

PROPOSED CHANGES TO CANADA'S ENVIRONMENTAL ASSESSMENT REGIME

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CANADIAN ENVIRONMENTAL ASSESSMENT ACT (CEAA)

- *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3
 - Guidelines Order
- CEAA originally introduced in 1992
- The federal government sought to achieve sustainable development by:
 - conserving and enhancing environmental quality
 - encouraging and promoting economic development that conserves and enhances environmental quality
 - Law List Regulations
 - Comprehensive Study List Regulation
 - Inclusion List Regulation

CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012 (CEAA 2012)

- Introduced in 2012
- Replaced CEAA, 1992
- One of the purposes of CEAA 2012 is to protect the components of the environment that are within federal jurisdiction from significant adverse environmental effects caused by a designated project
 - Examples: Fish, fish habitat, species at risk, migratory birds, Aboriginal peoples, federal lands, and interprovincial and international effects

CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012 (CEAA 2012)

- Applies to designated projects
 - “Designated project” means one or more physical activities that:
 - are carried out in Canada or on federal lands;
 - are designated by regulations or in a Ministerial order; and
 - are linked to the same federal authority as specified in those regulations or that order.
- 2 types of environmental assessments under CEAA, 2012
 - Agency/NEB/CNSC or Review Panel

BILL C-69

- Preceded by the report prepared by the expert panel that was established to conduct a review of Canada's environmental assessment processes
- Introduced and received first reading on February 8
- Received second reading on March 19
- Referred to the Standing Committee on Environment and Sustainable Development
- Received third reading on June 20
- Now in Senate
- Received first reading on June 20
- Currently in second reading stage

BILL C-69

- Proposes to repeal the CEAA 2012 and enact the Impact Assessment Act (the “**IAA**”)
 - Proposes to overhaul the existing federal environmental assessment process

IMPACT ASSESSMENT ACT

- Shifts the assessment process
 - from an “environmental assessment”
 - to an “impact assessment”
- Proposes a new impact assessment process
- Canadian Environmental Assessment Agency (the “**Former Agency**”) is continued as the Impact Assessment Agency (the “**IA Agency**”)
- Still refers to significant adverse environmental effects in preamble and with respect to federal lands, but otherwise this language is no longer used

DESIGNATED PROJECTS

- Applies to designated projects
 - “Designated project” means one or more physical activities that:
 - are carried out in Canada or on federal lands; and
 - are designated by regulations or in a Ministerial order.
- “Designated project” also includes any physical activity that is incidental to those physical activities

DESIGNATED PROJECTS

- The Minister may on own initiative or on request, by order, designate a physical activity, that is not prescribed and must provide a response and reasons within 90 days (9(3)), except where the physical activity has substantially begun or a federal authority has exercised a power
- We do not know at this time what projects will ultimately trigger the IAA as the Regulations Designating Physical Activities have not yet been drafted, but the list is likely to grow from that contained in CEAA, 2012

DESIGNATED PROJECTS

- Similar to CEAA, 2012 with respect to a list of projects that trigger the Act
- Different than CEAA, 1992, where that Act was triggered by the requirement to obtain various federal permits or the provision of federal funding; however, whether an environmental assessment is required under the IAA does consider federal heads of power
- Ebb and flow since 1992 with respect to the number of projects that the federal environmental assessment process has applied to

ASSESSMENT CRITERIA

- The IAA broadens slightly the assessment criteria and considers certain legislative effects (including changes to the environment or to health, social or economic conditions) in relation to various federal heads of power
 - Examples: Fish, fish habitat, species at risk, migratory birds, Indigenous peoples, federal lands, and interprovincial and international effects
- The IAA moves away from the question of whether “significant adverse environmental effects” will occur in favour of a “public interest” test
 - This creates uncertainty with respect to the criteria against which projects will be assessed
 - Some reference in the IAA is still made to significant adverse environmental effects, for projects on federal lands

IMPACT ASSESSMENT PROCESS

- Early Planning Phase
- Impact Statement
 - The proponent prepares a draft impact statement
 - The IA Agency reviews it for conformity with the regulations and guidelines posts it online for public comment
- Impact Assessment
 - Agency, Review Panel or Integrated Review leads Impact Assessment and review of impact statement
- Decision
 - The IA Agency assesses the impact statement and decides whether the project is in the public interest

PLANNING PHASE

- If on Project List, proponent provides initial description of Project s.10(2) and this is posted
- Agency must offer to consult with any jurisdiction that has powers in relation to the project, including province and affected Indigenous groups with respect to project. Agency must provide proponent with summary of issues it considers relevant (including from public comments) and post the same
- Proponent must provide Agency with a notice concerning how it will address the issues identified and a detailed description of the project, in accordance with regulations, but Agency can request additional information (s.15(3))
- According to EC, this is not intended to drive the proponent to prematurely undertake analysis, studies and the generation of other information that is more appropriately left to the Impact Statement preparation phase

PLANNING PHASE

- Notice addressing issues is posted and agency must decide whether IA is required taking into account factors in 16(2) and post decision whether IA is required under 16(3) and reasons (adverse effects within federal jurisdiction, Indigenous peoples)

CONSIDERATIONS IN DETERMINATION

- project description
- the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects
- any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982
- public comments
- strategic or regional assessments
- expert advice of other federal departments

PLANNING PHASE

Coordinated IA is contemplated through:

- Impacts Assessment Cooperation Plan
- Indigenous Engagement Plan
- Public Participation Plan
- Tailored Impact Statement Guidelines – set out the studies required in more detail the current Project Specific Guidelines
- Permitting Plan

IMPACT ASSESSMENT PROCESS: INFORMATION GATHERING

- If IA is required, Agency posts a Notice of Commencement that sets out the studies the Agency considers necessary to conduct the IA
- The Agency has 180 days to post the Notice of Commencement after the initial project description is posted under s.10(2), which may be extended by 90 days by the Minister (270 days total), but cabinet can indefinitely extend the 180 day limit, and subject to the Regulations ((112(c); (18(3)-(5))
- Compare to CEAA, 2012 – 45 days

IMPACT ASSESSMENT PROCESS – REVIEW PANEL

- The IA Agency or a review panel coordinates the impact assessment
- Minister may refer to a Review Panel within 45 days of commencement of the Impact Assessment by the Agency considering:
 - the potential adverse impacts of the project
 - public concern about the impacts of the project
 - opportunities for cooperation with other jurisdictions
 - any adverse impacts on the rights of Indigenous peoples
 - If the Agency concludes that an impact assessment is required for a designated project that is regulated under the Nuclear Safety and Control Act or the proposed Canadian Energy Regulator Act, then the Minister must refer the assessment to a review panel

IMPACT STATEMENT - TIMEFRAME

- The proponent has 3 years after posting of the Notice of Commencement to complete the indicated studies and the Agency must post notice when it is satisfied with the content of the studies, which is extendable on request of the proponent (s.19(2)(3))
- IA Agency reviews completed studies to ensure consistency with Tailored Impact Statement Guidelines
- The IA Agency may request or require the proponent to undertake further studies it views as necessary (s.26(2))
- Unclear whether this will involve the same paradigm as current environmental assessments and whether determinations of significance will still be central, eg. Selection of VEC, Project Interactions, Existing Conditions, Assessment of Project Environmental Effects and Cumulative Effects, Determination of Significance

IMPACT ASSESSMENT - REPORT

- For IA Agency review, the IA Agency prepares a report, posts a draft report on the internet site and must seek public comments and finalize the report
- If the IA Agency led the impact assessment, it must submit the final report to Minister within 300 days of the proponent providing the required information and studies and notice being posted under s. 19(4), but this may be extended by the Minister for certain purposes, including consultation with other jurisdictions and indefinitely by cabinet (s.28(6)(7))
- If a review panel led the impact assessment: within 600 days of the members being appointed but this may be extended by the Minister for certain purposes, including consultation with other jurisdictions and indefinitely by cabinet
- Designated projects regulated under Nuclear Safety and Control Act and Canadian Energy Regulator Act require a mandatory Review Panel/Integrated Panel

IMPACT ASSESSMENT PROCESS

- Exclusion of proponent delay such as under s. 26(6) of CEAA, 2012 does not appear to be explicitly included in the IAA with respect to 180, 300 and 600 day timeframe
- The report must set out the effects that are likely to be caused by carrying out the designated project and set out which effects are adverse within federal jurisdiction, direct or incidental (See section 22)

IMPACT ASSESSMENT FACTORS

- 22 (a)** the effects of the designated project, including
- (i)** the effects of malfunctions or accidents that may occur in connection with the designated project
 - (ii)** any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out
 - (iii)** *the result of any interaction between those effects*
- (b)** mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project
- (c)** the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*
- (d)** *the purpose of and need for the designated project*

IMPACT ASSESSMENT FACTORS

- (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means*
- (f) any alternatives to the designated project
- (g) traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project
- (h) the extent to which the designated project contributes to sustainability*
- (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change
- (j) any change to the designated project that may be caused by the environment
- (k) the requirements of the follow-up program in respect of the designated project
- (l) considerations related to Indigenous cultures raised with respect to the designated project

IMPACT ASSESSMENT FACTORS

- (m) community knowledge provided with respect to the designated project
- (n) comments received from the public
- (o) comments from a jurisdiction that are received in the course of consultations conducted under section 21
- (p) any relevant assessment referred to in section 92, 93 or 95
- (q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project
- (r) any study or plan that is conducted or prepared by a jurisdiction, that is in respect of a region related to the designated project and that has been provided with respect to the project
- (s) *the intersection of sex and gender with other identity factors*
- (t) any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account

IMPACT ASSESSMENT REPORT

- The Impact Assessment Act will require that the impact assessment report completed by the Agency/Review Panel identify the positive and negative environmental, health, social and economic effects that the designated project is likely to cause.
- For the purposes of decision-making, the report would indicate those effects which are adverse and under federal jurisdiction. The report would also indicate adverse effects that would directly result from other federal decisions about the project.

- Public Interest Decision / Decision Statement
 - The Minister or the Governor in Council (Minister may also refer to GIC) makes the “public interest decision” (s.63)
 - Are the adverse "effects within federal jurisdiction" and the adverse "direct or incidental effects" that are indicated in the report in the public interest (in light of the legislated factors)?
 - The Minister issues a decision statement that informs the proponent of the Minister's or the GIC's decision and sets out any conditions that are established with respect to the project within 30 days after posing of the report for the Agency and the governor in council must do so within 90 days for a review panel
 - These timeframes can be extended by 90 days by the Minister and indefinitely by cabinet

PUBLIC INTEREST DETERMINATION

Factors in Public Interest Determination

- (a) the extent to which the designated project contributes to sustainability
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*
- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

PUBLIC INTEREST DETERMINATION

- The Minister must establish a timeframe in which the proponent must substantially begin to carry out the project, subject to reasonable extension in Minister's discretion
- If the proponent does not comply with timeframe, then decision statement expires at end of period or extended period
- For assessments conducted by the Impact Assessment Agency of Canada, the Minister makes the public interest decision but has discretion to refer this decision to the Governor in Council. For all impact assessments conducted by a review panel, the Minister must refer all public interest decisions to the Governor in Council

IMPACT ASSESSMENT PROCESS

- Bill C-69 proposes to shorten the assessment process
- However, timelines can be extended
 - Examples:
 - The Minister may establish a longer time limit for both IA Agency-led and panel-led reports to allow for cooperation with other jurisdictions
 - The proponent of a designated project has three years to provide the IA Agency with the information and studies that are set out in relevant notice; this time limit may be extended at the request of the proponent, in which case, the Minister may require additional information or studies to be provided by the proponent
 - Cabinet may extend timelines indefinitely

IMPACT ASSESSMENT PROCESS

- It is difficult to predict with any certainty how long an impact assessment will ultimately take given the number of opportunities for extension and the number of parties that may be involved
- 180 days, subject to extensions to determine if IA is required as opposed to 45 days for CEAA, 2012
- Up to 3 years for studies under IAA, but could be significantly less
- Agency has 300 days to complete IA, subject to extensions as opposed to 365 days under CEAA, 2012 for completion of the EA, but CEAA, 2012 excludes proponent delay (27(6), 48) in timelines
- Significantly broader public interest criteria to make decisions under IAA

INDIGENOUS JURISDICTION

Indigenous governments that have existing powers in relation to:

- Impact assessment in other legislation, such as First Nations under the First Nations Land Management Act
- Indigenous governments that may enter into agreements with Canada pursuant to new regulations for Indigenous cooperation created under this Act
- The new Indigenous regulations would also provide opportunity to expand the jurisdiction of Modern Treaty bodies to take on powers to conduct assessment activities under the Act and to exercise these powers throughout treaty settlement lands, not only on Indigenous-owned lands

IAA TIMELINES

Impact Assessment Act Step	Minimum Days	Maximum*	
Initial Project Description			
Agency posts Summary of Issues			
Proponent posts notice on how it will address issues			
Agency must post decision on whether EA required			
Notice of Commencement which sets out studies	180	270	
Studies completed	180	1095	**
Impact Assessment Report	300	390	
Minister's Decision Statement	30	120	
Total	690	1875	
Years	1.9	5.1	
*assuming no extension by the Cabinet			
** assuming 6 months for completion of studies and assumes no requested extension by proponent			



CUMULATIVE EFFECTS AND COMPLIANCE

- Regional Assessments
- Strategic Assessments – Climate Change
- Enforcement Officers
- Compliance Orders
- Administrative Penalties

TRANSITIONAL PROVISIONS

- The IAA contains several transitional provisions
- Examples:
 - If the proponent of a designated project has provided a description of the designated project to the Former Agency, and the Former Agency has not decided (before the IAA comes into force) whether an environmental assessment is required, the screening is terminated (but the project description is deemed to be an initial project description under the IAA)

TRANSITIONAL PROVISIONS

- Examples:
 - Any environmental assessment of a designated project by the Former Agency commenced under CEAA 2012 before the IAA comes into force is continued under CEAA 2012 as if that act had not been repealed (provided that the notice of the commencement of the environmental assessment has been posted)
 - The proponent may request that the environmental assessment continue as an impact assessment under the IAA
 - A decision statement issued under CEAA 2012 is deemed to be a decision statement issued under the IAA

TRANSITIONAL PROVISIONS

- The transitional provisions in previous versions of Bill C-69 did not explicitly address certain circumstances, including:
 - If the proponent of a designated project has provided a project description to the Former Agency and the Former Agency has decided that an environmental assessment is not required
 - If the proponent of a project has not provided a project description to the Former Agency because the project is not a designated project under CEAA 2012 (and therefore the environmental assessment provisions of CEAA 2012 were not triggered)
- There were also no clear transitional provisions applicable to Section 67 determinations that have been made under CEAA 2012
- These circumstances are now addressed in section 185.1 of the latest publication of Bill C-69, as recommended in the committee stage

TRANSITIONAL PROVISIONS

Non-application of this Act

185.1 (1) This Act does not apply to a designated project, as defined in subsection 2(1) of the 2012 Act, that is a designated project, as defined in section 2 of this Act, if the former Agency determined that no environmental assessment was required under the 2012 Act or that section 128 of that Act applied to the project.

Non-application of this Act

(2) This Act does not apply to a designated project, as defined in section 2 of this Act, that is not a designated project, as defined in subsection 2(1) of the 2012 Act, if one of the following conditions applies:

- (a)** the proponent began the carrying out of the project before the day on which this Act comes into force;
- (b)** a federal authority, as defined in subsection 2(1) of the 2012 Act, exercised a power or performed a duty or function conferred on it under any Act of Parliament, other than this Act, that could permit the project to be carried out, in whole or in part;
- (c)** an environmental assessment of the project was commenced or completed before the day on which this Act comes into force by a jurisdiction other than a federal authority, as those terms are defined in subsection 2(1) of the 2012 Act.

TIMELINE

- The comment period regarding the approach to be used to guide the review of the Project List closed on June 1, 2018
- Following this first round of public consultation, a new Project List will be proposed potentially this year
- This Project List will be subject to a second round of public consultation
- The formal regulatory process will then begin, likely in 2019, which includes the federal government posting a draft regulation for public comment
- Based on preliminary guidance, the Project List is likely to be expanded

Q&A

THANK YOU

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