigenous group asserts at least *reasonable* rights claims and whether impacts are potentially serious.

6. Funding to Indigenous Groups

LBN appreciates the Discussion Paper's recognition of the need for "secure and timely funding" (p. 9) to allow for meaningful Indigenous participation in EAs. LBN does not think an independent body needs to administer the funding, and would not want to see the administrative costs of such a body eat into the funds available for Indigenous EA participation. As LBN and the EAO have agreed in their meetings, capacity dollars would ideally fund staff positions within the Indigenous government: in-house staff are more cost effective than outside consultants and full time and longer-term employment will allow staff to build stronger rapports with both the Nation's own government and the Crown's representatives.

LBN is in serious need of core funding to be able to engage meaningfully in EAs and on Crown land and resource referrals generally. At this time the Nation has an underfunded Fisheries team, a single Crown Referrals Officer with an excessive workload, and an Oil and Gas Commission Compliance and Enforcement Liaison Officer. At a minimum, Lake Babine needs a Natural Resources Director, an expanded fisheries team, environmental and cultural monitors, and a half time if not full-time archaeologist in order to participate meaningfully in EAs and engage with the Crown and proponents on other natural resource matters.

LBN does not support the concept of a fee schedule noted at p. 12 of the Discussion Paper. Core funding is critical to hire in-house staff, and additional, project specific costs will vary too much depending on the concerns of a Nation, the nature of the Project, and the existing resources of a Nation to be accurately predicted in a fee schedule.

7. Sustainability Analysis

While the Discussion Paper supports sustainability analysis that looks at the positive and negative effects of a project, including cumulative effects, it falls short of reassuring LBN that EAs would actually be rigorous.

LBN remains keen to see every EA answer questions about each dimension of sustainability (tailored to the particular project) as well as these general, overarching questions:

a) Is the project demonstrably sustainable in all dimensions of sustainability and if so, under what project conditions?

b) Does the project raise any serious sustainability concerns, i.e. serious adverse impacts relating to any dimension of sustainability, after taking into account proven and reliable mitigation measures?

c) Are there knowledge gaps that make it impossible to determine whether the project raises any serious sustainability concerns?

LBN believes that any rigorous EA must tackle questions to this effect, and thus this analytical framework should be confirmed in the legislation.

Also key for rigorous assessments is legislated direction that assessments may only rely upon mitigation measures that are feasible and reliable.

8. EA Report

The Discussion Paper is unclear as to who would write the EA Report. LBN believes it should be the Technical Advisory Group, that it should strive for consensus (with the proposed dispute resolution available to help bridge any impasses), and that any dissenting views should be included in the Report.

LBN recommends that the EA Report be reviewable in court, to counter the suggestion, at least in federal caselaw, that because a non-binding EA report is not subject to judicial review.[17] EA Reports should have an even greater impact on decision-making under the new regime than they do today, and as such, their content should be reviewable for compliance with legislative requirements.

9. Non-Section 35 Constraints on Decision-Making

Just as LBN believes that the new legislation must put some substantive limits on the Crown's discretion to approve projects in order to protect the section 35 rights of Indigenous groups, respect their decision-making authority, and meaningfully implement the principle of free, prior and informed consent, LBN remains of the view that the Crown's discretion should also be limited in certain cases based on the precautionary principle: where the Technical Advisory Group has unanimously concluded that knowledge gaps prevented them from determining whether a project raises serious sustainability concerns, the Crown should be required to reject the project. The Discussion Paper is silent on this matter and LBN continues to advocate for this substantive limit in order to promote EAs that are robust both in process and outcomes.

[17] *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 125. The legal challenges to the Joint Review Panel's EA report failed on the basis that the report did not make a decision about anyone's legal or practical interests and was therefore not reviewable.

10. Reasons for EA Decisions

The Discussion Paper does not propose any standards for reasons for decision. LBN continues to press for a higher standard than is set out in the new federal *Impact Assessment Act*. Decision-makers should be required to explain how they decided that the positive public interest considerations (in the case of approval) or the negative public interest considerations (in the case of rejection) prevailed.

11. EA Timelines

The timelines that the Discussion Paper proposes seem reasonable, but it is silent on certain timelines and does not confirm the principles that timelines are targets that may be varied (by the person or entity operating under the timeline), that the Crown must respond to extension requests in a timely way, and that timelines *must* be extended where required to satisfy the Crown's duty to consult and accommodate.

12. Full Proponent Liability for Accidents and Malfunctions

The Discussion Paper is silent about proponent liability for the costs of project accidents and malfunctions. BC has recently experienced a major mining disaster from the Mt. Polley Mine. The public seems to be bearing a large share of the clean up cost.[18] As LBN stated in its Recommendations, British Columbians should not be on the hook for proponents' environmental liabilities.

It is also time to ensure *accountability to Indigenous peoples* for industrial accidents and malfunctions, including non-monetary cultural and psychological harms. Money could never undo the harms that LBN would experience from a major industrial accident, but LBN would need financial resources to respond to major damage on its Territory and support its members and communities through the associated trauma.

Although LBN appreciates that the mechanisms for providing corporate accountability will lie partly outside the new EA legislation (eg: establishment of mandatory sectoral insurance funds), the Crown can and should make it a condition of all project approvals that the proponent be demonstrably able to internalize the full costs of the credible worst case scenario. The government should tackle this issue comprehensively in conjunction with EA revitalization.

[18] https://thenarwhal.ca/british-columbians-saddled-40-million-clean-bill-imperial-metals-escapes-criminal-charges