

# The New Environmental Assessment Regime

## EMA Regulatory Update

Presented By

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# BILL C-69



# BACKGROUND

- Report of the Expert Panel on Review of Environmental Assessment Processes (April 5, 2017)
- Report of Parliament's Independent Standing Committee on Transport, Infrastructure and Communities (March 23, 2017)
- Report of the Expert Panel on Modernization of the National Energy Board (May 15, 2017)
- Bill C-69 was introduced into Parliament on February 8, 2018 and is now awaiting second reading in the Senate



# SUMMARY

- Repeals, replaces and re-names federal Acts
  - Canadian Energy Regulator Act
  - Impact Assessment Act
  - Impact Assessment Agency
- Replaces the current federal environmental assessment process with a new, broader “impact assessment” process
- Restores lost protections for the public right to navigate on all navigable waters in Canada



# (1) “TRIGGERING”/APPLICATION

- Bill C-69 does not specify what projects may potentially be subject to a federal impact assessment
- The federal government intends to revise the *Regulations Designating Physical Activities* (the “Project List”) to specify the criteria that will be used to determine what projects may potentially be subject to a federal impact assessment
- Critics suggest that:
  - The proposed revisions to the *Regulations Designating Physical Activities* should be tabled before Bill C-69 is enacted
  - The criteria must ensure that only projects that engage a federal constitutional power will potentially be subject to a federal impact assessment



## (2) “ONE PROJECT – ONE ASSESSMENT”



- One objective of Bill C-69 is to ensure that each project gets one assessment
- Critics suggests that many projects subject to the *Impact Assessment Act* may require multiple assessments
- Subjecting projects to multiple assessments raises the potential for multiple regulator and judicial challenges to approval or authorization of a single project

### (3) NO IMPACT ASSESSMENT / NO PROJECT

- Bill C-69 permits the IAA and the Minister to determine that an impact assessment is not required for a project
- Critics suggest that:
  - The factors to be considered by the IAA are limited and only refer to adverse effects rather than beneficial effects
  - There are no factors for the Minister to consider – the determination is based on whether the Minister is of the opinion that the project would “cause unacceptable environmental effects within federal jurisdiction”
  - Additional clarity and guidance is required





## (4A) BROADER SCOPE OF REVIEW

- Bill C-69 replaces an environmental assessment with an “impact assessment” which requires the IAA or review panel to consider a greater number of factors including:
  - Changes to health, social or economic conditions that are likely to be caused by the project;
  - Indigenous rights and knowledge;
  - Alternatives to the project;
  - The extent to which the project contributes to sustainability and the federal government’s ability to meet its climate change obligations; and
  - The intersection of sex and gender with other identity factors



## (4B) BROADER SCOPE OF REVIEW

- Critics say that;
  - Bill C-69 does not expressly include “economic impacts” as a factor to be considered;
  - Bill C-69 does not specify how the various factors should be measured and weighed;
  - Bill C-69 does not specify who is responsible for ensuring adequate information on all of the factors is before the IAA or review panel, or how this information will be gathered during the permitted timeframes;
  - The broader scope of review will result in increased delay and costs for project proponents



## (5) PUBLIC PARTICIPATION

- Bill C-69 removes the “standing test” and permits any member of the public to participate in an impact assessment
- Critics suggest that guidelines or regulations should be developed to:
  - Ensure the public consultation process is fair, transparent and properly funded;
  - Avoid duplication and delays; and
  - Ensure that the perspectives of persons that are more directly impacted, and that are based on science and fact-based evidence, are given more weight by the decision-makers



## (6A) INDIGENOUS RIGHTS & PARTICIPATION

- Bill C-69:
  - Expands the range of potential impacts on Indigenous persons that will be considered in impact assessments;
  - Requires impact assessments to consider Indigenous rights and culture;
  - Requires the IAA to establish an Indigenous Advisory Committee to advise the IAA on the interests and concerns of Indigenous persons in relation to impact assessments



## (6B) INDIGENOUS RIGHTS & PARTICIPATION

- Indigenous persons and environmental groups advocate for:
  - A stronger role for Indigenous persons and Indigenous traditional knowledge in the impact assessment process
  - Mandatory consultation and disclosure at all phases of the impact assessment process
  - A requirement that the “free, prior informed consent” of Indigenous persons be obtained for all projects subject to federal impact assessment
- Industry groups advocate for:
  - Clear guidance on how the impact assessment process fits into the federal Crown’s duty to consult and accommodate Indigenous persons
  - Express legislative recognition that Indigenous persons do not have a “veto” over projects and that reconciliation challenges cannot be fully addressed through the impact assessment process





## (7) POLITICIZATION

- Bill C-69 preserves the politicization of the environmental/impact assessment process – the final decision on whether to approve a project is left with politicians (the federal Cabinet)
- Critics suggest that:
  - The process should be depoliticized with all decisions being made by an independent body or commission; or
  - The federal Cabinet should decide whether a project is in the public interest and aligns with broader policy considerations in the first stage of review (providing an early political “green light”) and the regulator should make the final decision on whether a project should proceed based on technical considerations

## (8) REGIONAL AND STRATEGIC ASSESSMENTS

- Bill C-69 permits regional and strategic assessments but does not contain details regarding:
  - The triggers for undertaking regional and strategic assessments;
  - Who will undertake regional and strategic assessments and how they will be funded; or
  - What purpose regional and strategic assessments are intended to serve (informative or prescriptive);
- Critics suggest further detail is needed



## (9) DELAYS, COSTS AND INVESTOR UNCERTAINTY

- Bill C-69 specifies that:
  - The early planning phase must be completed within 180 days;
  - Impact assessments conducted by the IAA must be completed within 300 days; and
  - Impact assessments conducted by a review panel must be completed within 300 – 600 days
- However, Bill C-69 permits timelines to be:
  - suspended by the Minister for prescribed reasons (TBD); and
  - extended indefinitely by Cabinet at the Minister's request
- Critics suggest that this process will result in delays, cost overruns and investor uncertainty

## (10) LACK OF FEDERAL POLICY DIRECTION

- Lack of clear policies on a number of important public issues (environmental concerns, economic priorities and Indigenous engagement) means the regulatory process has become the *de facto* forum for debating these issues
- Many stakeholders believe that:
  - A separate and appropriate venue should be created to debate and resolve broader public policy issues;
  - The federal government should adopt clear policies regarding these issues that provide macro-level objectives and legislative detail that can guide the regulatory process; and
  - The regulator should decide whether a specific project should be allowed to proceed based on technical merit and alignment with pre-set federal policies;

- Bill C-69:
  - Addresses some of the issues with the current environmental assessment process but also creates new issues;
  - Will likely result in increased regulatory delay and uncertainty; and
  - May negatively impact the resource investment climate in Canada



**EXPECT  
DELAYS**

# OTHER LEGISLATION





# BILL C-68 (FEDERAL)

- Bill C-68:
  - Introduced into Parliament on February 6, 2018 (now awaiting second reading in the Senate)
  - Effects amendments to the federal *Fisheries Act* that are intended to “restore lost protections and incorporate modern safeguards”
  - Has received relatively little attention compared to Bill C-69



# BILL 51 (PROVINCIAL)

- Bill 51:
  - Introduced into the B.C. Legislature on November 5, 2018
  - Repeals and replaces the current *Environmental Assessment Act* with a new “revitalized” *Environmental Assessment Act*





Questions?

# Thank You

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