

February 4, 2021

BY EMAIL

The Honourable Jonathan Wilkinson
Minister of Environment and Climate Change
ec.ministre-minister.ec@canada.ca

Dear Minister Wilkinson,

Re: Request for Regulation to Enable Indigenous Jurisdiction under *Impact Assessment Act*

We are legal counsel to Kebaowek First Nation (“Kebaowek”), a member of the Algonquin Anishinabeg Nation. We write to you on behalf of Kebaowek to request that you and your Cabinet colleagues immediately exercise the power granted by the *Impact Assessment Act* SC 2019 c 28 (“*IAA*”) section 109(d)(iii) to make a regulation designating and empowering Indigenous governing bodies to exercise “jurisdiction” per section 114(1) (e) (“Indigenous Jurisdiction Regulation”) for the purposes of impact assessment (“IA”). It goes without saying that this regulation should be drafted in full consultation with Kebaowek and other interested Indigenous communities, representatives and organizations across Canada.

We make this request on an urgent basis as none of the correspondence received from your office, including letters dated January 27, 2021 and Aug 31, 2020, commit to the timely passage of an Indigenous Jurisdiction Regulation such that it will be of value to Kebaowek, in any of the numerous federal environmental assessments in which they are currently engaged. It is a matter of public record that since 2019, Kebaowek has repeatedly requested the federal government to pass the necessary regulation and enter into an appropriate agreement regarding the IA of the Gazoduq Project. CELA has also filed requests on behalf of Kebaowek, including a letter to your office dated July 2, 2020.

As a result of the continued inaction to pass a regulation under s. 109(d)(iii) of the Act, the Crown remains legally incapable of recognizing Indigenous nations as a “jurisdiction” under the *IAA* (unless a modern treaty or self-government agreement has been signed), and thus unable to enter into jurisdictional agreements pursuant to s. 114(1)(e). While other *IAA* regulations were

promptly passed following the coming into force of the Act, this long overdue regulation continues to languish despite our client's repeated calls for its passage.

In our client's view, the federal government's inordinate delay in making the Indigenous Jurisdiction Regulation is unreasonable, unjustified and unacceptable. We note that your January 27th letter indicates that this Regulation remains at an "early stage," and that "adequate time" is needed to engage "Indigenous partners" in developing the Regulation. In response, Kebaowek submits that the federal government's dilatory approach to making the Regulation or engaging Indigenous communities is unconscionable since the Act has been in force since 2019, and it is now 2021.

Similarly, Kebaowek notes that your recent letter dated January 27, 2021 fails to establish a clear deadline (or interim milestones) for the issuance of the Regulation, and that your letter concedes that it is "unlikely" that the Regulation will be place to assist Kebaowek in relation to numerous impact assessments now underway in relation to projects that potentially affect our clients' rights, lands, interests and resources, as discussed below.

From our client's perspective, the *IAA* introduced some important changes to federal environmental assessment and significantly increased Indigenous rights protection compared to the former *CEAA 2012* framework. For example, the *IAA* includes commitments to recognize and respect the rights of Indigenous peoples throughout the preamble,¹ obligations to promote cooperation with Indigenous peoples and the consideration of Indigenous knowledge within the purposes of the Act,² and recognitions that Indigenous (Aboriginal and Treaty) rights are critical impact assessment 'factors' to be considered in the review of projects³ and to inform Ministerial determinations.⁴ In our view, these provisions clearly reflect Parliament's intention to use the *IAA* and its mechanisms to recognize and incorporate Indigenous peoples' rights within the IA process.

As the planning phase for the IA for the Gazoduq Project has now been completed, and the proponent is preparing its Impact Statement, Canada's failure and continued refusal to make the necessary regulation has effectively tied the hands of Kebaowek by preventing them from exercising powers, functions and duties within the IA process that would have been facilitated had an Indigenous Jurisdiction Regulation been passed and an agreement made under the Act.

The need for an action plan to implement an Indigenous Jurisdiction Regulation by the Government of Canada is compounded by the fact that Kebaowek First Nation is currently engaged in a number of significant projects that are subject to federal assessment requirements.

¹ *IAA* Preamble

² *IAA* s 6(1)(e), (f), (g), and (j).

³ *IAA* s 22(1)(c).

⁴ *IAA* s 63(d).

At present, this list includes the following project-level assessments:

- Wasamac Gold Mine Project (IAA Ref. #80879)
- Gazoduq Project (IAA Ref. #80264)
- Temiskaming Dam of Quebec Replacement Project (IAA Ref. #80151)
- Micro Modular Reactor Project at Chalk River (IAA Ref. #80182)
- Near Surface Disposal Facility Project (IAA Ref. #80122)
- Nuclear Power Demonstration Decommission Project (IAA Ref. #80121)
- CNL Access Road Upgrade (IAA Ref. #81243)
- CNL Material Pit Expansion Project (IAA Ref. #81209)
- CNL intermediate Waste Storage Area (IAA Ref. #81177)
- CNL Bulk Storage Laydown Area (IAA Ref. #81178)
- Kipawa Rare Earth Project (IAA Ref. #80029)
- Alexandra Bridge Replacement (IAA Ref. # pending)

Further, we do not accept that individualized consultation agreements, as referenced in your recent most correspondence to Kebaowek First Nation, is an equivalent or equitable substitute for the powers, functions, duties and roles which could be conveyed by an Indigenous Jurisdiction Regulation. First, maintaining an individualized or a project-specific approach to engagement is contrary to Canada's stated intent to advance reconciliation and nation-to-nation relationships. In our view, this fragmented approach diminishes the ability of Kebaowek to comprehensively and effectively address the environmental, socio-economic and health effects of designated projects, which, if considered in their entirety, could have profound impacts and create potential infringements of Kebaowek's section 35 rights. Moreover, an individualized approach to engagement risks inconsistencies and differential treatment between First Nations and their respective rights.

Not only is the lack of an Indigenous Jurisdiction Regulation troubling, it also raises credible concerns that the Crown is not fulfilling its duty to consult and accommodate, nor upholding constitutionally protected rights under section 35 of the *Constitution Act, 1982*. The direct, indirect and cumulative effects of currently proposed projects on Kebaowek's rights, interests and lands is significant, particularly since all of the above-noted projects are proposed within Algonquin traditional territory and they remain active at this time.

In these circumstances, an Indigenous Jurisdiction Regulation is of critical importance to informing present and future impact assessments, and it would also provide a coordinated response so that regardless of the individual project, the laws, traditions and values of Kebaowek can equally inform decision-making, the identification and roles of decision-makers, processes and review criteria.

Canada has already recognized the need, purpose and effect of an Indigenous Jurisdiction Regulation, as demonstrated by its inclusion within the IAA. Before moving forward with any of the above-mentioned projects, our client again requests the Government of Canada to provide an action plan with accompanying deadlines, and a clear commitment to enacting this regulation forthwith with meaningful Indigenous input in order to avoid a scattershot approach to the identification and protection of Indigenous rights in impact assessment processes. Until this regulation is in place, Kebaowek will continue to offer submissions on the above-noted projects under protest, and without prejudice to its section 35 constitutional rights.

Accordingly, we respectfully request your prompt response to this letter by February 19, 2021, given the unfortunate history of delays in resolving this issue. We also request an opportunity to virtually meet and discuss this matter with you, your staff, and representatives of Kebaowek First Nation.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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cc. Chief Lance Haymond, Kebaowek First Nation
Grand Chief Verna Polson, Algonquin Nation Tribal Council
Chief Adrienne Jérôme, Nation Anishnabe du Lac-Simon
Chief Monik Kistabish, Abitibiwinni First Nation
Chief Régis Pénosway, Anicinape Community of Kitcisakik
Chief Sacha Wabie, Timiskaming First Nation
Chief Steeve Mathias, Long Point First Nation
Chief Casey Ratt, Algonquins of Barriere Lake
Chief Lisa Robinson, Wolf Lake First Nation
Chief Dylan Whiteduck, Kitigan Zibi Anishinabeg
Chief Wendy Jocko, Algonquins of Pikwakanagan
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