

**SUBMISSION TO THE  
NATIONAL ENERGY  
BOARD  
MODERNIZATION  
REVIEW**

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**AMNESTY  
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## Introduction

The federal government has long affirmed its intent that the regulatory process conform to and uphold Canada's human rights obligations. For example, the 2012 Cabinet Directive on Regulatory Management, states that all federal "[d]epartments and agencies are to respect Canada's international obligations in areas such as human rights, health, safety, security, international trade, and the environment. They are also to implement provisions related to these obligations *at all stages of regulatory activity*, including consultation and notification, as applicable [emphasis added]."<sup>1</sup>

Despite this explicit intent, the *National Energy Board Act* makes no reference to human rights in general, or to the specific rights of First Nations, Inuit and Métis peoples. The *Canadian Environmental Assessment Act 2012*, which provides the framework for assessments carried out by the NEB, requires consideration of potential impacts on Indigenous peoples' "health and socio-economic conditions," their "physical and cultural heritage," "the current use of lands and resources for traditional purposes," and impacts on "any structure, site or thing that is of historical, archaeological, paleontological or architectural significance."<sup>2</sup> *CEAA 2012* also requires review panels to work in cooperation with Indigenous peoples<sup>3</sup> and take into consideration their traditional knowledge systems.<sup>4</sup> Yet, while these are all matters of human rights protected in Treaties, the Constitution, and international human rights law, *CEAA* does not explicitly acknowledge them as such and provides no guidance on the importance of protection of these rights or how they can be appropriately reconciled with other interests and imperatives.

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<sup>1</sup> Treasury Board of Canada. *Cabinet Directive on Regulatory Management*. 1 April 2012.

<sup>2</sup> Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 5(1)(c).

<sup>3</sup> Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 4(1)(c).

<sup>4</sup> Canadian Environmental Assessment Act, 2012 (Index: SC 2012, c19, s52), section 19(3).

In Amnesty International's experience, the absence of an explicit rights framework all too often means that serious concerns over potential rights violations are not given adequate consideration or are overlooked entirely. In November 2016, Amnesty International released a major case study,<sup>5</sup> the product of more than two years research in the energy rich Peace River Valley region of British Columbia, that documented how regulatory decisions of the federal and provincial governments have had serious unintended consequences for the health, safety, and well-being of women and men in the host communities, with the most marginalized members of those communities – particularly Indigenous women and girls – suffering the greatest harms. These harms include dramatic loss of land needed to sustain Indigenous cultures and traditions and foster individual and collective healing; the loss of access to necessities like affordable housing as the high wages of the resource sector drive local prices beyond the reach of families without access to such wages; strains on local infrastructure and community services that similarly put support and services out of reach for many; growing problems with drug and alcohol abuse linked to the influxes of such large numbers of outside workers; and very high rates of violent crime, including violence against women.

The harms documented in this report deny women and men the enjoyment of their fundamental human rights including the right to health, the right to an adequate standard of living, the right to a healthy environment, the right to live free from violence, and the right of Indigenous peoples to maintain their ties to their lands and make decisions about their futures. In Canada, these rights entail legal responsibilities set out in the *Charter of Rights and Freedoms*, the Constitutional affirmation of Aboriginal and Treaty Rights, and in the wider body of international human rights law that Canada has actively contributed to developing. Although unintended harms experienced by host communities in northeast BC have been previously documented in studies dating back over three decades,<sup>6</sup> and echo the findings of numerous studies in communities across Canada,<sup>7</sup> our research found little indication of their having been

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<sup>5</sup> Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights and Energy Development in Northeast British Columbia, Canada*, November 2016, AMR20/4872/2016

<sup>6</sup> Northern Health, *Population Health and Oil and Gas Activities: A Preliminary Assessment of the Situation in North Eastern BC*, 10 January 2008

<sup>7</sup> See for example, The Labrador West Status of Women Council et al., *Effects of Mining on Women's Health in Labrador West*, 7 November 2004; Alison Cretney et al., *Boom to Bust: Social and cultural impacts of the mining cycle*, Pembina Institute, 2008; Catherine Coumans and Mining Watch Canada, 'Research on Contested Ground: Women, Mining and Health,' in *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, 3:1, Winter 2005, pp. 9-32; Ginger Gibson and Jason Klinck, 'Canada's Resilient North: The Impact of Mining on Aboriginal Communities,' in *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, 3:1, Winter 2005, pp. 116-139; First Nations Women Advocating Responsible Mining, *Submission to Committee on the Elimination of Racial Discrimination, 80th Session*, January 2012; Conseil du statut de la femme Quebec, *Opinion - Women and Plan Nord: for Equality in Northern Development*, October 2012; Janis Shandro et al., *Ten Steps Ahead: Community Health The Social Dimension of Sustainable Development and the Mining Industry: A Background Paper and Safety in the Nak'äl Bun/Stuart Lake Region During the Construction Phase of the Mount Milligan Mine*, December 2014; Lisa Aurore Lapalme, *The Social Dimension of Sustainable Development and the Mining Industry: A Background Paper*, Natural Resources Canada, November 2003, p. 14; Robert James Early, *DISCONNECT: Assessing and Managing the Social Effects of Development in the Athabasca Oil Sands*, University of Waterloo, 2003, p. 167; Nobel Women's Initiative, *Breaking Ground: Women, Oil and Climate Change in Alberta and British Columbia*, 2013, pp. 18-20; Pauktuutit, *The*

considered or addressed in any substantive way in the decision-making processes of either the federal or provincial governments.

The NEB Modernization Review, along with parallel reviews of the *Canadian Environmental Assessment Act*, *Fisheries Act* and *Navigations Act*, provides an opportunity to bring the regulatory process into line with the human rights protections set out in domestic and international law, and with Canada's explicit commitments and legal responsibilities to uphold those protections. In the following submission, Amnesty International sets out recommendations in five areas where reform of the National Energy Board and the broader process of government decision-making around resource development is urgently needed to ensure decisions under the regulatory process are consistent with the Canada's human rights obligations under the Constitution and international law.

### **1. Protection of human rights should be explicitly named as part of the purpose of regulation**

All governments have a fundamental duty to ensure that the decisions they make are consistent with their human rights obligations. In every instance, there is a duty of due diligence: the responsibility to take every reasonable measure to ensure that the decisions and actions of government do not contribute to erosion or violation of human rights.

The regulatory process can be a crucial part of meeting this standard of due diligence. Public environmental assessments, for example, can provide an opportunity for claimed benefits and potential harms of any project to be scrutinized in a public manner with the direct participation of potentially affected individuals, communities, and Indigenous peoples. Even where the potential impacts involve matters such as disputes over Indigenous title and resource rights whose resolution is beyond the scope of the

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*impact of resource extraction on Inuit women and families in Qamani'tuaq, Nunuvut Territory: a qualitative assessment*, January 2014; Linda Archibald and Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project*, November 1999; National Aboriginal Health Organization, *Resource Extraction and Communities in Northern Canada: Gender Considerations*, 2008; World Health Organization, *Managing the public health impacts of natural resource extraction activities: a framework for national and local health authorities*, Draft Discussion Paper, 17 November 2010; Shira M. Goldenberg et al., 'Sexually Transmitted Infection (STI) Testing among Young Oil and Gas Workers: The need for Innovative, Place-based Approaches to STI Control,' in *Canadian Journal of Public Health*, 99:4, July-August 2008, pp. 350-254; Shira M. Goldenberg et al., 'And they call this progress? Consequences for young people of living and working in resource-extraction communities,' in *Critical Public Health*, 20:2, p. 162; S. Barton, 'Aspects of the effect of substance use on health, wellness and safety of employees and families in northern remote work sites,' in *Social Indicators Research*, 60:1. p. 267; S. Markey and K. Heisler, 'Getting a fair share: Regional development in a rapid boom-bust rural setting,' in *Canadian Journal of Regional Science*, 33:3, p. 56; Northern British Columbia Women's Task Force, *Report on Single Industry Communities: Kitimat, BC; Fraser Lake, BC; Mackenzie, BC*, 1977; Northern Health, *Men's Health Matters Because Men Matter: Community Consultation on Men's Health: What We Heard*, September 2011; and Northern Health, *Where are the Men? Chief Medical Health Officer's Report on the Health and Wellbeing of Men and Boys in Northern BC*, November 2011.

regulatory process itself, the duty of due diligence requires careful consideration of how the decision before the regulator could contribute or detract from the potential for a just resolution of such a dispute.

Amnesty International recommends that:

1. All national legislation pertaining to the review and potential approval of resource development and infrastructure should include in its purposes the protection of human rights.
2. A reformed *National Energy Board Act* should include explicit recognition that impacts on the culture and heritage of Indigenous peoples, and on Indigenous peoples use of lands and resources, are matters of human rights protected by Treaties, the Constitution and international law, including the *United Nations Declaration on the Rights of Indigenous Peoples*.
3. The assessment process should require disclosure of the government's assessment of the strength of Treaty and Aboriginal rights asserted by potentially affected Indigenous peoples and provide an opportunity for Indigenous peoples to put forward contending interpretations and such supportive evidence as they may wish to provide.

## **2. The scope of assessments must be broadened to include a range of social and economic impacts where rights are potentially at stake**

In Amnesty International's view, any government has a clear and substantial obligation to thoroughly consider a wide range of factors necessary to ensuring that human rights are upheld and not undermined by the decisions that it makes about the projects that it approves and any conditions that attached to such approval.

International human rights bodies routinely call for "human rights impact assessments" of government decisions. Such assessments must include factors such as impacts on safety, security, health, culture and heritage and harm to the specific rights of Indigenous peoples.

Amnesty International recommends that:

4. The National Energy Board Act should be reformed to require that project reviews a) assess and report on the claimed social and economic benefits of proposed projects and b) assess and report on the potential

negative social and economic impacts caused directly by a project or in interaction with other cumulative impacts.

**3. All assessments should include specific consideration of how a proposed project may have different impacts for people of different genders**

There is no acknowledgement in Canada's regulatory legislation that the effects of resource development projects may be experienced differently by people of different genders. Incorporating a gender-based analysis is an essential tool for identifying potential risks that may otherwise be overlooked, assessing the seriousness of these risks, and proposing appropriate and effective mitigation strategies.<sup>8</sup> Where Indigenous peoples have carried out their own gender-based analysis of projects proposed in their territories, the result has often been to highlight critical issues that might otherwise have been ignored. For example, a study of the potential impact of a gas transmission line carried out for the Nak'azdli First Nation in central BC found that loss of access to wild foods could have potentially greater impact on female-headed households than on male-headed households because they were more likely to hunt or fish and were much more likely to eat traditional foods.<sup>9</sup>

The World Bank has stated that failure to consider impacts on women and girls can contribute to and exacerbate a number of risks including "lack of voice and representation in the formal decision making process," "risk in violence and sexual abuse as a result of domestic disputes, alcoholism, drug use, or gambling," "rise in prostitution and HIV/AIDS and other STDs," "poor working conditions and incidences of sexual abuse for women in the project workforce," and "loss of safety and security due to influx of construction workers."<sup>10</sup> These concerns mirror the gendered impacts experienced by Indigenous women and girls that Amnesty International observed in our recent report on northeast BC.

While nothing in Canada's regulatory framework as it currently exists precludes a gender-based analysis, it is extremely rare for decision-making processes to incorporate such an analysis.<sup>11</sup> Amnesty International is aware of only one assessment which has done so.<sup>12</sup> The failure to conduct a gender-based analysis prior to the

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<sup>8</sup> UN, *Beijing Declaration and Platform for Action: The Fourth World Conference on Women*, September 1995; and Status of Women Canada, 'Gender-Based Analysis Plus,' [www.swc-cfc.gc.ca/gba-acs/index-en.html](http://www.swc-cfc.gc.ca/gba-acs/index-en.html)

<sup>9</sup> Quintessential Research Group Inc., *Socio-Economic Impact Assessment of Spectra Energy's Westcoast Connector Gas Transmission Project on Nak'azdli Band and Community Members*, prepared for the Nak'azdli Band, 28 October 2014, p. 34.

<sup>10</sup> World Bank, *Gender in Extractive Industries*, 21 November 2013.

<sup>11</sup> Barbara Clow, et al., *Gender-based analysis meets environmental assessment: Aligning policy mechanisms to address the resource development in Canada's North*, Canadian Research Institute for the Advancement of Women, October 2016.

<sup>12</sup> Linda Archibald and Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project*, November 1999.

approval of projects in Canada stands in contrast to the federal government's broad public commitment to gender-based analysis, which continues to expand and for the first time in 2017, included gender-based analysis of the federal budget.

Amnesty International recommends that:

5. All regulatory processes should require examination of differential impacts by gender, including how gender interacts and intersects with other aspects of identity, including sexual identity, ability, ethnicity and Indigenous identity.
6. Project proponents should be required to include intersectional gender-based analysis in their submissions.
7. The government should allocate resources to developing capacity for gender-based analysis within relevant ministries and, with each specific assessment, within potentially affected communities.
8. Reform of the regulatory process should take place in the context of broader reform of government laws and policies to ensure their consistency with domestic and international laws pertaining to women's rights and gender equality.

#### **4. Assessments must be responsive to the situation of marginalization and disadvantage experienced by Indigenous peoples**

When the federal and provincial governments promote resource development on the traditional territories of Indigenous peoples anywhere in Canada, there is a crucial historical context that must guide their actions and decisions. First, Indigenous peoples have already experienced widespread and profound harm as a consequence of past government decisions. Secondly, Indigenous peoples continue to suffer problems of impoverishment, ill-health, discrimination, and social marginalization that are the product of these harms remaining largely unaddressed.

In the context of the criminal justice system, the Supreme Court of Canada has said "courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools" and how that history "continues to translate" into the contemporary social challenges facing First Nations, Inuit and Métis peoples.<sup>13</sup> The standard of due diligence requires that the same principle apply to any decision-making that potentially affects the rights of Indigenous peoples. In the context of the lasting, unresolved harms caused by past government actions, governments must take

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<sup>13</sup> *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

precaution to ensure that their decisions do not further compound this harm. More than that, the requirements of justice mean that governments should prioritize decisions and approaches that support the restoration of Indigenous societies and communities.

Amnesty International recommends that:

9. Legislation that is brought forward to amend or replace the National Energy Board Act and other related legislation should include as part of a preamble an acknowledgement of the harm done to Indigenous peoples by colonial policies and practices.

10. The Act should provide explicit guidance to ensure that, when considering the seriousness of potential impacts, future assessments must consider the extent to which previous harms experienced by Indigenous peoples have created heightened vulnerability to further harm.

11. The regulatory process should further ensure that Indigenous perspectives are incorporated in determining the seriousness of potential impacts.

**5. The process by which regulatory decisions are made must be consistent with the high standard of protection required for the rights of Indigenous peoples**

Canadian courts and international human rights bodies have consistently recognized the need for an especially rigorous standard of protection for the human rights of Indigenous peoples. In part, this is in recognition of the heightened risk of harm created by the historic denial of Indigenous peoples' rights and the continued failure to provide timely and adequate redress for these past harms. Basic principles of justice, fairness and the honour of the Crown are at stake in how governments make decisions in such a context. Thus, for example, the Supreme Court of Canada's *Haida Nation* decision states that "[t]he Crown acting honourably, cannot cavalierly run roughshod over Aboriginal interests" while matters like Indigenous ownership and jurisdiction over lands and resources are the subject of unresolved disputes.<sup>14</sup>

In decisions potentially impacting Indigenous peoples' use of their traditional lands, the standard of protection must also reflect the central importance of secure access to and use of the land in fulfilling a wide range of other rights. In the report of its recent investigation into violence against Indigenous women and girls in BC, the Inter-American Commission on Human Rights (IACHR) stated that "special protection for the right of indigenous peoples to their lands and resources" is essential because the

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<sup>14</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73.

“economic, social, spiritual, and cultural development” of their communities as a whole depends on their relationship to the land.<sup>15</sup>

The participation of Indigenous peoples in the decision making process is key to ensuring that potential harms are understood from the perspective of those who will bear the burden. The late Rodolfo Stavenhagen, who was the first UN Special rapporteur on the rights of Indigenous peoples, stated that when large-scale economic activities are carried out on the lands of Indigenous peoples, “it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.”

The *UN Declaration on the Rights of Indigenous Peoples* repeatedly calls not only for consultation with Indigenous peoples – which is understood in international law as encompassing a good faith willingness on the part of government to consider the possibility that a project should be rejected in order to avoid harm to Indigenous peoples – but also for cooperation and collaboration between Indigenous peoples and the state. Furthermore the *UN Declaration* and a larger body of rulings and interpretative statements by human rights mechanisms within the UN and Organization of American States (OAS) are consistent in setting out that whenever there is risk of serious harm to the cultures, well-being, and safety of Indigenous peoples, decisions should be taken only with their free, prior and informed consent (FPIC). This is consistent with the Supreme Court’s decision in *Haida Nation* that included consent within the spectrum of possible accommodations required when the process of consultation reveals the potential for serious harms.

Like most other human rights protections in Canadian law, the right of free, prior and informed concept is not absolute and allows for the reconciliation of competing rights. The understanding of when consent is required should reflect the underlying purpose of providing substantial protection to rights that are highly vulnerable to abuse. The former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya said that states should generally presume that FPIC is required for any large-scale resource development project because of the inherently high risks to Indigenous land use and traditions. He argues that before an exception to this requirement can even be considered, there must be a compelling and objective rationale, alternatives must be fully explored, any harmful impact must be minimized, and care must be taken to ensure that Indigenous peoples enjoy more benefit than harm.<sup>16</sup>

Amnesty International recommends that:

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<sup>15</sup> Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada* (Index: OEA/Ser.L/V/II. Doc.30/14), 21 December 2014, para. 117.

<sup>16</sup> S. James Anaya, *Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples* (Index: A/HRC/24/41), UN Human Rights Council, 2013, paras. 31-36.

13. Reform of the regulatory process should take place in the context of broader reform of government laws and policies to ensure their consistency with the rights of Indigenous peoples in domestic and international law, including the right of free, prior and informed consent.

14. Governments should collaborate with Indigenous peoples in establishing the terms of reference for each assessment.

15. Factors considered in an environmental assessment should include whether the affected people have given their free, prior and informed consent.

16. In the interests of transparency and accountability, the report of all assessments should contain recommendations and reasoning for whether a project should be approved.

Submitted 31 March 2017 by Amnesty International Canada

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