INDIGENOUS
Advisory and Monitoring Committee
Trans Mountain Expansion and Existing Pipeline

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1. Introduction

The Indigenous Advisory and Monitoring Committee for the Trans Mountain Expansion and Existing Pipeline ("**IAMC-TMX**") brings together 13 Indigenous members and six senior federal representatives to provide advice to regulators. Members have a shared goal of safety and protection of environmental and Indigenous interests in lands and waters. The Indigenous members on the IAMC comprise the Indigenous Caucus of the IAMC (the "**Indigenous Caucus**").

This document is the response of the Indigenous Caucus (the "**Response**") to *Discussion Document on the Implementation Framework for a Right to a Healthy Environment Under the Canadian Environmental Protection Act, 1999* (the "**CEPA Discussion Paper**" or "**Discussion Paper**").[1]

The Indigenous Caucus appreciates the government passing the recognition of the right to a healthy environment within the *Canadian Environmental Protection Act* ("**CEPA**" of the "**Act**")[2] and the opportunity to provide feedback. We recognize the difficulties in creating a pan-Canadian approach that is all-encompassing and support the efforts of the Minister of Environment and Climate Change and the Minister of Health in the development of an implementation framework (the "**Framework**") and the subsequent administration of the Act. While there have been recognizable gains for Indigenous Peoples over the last several years, and an increase in inclusive language surrounding Indigenous Peoples within federal policies,[3]

[1] Environment and Climate Change Canada, *Discussion Document on the Implementation Framework for a Right to a Healthy Environment Under the Canadian Environmental Protection Act, 1999* (2024 February), Retrieved at: <https://publications.gc.ca/collections/collection_2024/eccc/En14-542-2024-eng.pdf>. "Discussion Paper"

[2] *Canadian Environmental Protection Act,* SC 1999, c. 33.

[3] The Indigenous Climate Action (2023) conducted an international scan of climate policies and noted high rate of Indigenous mentions in their policies (Bowie-Edwards, A., Jodoin, S., Cree, I., et al., *Indigenous Rights and Sovereignty in National Climate Policies: A Systemic Analysis)*. Another analysis of conducted a scan of federal climate policies and acknowledge the increase in stronger language from 2020 onwards, see Reed, G., Brunet, N.D., McGregor, D., et al. (2022). Toward Indigenous visions of

there remains a need to implement stronger regulations and processes to ensure Indigenous Peoples are meaningfully included in decision-making processes.

This Response is Indigenous Caucus' answer to the federal government's call for feedback on the Framework. This Response provides an overview of the right to a healthy environment, key critiques of the CEPA Discussion Paper, and recommendations for the federal government to consider in the implementation Framework.

2. About the IAMC-TMX

The IAMC-TMX serves 129 impacted Indigenous communities along the Trans Mountain pipeline route, including 31 Indigenous communities in the marine shipping route. The IAMC-TMX provides for the collaborative, inclusive and meaningful Indigenous involvement in the review and monitoring of environmental, safety and socioeconomic issues related to the Trans Mountain Project, the existing pipeline route and related marine shipping over their life cycles. The IAMC-TMX work blends Indigenous Knowledge and cultural practices to help raise the voices of the communities we serve and advocate for their concerns to be addressed.

It should be noted that communities' participation in the IAMC-TMX is undertaken on a without prejudice basis, and that the Indigenous Caucus members that make up the Indigenous Caucus are not authorized to represent any individual community. However, the Indigenous Caucus, working in collaboration with government and with communities, has developed considerable experience in the application of legislation, regulations and policy in relation to major resource development and provides this commentary to assist the government in developing its framework.

3. Overview of the Right to a Healthy Environment

A healthy environment is essential to human life, health, and well-being. There is increasing international consensus that efforts to mitigate and adapt to climate change are ultimately necessary to protect and advance basic human rights.[4]

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nature-based solutions: an exploration into Canadian federal climate policy. *Climate Policy, 22*(4), 514-533.

[4] In July 2021, 161 states - including Canada - supported a resolution of the United Nations General Assembly that recognizes the right to a clean, healthy, and sustainable environment. It notes that this right is linked to other existing international human rights and legal principles and calls on states and other stakeholders to increase efforts to protect the environment (UN General Assembly, *The Human right to a clean, healthy and sustainable environment* (28 July 2022), online: <https://digitallibrary.un.org/record/3983329?ln=en&v=pdf>); Mason, R. (2024). *Climate Change and the Right to a Healthy Environment: International and Canadian Developments*. (2023-12-E). HillStudies, Retrieved from Library of Parliament: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/PDF/2023-12-E.pdf>.

As previously stated, Canada recognized the right to a healthy environment for the first time at a federal level by amending CEPA.[5] The preamble to CEPA now states "that every individual in Canada has a right to a healthy environment as provided under [CEPA]".[6] Section 5.1 of CEPA requires that the Minister of the Environment and the Minister of Health develop an implementation framework within two years that sets out "how the right to a healthy environment will be considered in the administration of [CEPA]".[7] Accordingly, the full scope and impact of CEPA's recognition of the right to a healthy environment has yet to be determined.[8]

The federal government has committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* through the *United Nations Declaration on the Rights of Indigenous Peoples Act* and its associated Action Plan (the "**Federal Action Plan**").[9] Article 29 of UNDRIP recognizes that "Indigenous peoples have the right to the conservation and protection of the environment".[10] Several Action Plan Measures ("**APMs**") in the Federal Action Plan stem from Article 29, including supporting self-determined climate action, and ensuring that "Indigenous peoples enjoy the right to a healthy and natural environment with Indigenous ways of knowing incorporated into the protection and stewardship of lands, waters, plants and animals".[11]

Among other measures, APM 1.46 of Federal Action Plan commits the federal government to:

> … ensuring that First Nations, Inuit and Metis peoples have stable long-term financing to implement their climate actions, make climate related decisions with the Government of Canada, and that systematic barriers to Indigenous climate leadership are addressed.[12]

The right to a healthy environment also has implications for Aboriginal and treaty rights, under s. 35 of the *Constitution Act, 1982*.[13] While the nature and scope of Aboriginal and treaty rights vary, generally, climate change has detrimental impacts on the realization of these rights.[14]

Despite the significance of the right to a healthy environment for Indigenous communities, CEPA and the CEPA Discussion Paper have fallen short and do not meaningfully include Indigenous Peoples.

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[5] Mason, R. (2024).
[6] CEPA at Preamble.
[7] CEPA at s. 5.1; the framework must cover several components, including how the principles of environmental justice, non-regression and intergenerational equity will be considered in the administration of CEPA, as well as the reasonable limits to which the right will be subject and the relevant factors to be taken into account, for example, social, health, scientific and economic factors.
[8] Mason, R. (2024).
[9] Department of Justice Canada. (2023). *The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan.* Retrieved at: <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf> (the "Federal Action Plan").
[10] UNDRIP at Article 29.
[11] Federal Action Plan at p. 36.
[12] Federal Action Plan at APM 1.46.
[13] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982 c. 11 (UK) at s. 35.
[14] Mason, R. (2024).

4. Key Critique: Indigenous Peoples are not meaningfully included in the CEPA Discussion Paper

The Indigenous Caucus has identified three areas that demonstrate the failure to meaningfully include Indigenous Peoples in the CEPA Discussion Paper:

1) Section 3.2: Principles;
2) Section 3.4: Indigenous Rights; and
3) Section 2.3 and Section 3.1: Defining A Clean, Healthy and Sustainable Environment.

The following sections discuss each of the above examples in turn.

4.1 Section 3.2: Principles:

Section 3.2 of the CEPA Discussion Paper adds a set of principles that must be elaborated upon in the Framework.[15] Those principles are: environmental justice (including the avoidance of adverse effects that disproportionately affect vulnerable populations); non-regression; and intergenerational equity.[16] These principles are elaborated on, and critiqued, below.

4.1.1 Environmental Justice

Section 3.2.1 elaborates on how environmental justice may be considered when making decisions under CEPA.[17] The principle of environmental justice in CEPA includes consideration of the avoidance of adverse effects that disproportionately affect vulnerable populations.[18] However, the concept of "environmental justice" as articulated in the CEPA Discussion Paper does not adequately address the needs of Indigenous Peoples for the reasons that follow.

First, "environmental justice" as defined in the CEPA Discussion Paper, does not consider the unique position of Indigenous Peoples, both in terms of Aboriginal and Treaty rights as well as historic, cultural, and spiritual relationships to the land. By failing to identify these specific Indigenous environmental justice concerns, the CEPA Discussion Paper flattens the experiences of marginalized non-Indigenous and Indigenous Peoples.

Second, the CEPA Discussion Paper uses overly permissive language, stating that environmental justice *may* be considered in decision making, but is not a requirement of decision-making. Overall, the section on "environmental justice" minimizes the unique nation-to-

[15] These three principles are added to the other principles mentioned in the Act's preamble that have been sued to guide CEPA decision-making since 1999, including: sustainable development; ecosystem approach; intergovernmental cooperation; national standards; science-based decision-making; precautionary principle; pollution prevent; and polluter pays (CEPA Discussion Paper at p. 12).
[16] CEPA Discussion Paper at p. 12.
[17] The CEPA Discussion Paper states that environmental justice refers to the procedural and geographic discrimination of specific communities, which could include Indigenous, Black, and other racialized people, 2SLGPTQI+ people, women, persons with disabilities and other marginalized people (p. 13).
[18] In the CEPA Discussion Paper, vulnerable populations are referred to as populations who may be disproportionately impacted by pollution or chemical exposure (CEPA Discussion Paper at p. 13).

nation relationship between Indigenous Peoples and the Crown, as well as Indigenous People's historic, cultural, and spiritual connections to the land.[19]

Third, while the paper alludes to the potential development of "indicators of a healthy environment that would support annual reporting and help measure progress in implementation",[20] there does not appear to be a focus on developing those indicators in a way that is responsive to Indigenous knowledge, culture and practices. If the framework is to be effective in implementing environmental justice, then practical indicators are needed to ensure accountability.

Finally, the consideration of "vulnerable populations" is meant to describe how some segments of the population may be more susceptible to harmful effects of substances due to differences in physical characteristics, life stage, behaviours, culture, geography, occupation and socio-economic status.[21] Although these factors include differences that are true for many Indigenous Peoples, including culture and geography, Indigenous Peoples are not specifically included in the definition of vulnerable populations. Further, aspects such as Indigenous spirituality are not addressed in the list differences.

4.1.2 Non-regression

Non-regression is not defined in CEPA. However, the CEPA Discussion Paper elaborates on the concept of non-regression, stating that it generally refers to the notion that current levels of protection must be maintained. It may also include a continuous improvement in environmental and health protection.[22]

In 2016, the International Union for Conservation of Nature's World Commission on Environmental Law ("**IUCN WCEL**") laid out the definition for the principle of non-regression and its significance for the enjoyment of human rights and environmental protection. According to the IUCN World Declaration on the Environmental Rule of Law, in its simplest form, the principle is that "States… shall not allow or pursue actions that have the net effect of diminishing the legal protection of the environment or of access to environmental justice".[23] The definition of non-regression provided in the CEPA Discussion Paper is vague and lacks clarity as to what precisely must be maintained or improved, especially in contrast to other definitions such as the one provided by the IUCN.

The principle of non-regression also does not sufficiently address Indigenous people's concerns with respect to the right to a healthy environment. As demonstrated in foundational Treaty rights

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[19] This specifically related to Article 25 of UNDRIP which states that Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationships with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
[20] CEPA Discussion Paper at p. 11.
[21] CEPA Discussion Paper at p. 14.
[22] CEPA Discussion Paper at p. 15.
[23] IUCN World Congress on Environmental Law, IUCN World Declaration on the Environmental Rule of Law (2017), available at <https://www.iucn.org/sites/default/files/2022-10/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf>.

cases such as *Yahey v British Columbia,* there are examples across Canada of many Indigenous Peoples whose ability to meaningfully to exercise their Treaty or Aboriginal rights have been significantly diminished due to extensive development in their traditional territories.[24] Maintenance of the status quo is insufficient to address environmental concerns, as the baseline in many cases is already impermissibly low.

4.1.3 Intergenerational Equity

The principle of intergenerational equity in the context of CEPA emphasizes that it is "important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs".[25] This recognition is in alignment with international commentary on children's rights.[26]

As stated in the CEPA Discussion Paper, both intergenerational equity and sustainable development can be applied to decision-making throughout the CEPA Management cycle. The CEPA Discussion Paper also identifies the fact that this understanding of sustainable development is consistent with the teachings originating with the Haudenosaunee Confederacy and adopted by many Indigenous Peoples about respecting and protecting the needs of, and impacts on, people seven generations in the future.[27]

It is significant that CEPA and the CEPA discussion paper discuss the principle of intergenerational equity and addresses the teachings originating with the Haudenosaunee Confederacy. However, intergenerational equity is not a factor that *must* be considered in the CEPA management cycle. Rather, it is a factor that *can* be considered. There is nothing in the CEPA Discussion Paper, or CEPA generally, that CEPA to be considered. Similarly, there is no elaboration as to how intergenerational equity is to impact, or be considered in, the CEPA management cycle.

4.2 Section 3.4: Indigenous rights

In Section 3.4, the CEPA Discussion Paper outlines the Government of Canada's commitment to renew nation-to-nation relationships with Indigenous Peoples, based on the recognition of rights, respect, cooperation, and partnership. This commitment is rooted in s. 35 of the *Constitution Act* and guided by UNDRIP.[28]

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[24] *Yahey v British Columbia*, 2021 BCSC 1287 [***Yahey***].
[25] CEPA Discussion Paper at p. 16.
[26] In a 2023 general comment, the UN Committee on the Rights of the Child provided guidance on how children's rights – including their right to a healthy environment – can be understood in the context of climate change, emphasizing the urgent need and "obligation to effectively prevent, protect against and provide remedies for both direct and indirect environmental discrimination" (Committee on the Rights of the Child, *Convention on the Rights of the Child: General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change* (22 August 2023), Retrieved at: < https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vHrWghmhzPL092j0u3MJAYhyUPAX9o0tJ4tFwwX4frsfflPka9cgF%2FBur8eYD%2BEeDmuoVnVOpjkzwB9eiDayjZA> at para 14.
[27] CEPA Discussion Paper at p. 16.
[28] CEPA Discussion Paper at p. 21.

While the CEPA Discussion Paper references UNDRIP and generally discusses the implementation of Indigenous knowledge, it does not substantively consider how Indigenous rights, issues, concerns and knowledge will be incorporated into the CEPA Discussion Paper and the Framework. For example, the CEPA Discussion paper states that "CEPA recognizes the role of Indigenous knowledge systems in the process of making decisions", and that the items under CEPA "could be informed by existing Indigenous knowledge policy frameworks and approaches under other Acts."[29] However, there is no tangible commitment from the government to implement those knowledge systems, to uphold those rights, nor any examples as to what this may look like or how it has already been applied. This is representative of a larger systemic issue, as Indigenous Peoples remain "structurally excluded from the decision-making tables where these plans were made."[30]

Another example is the exclusion of Indigenous Peoples in the CEPA management cycle (see Figure 1). The CEPA Management Cycle is a process set up to identify, assess and manage pollution and protect the environment and people in Canada from pollution that could impact their health. It consists of the stages shown in Figure 1, which are supported and integrated through public participation and intergovernmental cooperation.[31] However, the CEPA management cycle reduces Indigenous Peoples to "stakeholders", ignoring the unique Crown-Indigenous relationship.

Figure 1: The CEPA Management Cycle.

4.3 Section 2.3 and Section 3.1: Defining A Clean, Healthy and Sustainable Environment

Section 3.1 outlines the scope of the right to a healthy environment in CEPA. It states that a "healthy environment" is defined as an environment that is clean, healthy, and sustainable.

[29] CEPA Discussion Paper at p. 22
[30] Indigenous Climate Action. (2021). *Decolonizing Climate Policy in Canada: Report from Phase I.* Author.
[31] CEPA Discussion Paper at p. 7.

However, the Discussion Paper goes on to state that the meaning of the right in the context of CEPA will be elaborated on in the implementation framework.[32] Section 2.3 states that there is no common or internationally agreed upon understanding of the content and scope of a right to a clean, healthy, and sustainable environment.[33]

As currently outlined in Section 2.3, 3.1 and Appendix 1, the right to a clean, healthy, and sustainable environment does not include Indigenous knowledge or perspectives. This is a critical oversight as Indigenous perspectives on the scope of a healthy environment is broad, inclusive, and goes well beyond the notion of physical, mental, or physiological health impacts. For many Indigenous communities, health "is characterized by a combination of practices and knowledge about coexistence with other human beings, with nature and local natural resources, and with spiritual beings."[34] Healthy environments include ceremony, language, heritage, kinship, and the relationships people have with non-human beings, including the spiritual realm.[35]

The CEPA Discussion Paper does not incorporate spirituality and ceremony in defining the right to a healthy environment, which is emblematic of the larger systemic issue of failing to include Indigenous perspectives in defining the right to a healthy environment. Spirituality and ceremony provide examples of differing worldviews and ontologies related to what clean, healthy, and sustainable means and speaks to why incorporating Indigenous knowledge at the decision-making table is vital. While CEPA "recognizes the role of Indigenous knowledge systems", there is no commitment to embed what health and a healthy environment means for various Indigenous Peoples and groups in Canada, which often includes deep connections to the land, waters, non-human beings, knowledge transfers and ceremonial traditions.

5. Recommendations

The Indigenous Caucus has seven key recommendations to address the lack of meaningful incorporation of Indigenous Peoples in the implementation Framework, which are as follows:

1) The Framework must meaningfully incorporate Indigenous Knowledge;
2) The Framework must align with the federal government's commitments under UNDRIP;
3) The Framework must embed an intersectional analysis from the outset;
4) The Framework must ensure meaningful and effective Indigenous participation and consistency with UNDRIP in legislative drafting and implementation;
5) The federal government must facilitate access to justice for Indigenous Peoples; and

[32] CEPA Discussion Paper at p. 10.
[33] CEPA Discussion Paper at p. 9.
[34] Donatuto, J., Campbell, L., Gregory, R. (2016). Developing Responsive Indicators of Indigenous Community Health. *International Journal of Environmental Research and Public Health, 13*(899), 1-16.
[35] McGregor, D., Whitaker, S., Sritharan, M. (2020). Indigenous environmental justice and sustainability. *Current Opinion in Environmental Sustainability*, 43, 35-40; Preston, B.J. (2024). The right to a clean, healthy and sustainable environment: how to make it operational and effective. *Journal of Energy & Natural Resources Law, 42*(1), 27-49.

6) The federal government must coordinate with the provincial and territorial governments to implement the right to a healthy environment.
7) The federal government must elaborate on how CEPA will account for cumulative effects.

These recommendations are presented separately but are meant to be incorporated holistically.

5.1 Recommendation 1: The federal government must meaningfully incorporate Indigenous Knowledge into the Framework.

The CEPA Discussion Paper fails to require Indigenous knowledge be considered in ministerial, administrative, or judicial decision-making. Although the Discussion Paper acknowledges the lack of Indigenous communities and voices in decision making processes, the Discussion Paper still does not call for the mandatory inclusion of Indigenous Knowledge.[36]

CEPA needs more than just a commitment to "consider Indigenous Knowledge"[37], but a requirement to *include, integrate,* and *utilize* Indigenous Knowledge in tandem with western science.

Without language requiring the inclusion of Indigenous knowledge, administrative decision-makers and courts will continue to fall short in the incorporation of Indigenous knowledge when interpreting CEPA. The result of the ambiguous inclusion of Indigenous knowledge has been demonstrated by administrative decision-makers and courts, and often means that Indigenous perspectives are devalued, or deprioritized, as compared to western science. For example, the Commission of the Canada Energy Regulator ("**Commission**") recently decided to approve a deviation of the Trans Mountain Expansion Project ("**TMEP**") near the Jacko Lake (Pipsell) area (the "**Pipsell Decision**").[38] After hearing submissions from Trans Mountain and Stk'emlupsemc te Secwepemc Nation ("**SSN**"). The Commission accepted SSN's assessment of the deviation application and found that open trench construction would result in surface disturbance along the Pipsell Corridor, impacting SSN's rights. However, the Commission found that this determination must be considered in the context of other findings, including technical evidence put forward by Trans Mountain.[39]

[36] CEPA Discussion Paper, Section 3.1.1: "Science is the foundation of decision-making under CEPA" at p. 11, Section 3.2: Principles: "science-based decision making" at p. 12, "Application of weight of evidence and precaution in risk assessment" at p. 12-13.
[37] CEPA Discussion Paper at p. 7 & p. 22
[38] Canada Energy Regulator - REGDOCS - C26807 Commission | Commission - Reasons for decision - Trans Mountain Expansion Project - Application pursuant to section 211 of the Canadian Energy Regulator Act Segment 5.3 – Pípsell (Jacko Lake) (cer-rec.gc.ca) at p.42 (the "**Pipsell Decision**").
[39] Reasons for Decision at p. 42.

5.2 Recommendation 2: The federal government must align the Framework with UNDRIP.

The CEPA Discussion Paper outlines some key UNDRIP Articles. However, as it stands, the CEPA Discussion Paper fails to bring CEPA into alignment with UNDRIP, UNDA or the Federal Action Plan.[40]

Canada has committed to implementing UNDRIP and ensuring all laws are consistent with the UN Declaration.[41] This requires amending legislation, such as CEPA. The CEPA Discussion Paper explicitly identifies that Indigenous Peoples have the right to conservation and protection of the environment and the productive capacity of their lands, territories, and resources (Article 29.1), Indigenous Peoples have the right to the improvement of their economic and social conditions (Article 21.1), and Indigenous Peoples have an equal right to the enjoyment of the highest attainable standard of physical and mental health (Article 24.2).[42]

The CEPA Discussion Paper also mentions the "distinctive spiritual relationship" Indigenous Peoples have to their territories and lands (Article 25), the link between protection of the environment and the maintenance and restoration of health (Article 29), the incorporation of Indigenous knowledge (Article 31), and the right to participate in decision-making (Article 18). However, the CEPA Discussion Paper is notably lacking in two important areas when it comes to UNDRIP implementation.

First, the CEPA Discussion Paper does not outline how Indigenous Peoples will be involved at the procedural level and in decision-making or co-development. Article 18 states that Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights. Article 18 is mentioned in the CEPA Discussion Paper's section on "participation in decision-making". However, the CEPA Discussion Paper fails to outline how Indigenous Peoples will participate in decision-making processes over and above public consultation. Incorporating Indigenous Peoples in the public decision-making process fails to acknowledge their distinct legal status, Aboriginal and Treaty rights, and historical relationship with the land. As will be discussed in Section 5.4 below, the federal government has also not allowed sufficient time for Indigenous Peoples to respond to the CEPA Discussion Paper.

Second, but relatedly, the CEPA Discussion Paper states that "… the Government is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples including free, prior and informed consent".[43] While free, prior, and informed consent ("FPIC") is not a legal requirement in Canada, it cannot be disregarded entirely. For example, in the Pipsell Decision, the Commission failed to engage with the concept of FPIC, demonstrating a lack of meaningful consideration of Indigenous perspectives and consultation. The framework must elaborate on, and clarify how, FPIC will be incorporated into CEPA. Otherwise, administrative decision-makers and the courts will continue to fall short of ensuring FPIC.

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[40] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14 [***UNDA***].
[41] *UNDA* at s. 5.
[42] CEPA Discussion Paper at p. 21.
[43] CEPA Discussion Paper at p. 7.

5.3 Recommendation 3: The federal government must embed an Intersectional Analysis from the outset.

The Discussion Paper recognizes and references the opportunity to conduct intersectional analyses to support the right to a healthy environment. However, intersectionality - and subsequently conducting a GBA+ - must be embedded from the outset.[44] We can see this lack of intersectionality in the exclusion of Indigenous Peoples from the Discussion Paper, a common practice in Canadian government plans,[45] and a further gender-blind Discussion Paper.

Indigenous feminist and ecological scholars call for a decolonization of processes in relation to environmental justice. Decolonizing environmental justice processes, policies, regulatory spaces, and procedures involves analyzing and redressing the entrenched inequities that exist in society. Indigenous feminist scholar, Carla Dhillon, emphasizes the importance of understanding the power dynamics that exist, noting that "[r]eclaiming balanced power to overcome settler colonial oppressions is exemplified in the continued maintenance of traditional kin networks and through environmental movements already led by Indigenous women, youth, and queer/two-spirit people" (p.30). Deborah McGregor, another Indigenous feminist scholar, explicitly states that to "address the challenges of the ecological crisis as well as the various forms of violence and injustices experienced specifically by Indigenous people" then any form of justice "must be grounded in Indigenous philosophies, ontologies, and epistemologies in order to reflect Indigenous conceptions of what constitutes justice" (p.35). This speaks to the need to go beyond consulting with and increasing Indigenous presences and speaks to the need for Indigenous Peoples to reclaim how science, justice, and governance systems are implemented in order to further empowerment of their communities.[46]

Without these considerations at the outset, the result is gender-blind policies and procedures that ignore the realities of marginalization for women, elderly, youth, and other vulnerable populations.[47] The Discussion Paper could have grounded the questions, concerns, and opportunities using an intersectional approach. Instead, the current Discussion Paper maintains a gender-blind approach to understanding the right to a healthy environment, particularly for Indigenous women, girls, and gender-diverse people.

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[44] Critiques over the federal government's GBA+ framework note that it remains a colonial and Eurocentric view of intersectionality. The Province of BC and the Native Women's Association of Canada have recognized the need to decolonize the GBA+ and are promoting the use of an Indigenous GBA+ (IGBA+) or the Culturally Relevant GBA+ (CRGBA+), respectively.

[45] Slick, J. Parker, C., & Valoroso, A. (2022). *Recognition of the Gendered Impacts of Disasters: A Missing Dimension in Canadian Emergency Management and Pandemic Plans.* Research Snapshot, Royal Roads University.

[46] Dhillon, C.M., (2020). Indigenous Feminisms: Disturbing Colonialism in Environmental Science Partnerships. *Sociology of Race and Ethnicity, 6*(4), 483-500.

[47] UNDR. (March 18, 2024). *Launch of the Gender Action Plan to Support Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030*. [online]. CSW68 Side Event, New York, NY.

5.4 Recommendation 4: The federal government must incorporate Indigenous Peoples at all stages of the Framework's drafting and implementation.

Enacting legislation, or amending existing legislation, to bring Crown law into consistency with UNDRIP involves transitioning towards a consent-based approach to legislative drafting and policy formation, otherwise known as "legislative reconciliation" or "recognition legislation".[48] UNDRIP emphasizes that the development of recognition legislation should involve consultation and cooperation with Indigenous Peoples to obtain their FPIC, echoing the Supreme Court of Canada's statement that unilateral accommodation by government is "the antithesis of reconciliation and mutual respect".[49]

Legislative reconciliation is not only achieved by enacting new legislation, but also by amending existing legislation to operationalize specific aspects of UNDRIP. This is now a requirement in jurisdictions that have enacted implementing legislation.[50]

CEPA falls short of achieving legislative reconciliation in part because of its failure to incorporate Indigenous Peoples in the drafting and implementation process. Specifically, the CEPA Discussion Paper was released on February 8, 2024, and the 60-day public comment period closed on April 8, 2024.[51] The CEPA Discussion Paper lacked proper distribution to Indigenous communities and organizations, violating the principles of advance notice and engagement.

Insufficient time for review hinders meaningful Indigenous involvement. The timelines afforded to Indigenous Peoples to respond to the CEPA Discussion Paper is inconsistent with other federal government timelines. For example, Section 5.3.1 of the *Cabinet Directives on Regulation* ("CDR") states that "departments and agencies should provide advance notice to stakeholders, including Indigenous peoples, on upcoming regulatory changes over a period of 24 months, so that they can engage in regulatory development and plan for future regulatory changes at the earliest opportunity".[52]

Two months is insufficient for Indigenous Peoples to review the CEPA Discussion Paper, consult within their communities, seek legal advice, and provide meaningful feedback. Many Indigenous Peoples are under-staffed and under-resourced. Without explicit advance notice for

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[48] *Reference re An Act Respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 at para. 17.
[49] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 49. While the SCC, in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, noted that remedies for breach of the duty to consult were not available during the legislative drafting process, all the judges agreed that failure to consult would be relevant to establishing a justified infringement of an inherent right; Naomi Metallic, Aboriginal Rights, Legislative Reconciliation and Constitutionalism (11 November 2022), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263010> at p. 9.
[50] See, for example, UNDA and the Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44.
[51] Discussion Paper.
[52] *Cabinet Directives on Regulation, Treasury Board Secretariat, S.5.1.3 Forward Regulatory Plan*

important policy and legislative development, the federal government is not meaningfully engaging with Indigenous Peoples to ensure legislative reconciliation.

5.5 Recommendation 5: The federal government must facilitate access to justice for Indigenous Peoples to participate in the Framework.

The CEPA Discussion Paper does not uphold access to justice in a way that meaningfully incorporates Indigenous perspectives. The Framework must facilitate access to justice for Indigenous Peoples.

The right to a healthy environment is generally understood to include both substantive rights, such as a safe climate system, clean air, and non-toxic environments, as well as procedural rights, such as access to information and access to justice.[53] Enhancing the integration of access to justice into CEPA is crucial for Indigenous People's participation and ability to assert their right to a healthy environment for the following reasons.

First, access to justice is essential for recognizing and safeguarding Indigenous knowledge, values and rights concerning the environment. While CEPA provides for access to information and participation in decision-making, it lacks a specific mechanism to address alleged violations of the right to a healthy environment.[54] For example, CEPA does not amend s. 22, which allows for limited court action to seek redress for offences under CEPA, nor does it provide an alternative remedy for enforcing the newly recognized right to a healthy environment.[55] The absence of a clear remedy within CEPA poses challenges for effectively upholding and enforcing the right to a healthy environment.

Second, for many Indigenous Peoples, land is a critical aspect of cultural identity and spirituality. Access to justice enables Indigenous communities to protect their cultural and spiritual connection to the land and protect their way of life. However, the broad language of CEPA grants substantial discretion to the federal executive and lacks a clear enforcement mechanism. For example, the right recognized in s. 2(1) of CEPA is qualified by "reasonable limits".[56] The CEPA Discussion Paper states that the framework should elaborate on what constitutes "reasonable limits", considering social, health, scientific and economic factors.[57] The Discussion Paper further states that "CEPA also recognizes the role of Indigenous knowledge in decisions

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[53] United Nations, *What is the Right to a Healthy Environment?: Information Notice,* Office of the High Commissioner for Human Rights, UN Environment Programme and UN Development Programme (2023), online: https://wedocs.unep.org/bitstream/handle/20.500.11822/41599/WRHE.pdf?sequence=1&isAllowed=y; Mason, R. (2023).

[54] It is recognized that Bill C-226 is presently before the Standing Senate Committee on the Energy, the Environment and Natural Resources. If passed, this bill could strengthen access to justice measures by providing an opportunity for Indigenous concerns to be heard and addressed.

[55] CEPA at s. 22.

[56] CEPA at s. 2(1).

[57] CEPA Discussion Paper at p. 11.

protecting the environment and human health".[58] However, without more guidance, the definition of "reasonable limits" will be left to executive discretion and judicial interpretation. This ambiguity will hinder the proper incorporation of Indigenous knowledge and spirituality into decision-making processes, potentially overlooking Indigenous values in favour of Western science. This was exemplified in the Pipsell Decision, where western science was prioritised over Indigenous Knowledge Systems.[59] In addition, ambiguity around "reasonable limits" may generate extensive, time consuming and costly litigation for Indigenous Peoples.

Addressing the gap in access to justice within CEPA is paramount to safeguarding Indigenous perspectives on the right to a healthy environment and ensuring that Indigenous communities can effectively protect their lands, resources and culture within the legal framework of CEPA.

5.6 Recommendation 6: The federal government must coordinate with the provincial and territorial governments to implement the right to a healthy environment.

The provincial and territorial governments play a crucial role in the development of lands and natural resources and must develop a coordinated strategy for implementation of the right to a healthy environment.

The CEPA Discussion Paper mentions the opportunity for collaboration and coordination with the provincial governments.[60] However, there is no substantial discussion as to how the provinces and the federal government will coordinate the implementation of the right to a healthy environment.

Due to the provinces' authority over lands and natural resources under Canada's *Constitution*, provincial governments have an important role to play in the functioning and implementation of the right to a healthy environment.[61] Territorial governments exercise similar authority in respect of lands and resources within their respective territorial jurisdiction.

The findings and suggestions in this Response, equally apply to any current or future legislation that the provinces may propose, as to the federal government. The right to a healthy environment is recognized in different forms in Ontario, Quebec, Yukon, the Northwest Territories and Nunavut.[62] Due to the provinces' jurisdiction over lands and natural resources, federal guidance is required to ensure that there is consistency and clarity between CEPA and provincial legislation, otherwise there will be continuing legal and political ambiguity.

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[58] CEPA Discussion Paper at p. 11.
[59] Reasons for Decision at p. 42.
[60] CEPA Discussion Paper at p. 9, 11 and Appendix 1.
[61] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982 c. 11 (UK) at s. 92.
[62] See *Environmental Bill of Rights, 1993*, SO 1993 c. 28 (Ontario); *Environment Quality Act*, 2023 c. Q-2 (Quebec); *Environment Act*, RSY 2002, c. 76 (Yukon); *Environmental Rights Act*, SNWT 2019 c. 19 (Northwest Territories); *Consolidation of Environmental Rights Act*, RSNWT 1988 c 83 Supp. (Nunavut).

Without interjurisdictional coordination, there is a risk of continued ambiguity, uncertainty, and piecemeal outcomes. In addition, Indigenous Peoples must be given meaningful space at any coordination table.

5.7 Recommendation 7: The federal government must elaborate on how CEPA will account for cumulative effects.

CEPA requires Ministers to consider cumulative effects resulting from the exposure of a substance, in combination with other substances, in some determinations of whether a substance is toxic or capable of becoming toxic.[63]

The focus of s. 76.1(2) of CEPA is already narrow. However, the CEPA Discussion Paper does not elaborate any further on how cumulative effects will be considered by the Minister.

A broad and holistic approach must be undertaken in the context of evaluating the cumulative effects of a substance, accounting for impacts on both human health and the environment, which necessarily includes the cumulative impacts of the same on rights, culture and the ways of life of Indigenous Peoples. This is in alignment with Article 29(1) of UNDRIP, which speaks to Indigenous peoples having the right to conserve and protect the environment. This holistic approach further aligns with Article 24, which speaks to Indigenous Peoples' right to maintain their traditional medicines and health practices, including the conservation of their vital medicinal plants, animals, and minerals, as well as their right to the enjoyment of the highest attainable standard of physical and mental health.[64]

Assessments of cumulative effects are important to Indigenous Peoples and is imperative to properly assessing a healthy environment.[65] Furthermore, assessment of cumulative effects necessitates a requirement to incorporate GBA+ perspectives to ensure intersecting effects are identified and either redressed or, ideally, prevented.[66] The Minister's assessment of cumulative effects in CEPA is already disappointingly narrow. The Framework must further elaborate on how cumulative effects are to be considered.

6. Conclusion and Next Steps

The Minister of Environment and Climate Change and the Minister of Health is required implement the right to a healthy environment. The development of the Framework must be a whole-of-government approach and co-developed in a in a way that meaningfully incorporates

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[63] CEPA at s. 76.1(2).
[64] Assembly of First Nations. (2022, December). *Submission to the House of Commons Committee on Environment and Sustainable Development*. Retrieved at: https://www.ourcommons.ca/Content/Committee/441/ENVI/Brief/BR12143095/br-external/AssemblyOfFirstNations-e.pdf.
[65] The importance of cumulative effects is demonstrated in cases such as *Yahey v British Columbia*.
[66] IUCN. (2024). *Gender equality for greener and bluer futures: Why women's leadership matters for realising environmental goals.* Retrieved at: <https://www.iucn.org/resources/grey-literature/gender-equality-greener-and-bluer-futures-why-womens-leadership-matters>

Indigenous Peoples and centres Indigenous, feminist approaches to environmental justice. Already, the federal government has demonstrated its lack of commitment, by providing Indigenous Peoples such a short time period to respond to the CEPA Discussion Paper.

Moving forward, the Indigenous Caucus provides the following recommendations:

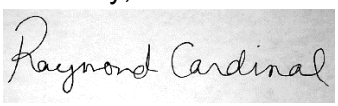
1) The Framework must meaningfully incorporate Indigenous Knowledge;
2) The Framework must align with the federal government's commitments under UNDRIP;
3) The Framework must embed an intersectional analysis from the outset;
4) The Framework must ensure meaningful and effective Indigenous participation and consistency with UNDRIP in legislative drafting and implementation;
5) The federal government must facilitate access to justice for Indigenous Peoples; and
6) The federal government must coordinate with the provincial and territorial governments to implement the right to a healthy environment.
7) The federal government must elaborate on how CEPA will account for cumulative effects.

If the right to a healthy environment is implemented correctly, Indigenous peoples will have an opportunity to freely and actively participate at the decision-making level. The right to a healthy environment will advance the federal government's opportunity to further the federal government's commitments under UNDA and the Federal Action Plan, mitigate inequities for vulnerable populations, and support sustainable self-determination for Indigenous Peoples.

Once again, we appreciate the opportunity to provide this feedback and look forward to future opportunities where time allows for a more fulsome response and engagement. Ultimately, as the framework moves forward, the federal government must ask how Indigenous Peoples themselves envision their future in the face of ongoing injustice, and how the right to a healthy environment can forward the federal government's objectives of reconciliation, and commitments to UNDRIP.[67]

If you have any question, please do not hesitate to contact our Indigenous Caucus Director Dean Cherkas at 403-652-9798, email caucusdirector@iamc-tmx.com. I can also be reached at 587-590-6081.

Sincerely,



Raymond Cardinal, Chair
Indigenous Caucus, IAMC-TMX

[67] McGregor, et al, 2020.