

Brace for Impact (Assessments) – Government of Canada Tables Omnibus Environmental Bill

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On February 8, 2018, the Government of Canada tabled Bill C-69, [An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts](#).¹ This 340-page omnibus bill proposes sweeping changes to three key pieces of Canadian environmental legislation – the *Canadian Environmental Assessment Act, 2012*,² the *National Energy Board Act*,³ and the *Navigation Protection Act*.⁴

In its news release, the Government of Canada succinctly explained the purpose for making the changes:

A clean environment and a strong economy go hand in hand – that’s why the Government of Canada is bringing forward better rules for the review of major projects. Better rules will protect our environment, fish and waterways, rebuild public trust, and create new jobs and economic opportunities...⁵

Until the new legislation comes into effect, existing laws and interim principles for project reviews will continue to apply to projects under review. The government has also expressly stated that once the new rules come into effect, it will not be revisiting project decisions made under previous legislation.

¹ Environment and Climate Change Canada, Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* (February 8, 2018), online: ECCC <http://www.parl.ca/Content/Bills/421/Government/C-69/C-69_1/C-69_1.PDF>.

² SC 2012, c 19, s 52.

³ RSC 1985, c N-7.

⁴ RSC 1985, c N-22.

⁵ Environment and Climate Change Canada, “News Release: Government of Canada takes steps to ensure a clean environment and strong economy” online: Environment and Climate Change Canada <https://www.canada.ca/en/environment-climate-change/news/2018/02/government_of_canadatakesstepstoensureacleanenvironmentandstrong.html>.

IMPACT ASSESSMENT ACT

The *Canadian Environmental Assessment Act, 2012* will be repealed and replaced with the *Impact Assessment Act*. Key highlights include:

Single Assessment Agency

- ◆ Establishing a new independent entity, the Impact Assessment Agency of Canada (IAAC), to lead and coordinate all federal impact assessments for designated projects
- ◆ The IAAC will assess smaller projects and the Minister of the Environment and Climate Change (Minister) may appoint a review panel to review larger projects and projects that include physical activities that are regulated under the *Nuclear Safety and Control Act*, the proposed *Canadian Energy Regulator Act*, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

Assessment Process

- ◆ Requiring proponents to complete an early planning process with the engagement of key parties (particularly Indigenous communities) to determine foreseeable issues and concerns prior to submitting an application for review
- ◆ Providing that assessments will focus on whether a project is in the public interest by considering, in addition to environment impacts, health impacts, social and economic impacts, and effects on Indigenous peoples' rights. Reviews will also include a gender-based analysis
- ◆ Reducing timelines for assessments from 720 days to 600 days for larger projects, and from 365 to 300 for smaller projects

Regional and Strategic Assessments

- ◆ Providing for the assessment of cumulative effects in a specific region through regional assessments
- ◆ Providing for strategic assessments of Government of Canada policies, plans or programs (proposed or existing) that are relevant to conducting impact assessments

Project Approval

- ◆ Providing that the Minister may set conditions, including mitigation measures, that must be implemented by a project proponent
- ◆ Prohibiting designated projects if they are likely to cause certain environmental, health, social or economic effects, unless the Minister or Governor in Council determines that those effects are in the public interest

Cooperation

- ◆ Providing for better cooperation between jurisdictions, including Indigenous governing bodies, through the delegation of any part of an impact assessment, the joint establishment of a review panel or the substitution of another process for impact assessment

Transparency

- ◆ Providing for public participation and for funding to facilitate public participation
- ◆ Requiring that scientific and other information taken into account in an impact assessment, as well as the reasons for decisions, be made available to the public through an online registry

As part of the legislative process, the current Canadian Environmental Assessment Agency is seeking public comment by April 15, 2018 on two key regulations under the *Impact Assessment Act*:

- ◆ A revised “Project List” to identify the major projects that will be subject to the Act based on a proposed “criteria-based” approach, and
- ◆ Proposed *Information and Time Management Regulations* to replace the existing regulatory requirements for the description of a designated project. The proposed regulations will specify information that a proponent will be required to provide at the early planning phase of the review to allow Indigenous people and other members of the public to consider whether and how they may be affected. The proposed Regulations will also set out the criteria for “stopping the clock” respecting the timelines set out in the legislation.

CANADIAN ENERGY REGULATOR ACT

The *National Energy Board Act* will be repealed and replaced with the *Canadian Energy Regulator Act*. The National Energy Board will be replaced by the Canadian Energy Regulator (CER).

Key highlights from the *Canadian Energy Regulator Act* include:

- ◆ Providing that the CER will regulate offshore energy projects
- ◆ Replacing the existing public participation standing test to allow more public participation
- ◆ Requiring that at least one CER board member and hearing commissioner be Indigenous

CANADIAN NAVIGABLE WATERS ACT

The *Navigation Protection Act* will be amended and renamed the *Canadian Navigable Waters Act*.

Key highlights from the *Canadian Navigable Waters Act* include:

- ◆ Redefining “navigable waters” to include any body of water (including a canal or any other body of water created or altered as a result of the construction of any work) that is used or is reasonably likely to be used by vessels as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*
- ◆ Providing that an owner must obtain ministerial approval in order to construct, place, alter, rebuild, remove or decommission a major work in, on, over, under, through or across any navigable water

PUBLIC REACTION TO ANNOUNCED CHANGES

Public reaction to the omnibus bill thus far has been mixed.

Conservative MP Ed Fast was quick to strongly criticize the package of reforms stating that the new rules will bog down the review process to the point where it will be the “death knell of major resource development in Canada”.

Chris Bloomer, CEO at the Canadian Energy Pipelines Association indicated that the legislation would create ill-defined obstacles: “today’s announcement adds uncertainty for CEPA’s members”.

The Mining Association of Canada (MAC) offered a positive response but noted that any improvements will be subject to how they are implemented:

At first glance, the draft legislation introduces a range of new concepts related to timelines and costs, which depending on how they are implemented, could adversely impact the industry’s competitiveness and growth prospects. At the same time, the bill appears to strengthen the Agency’s authority to run efficient processes. It also commits to regional and strategic assessments and more innovative and fair approaches to addressing cumulative effects, and enhances opportunities for Indigenous and public participation. Additionally, there are provisions for greater cooperation with other jurisdictions and better coordination with the federal government.

Pierre Gratton, MAC’s President and CEO went on to note the importance of the government’s promise to provide increased funding to ensure implementation of legislative changes:

We are encouraged by the government’s recognition of the need for capacity with its planned investment of \$1 billion over five years to help ensure that the Impact Assessment Agency and departments can effectively implement the changes.

Even though it is clear that, under the new legislation, Indigenous people will have direct involvement in reviewing projects, monitoring effects and ensuring that companies live up to conditions imposed by government, Perry Bellegarde, National Chief of the Assembly of First

Nations, was cautiously optimistic. He stated that while the legislation takes some important steps towards Indigenous reconciliation, there is still “room for improvement”.

Environmental groups want the federal government to clarify and toughen the measures set out in the Bill C-69. For example, West Coast Environmental Law noted:

[There are] concerning flaws – including more restrictive timelines, a failure to require regional and strategic assessments (which remain discretionary under the new *Impact Assessment Act*), an absence of safeguards to ensure economic interests don’t trump other considerations in a broad ‘public interest’ determination, and only requiring assessments of limited category of projects.

Ecojustice reflected similar concerns in its reaction/release stating that:

[T]he gains in the bill depend on the government’s new project list – a Harper-era regulation that determines what is actually subject to assessments. Unless that is significantly expanded to include projects like in-situ oil sands extraction, the impact of the new law will be limited. The legislation also missed an opportunity to implement ‘clear, objective’ sustainability criteria recommended by the government-appointed Expert Panel.

MiningWatch Canada responded with the observation that:

[A]s it stands, the government could well be accused of being interested in a process that will allow it to check all the right boxes (climate change and Indigenous rights and sustainability and gender etc.) without actually opening it up to meaningful rigour and depth of analysis.

Finally, the Canadian Freshwater Alliance responded to the newly proposed *Canadian Navigable Waters Act* by stating that it falls short of fully restoring the lost protections promised by the Liberals in the last campaign:

To regain public trust, all waters need to be protected from the cumulative impact of multiple projects. We remain concerned that these impacts will go undocumented and untested.

Our firm will be closely following the progress of Bill C-69 as it is expected to be reviewed by a Parliamentary Committee or Committees starting in March 2018.

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