

Changes to federal impact assessments, energy regulator and waterway regulation (Bills C-68 and C-69)

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Author: [Sander Duncanson](#)

On February 6 and 8, 2018, the Canadian government introduced Bills C-68 and C-69, respectively, which introduce several major changes to Canada's federal regime for the assessment of federally regulated projects and regulation of waterways. The Bills repeal and replace the *Canadian Environmental Assessment Act, 2012* and the *National Energy Board Act*, while making several significant changes to the *Fisheries Act* and the *Navigation Protection Act*.

New federal impact assessment regime

Impact Assessment Agency to assess designated projects

The new *Impact Assessment Act* (IAA) will replace the existing *Canadian Environmental Assessment Act, 2012* (CEAA), resulting in a brand new regime for the assessment of impacts caused by certain federally regulated projects. The IAA names the Impact Assessment Agency of Canada (the Agency) as the authority responsible for conducting impact assessments. The Agency steps into the role of the existing Canadian Environmental Assessment Agency and assumes the expanded responsibility for "impact" assessments – previously referred to as environmental assessments – for all designated projects.

The proposed IAA only requires federal impact assessments for certain designated projects. Although it is not yet known whether the list of designated projects will be the same or similar to the current list under the CEAA regulations, the government intends to maintain a list of projects to which the IAA will apply. The Government of Canada has initiated consultations on which projects should be designated projects. Among others, the government's consultation documents suggest that potash mines, large-scale wind power facilities and in-situ oil sands facilities (to the extent there is no hard cap on greenhouse gas emissions in place for the oil sands) could be added to the current project list.

A brand new impact assessment process

The IAA establishes a new project assessment process that, although it resembles the existing environmental review regime to some extent, is a unique process that has never before been tested in Canada. From the perspective of project proponents, some of the most important elements of the process are:

- There will be an early engagement process before the formal Agency review process commences. This step is likely to add to overall project approval timelines.

- Impact assessments will be conducted by way of panel review where the project includes activities regulated under the *Canadian Energy Regulator Act* or *Nuclear Safety and Control Act*. Panels will include two members of the Agency and one Canadian Energy Regulator (CER) commissioner or Canadian Nuclear Safety Commission member, respectively.
- The IAA establishes specific legislated timelines for the major steps of the review process. However, those timelines (i) do not include the early engagement process; (ii) can be paused by the Minister for prescribed reasons (to be determined); and (iii) can be extended indefinitely by Cabinet at the Minister's request. Overall, these timelines will be longer than the current legislated timelines.
- In making a public interest decision under the Act, the Minister will be required to consider certain specified factors, including "alternatives to" a project and "the intersection of sex and gender with other identity factors." These factors make the role of an impact assessment more of a policy-setting exercise than focused on the merits of a specific project, which is likely to increase the scope of studies that proponents will need to engage in and contribute to overall project uncertainty.
- The IAA does not include a standing test for participation in panel reviews, thereby allowing for the participation of any organization or individual. Review panels will have the authority to separate organizations and individuals into different groups with different opportunities to participate. Depending on how it is implemented, this approach has the potential to reduce the frustration previously expressed by members of the public who wish to be heard, while still managing to keep the review process moving forward.
- A review panel's report will not make a recommendation. Rather, it is only required to set out the effects that are likely to be caused by the project and to indicate the extent to which they are adverse. This means the government – rather than an independent tribunal – will be responsible for weighing the costs and benefits of a project and making a decision as to whether it should proceed. This is likely to enhance the politicization of major projects.

Application to presently proposed projects

The transition provisions for the IAA will require many environmental assessments that are currently underway under CEAA to shift to the new regime, which could add time and uncertainty to the regulatory review processes for those projects. The specific implications will depend on when the new IAA comes into effect (which is expected in 2019) and how far along a particular project is in the CEAA process.

Strategic assessment for climate change

The IAA establishes a framework for strategic assessments that must be factored into federal project reviews and approvals. The first strategic assessment will be in relation to climate change. This could have significant implications for any new project, but details won't be known until the process is finished. Again, this creates uncertainty for any project that is advanced in the meantime.

Changes to the National Energy Board

Change to name and structure

The new *Canadian Energy Regulator Act* (CERA) will replace the existing *National Energy Board Act* (NEB Act). Under the CERA, the Canadian Energy Regulator (the Regulator or CER) will, subject to our below comments regarding the assessment of designated projects, function in much the same way as today's National Energy Board.

However, the structure of the new Canadian Energy Regulator is being revamped. There will be a board of directors responsible for the governance of the Regulator. There will also be a Chief Executive Officer. Hearings of the Regulator will be conducted by commissioners who are limited to serving no more than 10 years. This limit of 10 years is problematic in our view given that the commissioners who become the most experienced in financial and technical regulation will be required to leave the Regulator shortly after developing that valuable expertise.

Taking a back seat

For the first time since the NEB's establishment, the agency responsible for regulating energy projects within federal jurisdiction will no longer have the responsibility or authority to review and approve new major projects. Rather, the new regime established under the CERA and IAA gives the review powers to a review panel under the IAA (with one of three panel members from the energy regulator) and the decision-making role to the Minister or Cabinet. Surprisingly, unlike CEAA, the IAA does not stipulate when the decision is to be made by the Minister as opposed to the Cabinet. Under CEAA, this distinction depends on whether there were significant adverse environmental effects.

Although the CER will be able to feed into the IAA review process for projects regulated under the CERA, its role will largely be confined to lifecycle regulation for approved projects, rather than the consideration of new projects.

Further changes

Additional changes to the CER's mandate include giving the CER responsibility for regulating offshore renewable energy projects and removing the standing test for participation in hearings, thereby allowing for the participation of any organization or individual.

Changes to the *Fisheries Act*

Harmful alteration, disruption or destruction of fish habitat

Among other changes to the *Fisheries Act*, the passing of Bill C-68 would see the resurrection of the "HADD" – harmful alteration, disruption or destruction of fish habitat – threshold for requiring federal authorization of in-stream works. Authorization would also be required for any activities that may cause the death of fish. These requirements – including the well-known HADD threshold – existed in the Act prior to changes made by the previous federal government.

However, Bill C-68 proposes changes that would allow for certain classes of works,

undertakings or activities to proceed without federal authorization, provided that they comply with codes of practice that are established under the revised Act. Until the regulations are released, the breadth of this exception is largely unknown. While it is expected to apply to minor works by private landowners along shorelines, such as the installation of small private docks, it has the potential to allow other common activities undertaken by industry, such as the construction of watercourse crossings for pipelines, powerlines or roads, to proceed without prior federal authorization.

Yet-to-be designated activities, projects and areas

If passed, the Bill would add distinct federal approval requirements for designated works, undertakings or activities that are “part of a designated project” or that take place in a designated “ecologically significant area.” While this appears to be a further expansion of federal oversight, the implications of these added requirements and their application to a given activity will only be known once the regulations designating the activities, projects and areas to which these requirements apply are released.

Indigenous considerations

While the above changes are likely to be the most consequential to project proponents, consistent with themes that run through the proposed IAA and CERA, Bill C-68 also proposes changes that expressly require the responsible Minister to consider adverse effects on Indigenous peoples and traditional knowledge when making decisions under the Act.

Changes to the navigable waterways regime

Bill C-69 will amend the *Navigation Protection Act* and rename it the *Canadian Navigable Waters Act*. The *Canadian Navigable Waters Act* would maintain the schedule of navigable waters previously found in the *Navigation Protection Act*, which means that not all bodies of water are automatically navigable waters. However, the *Canadian Navigable Waters Act* would also include a process for works in navigable waters not listed in the schedule. This process would allow any interested person to file comments regarding proposed works in public waterbodies, and could require approval from the federal Minister of Transport for these activities.

Conclusion

Despite the Government of Canada’s suggestion that the new legislation will improve the efficiency and timing of federal regulatory reviews, there is nothing in the new legislation that will necessarily achieve these results and many aspects of the legislation will likely have the opposite effect. If the proposed legislation is to result in greater regulatory certainty and efficiency, amendments should be incorporated during Parliament’s review to achieve this. In addition, the creation of the regulations that set out designated projects and under what circumstances the legislated timelines are suspended will have a major impact on future regulatory processes. We recommend that industry participants be actively involved in these ongoing processes.

In conclusion, it is our view that the proposed legislation suffers from the same problem that we have been observing in project regulatory processes for some time. These reviews are becoming forums where all manner of social and environmental issues are expected to be addressed, even when they are beyond the ability of any single project proponent to mitigate. The result is increased regulatory delay and uncertainty, which ultimately affects

Canada's competitiveness relative to the rest of the world.