Practical Impacts: changes to Canada's environmental assessment framework

大成 DENTONS

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Introduction

The Government of Canada introduced Bill C-69 in the House of Commons, proposing changes to how impacts from certain major projects are reviewed. The Bill is the product of a review process that began in January of 2016 to "rebuild public trust" in Canada's environmental review process. The federal legislative review was addressed in past bulletins available **here**, **here** and **here**.

Many of the changes track the proposals in the government's June 2017 **Discussion Paper**. Key features of the new impact assessment framework would include:

- expanding Indigenous and stakeholder consultation requirements;
- adding new factors which must be considered as part of the "impact assessment" process; and
- giving ministers or federal Cabinet the ability to extend legislated time limits.

The *Impact Assessment Act*

Bill C-69 would repeal the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and replace it with the *Impact Assessment Act*. The Canadian Environmental Assessment Agency would be rebranded as the Impact Assessment Agency of Canada (Agency) and would be the authority responsible for impact assessments under that Act.

As with CEAA 2012, proponents and federal authorities would be prohibited from doing anything in connection with a "designated project" that may cause certain effects unless the Agency determines that no impact assessment is required, or the designated project successfully completes the impact assessment process. Consistent with CEAA 2012, "designated projects" would be established through regulations or designated by order of the Minister of Environment and Climate Change (Minister) on the Minister's own initiative or "upon request." The significance of the change from CEAA 2012 will depend on the scope of "designated projects" defined by the regulations, a draft of which is to be released later this year.

The "planning phase"

The *Impact Assessment Act* would eliminate the screening phase that exists under CEAA 2012 and replace it with a "planning phase", in which the Agency would determine whether a designated project requires an impact assessment. The planning phase would include Indigenous and stakeholder consultation beyond what is provided for under CEAA

2012.

The Agency would be required to offer to consult with other "jurisdictions" including federal and provincial bodies and provincial governments with responsibilities in relation to an assessment of environmental effects for the designated project during the planning phase. Regulations under the *Impact Assessment Act*, which also have not been released, would authorize the Minister to enter into agreements with "Indigenous governing bodies" to make those bodies "jurisdictions" and authorizing those bodies to "exercise powers or perform duties or functions in relation to impact assessments." The Agency would need to consult with those Indigenous governing bodies during the planning phase in addition to any "Indigenous group" that may be affected by the proposed designated project. CEAA 2012 did not require any consultation with other jurisdictions or Indigenous groups in the screening phase.

The Agency's public engagement mandate during the planning phase is also broadened. The Agency would be required to "ensure the public is provided with an opportunity to participate in preparations for a possible impact assessment" which could be done through "inviting public comments", as is done under CEAA 2012, or through other means. It is not clear what other means the Agency might rely upon, though the Expert Panel tasked with reviewing the environmental assessment process emphasized the need for "face-to-face" engagement.

A new veto power would allow the Minister to deny designated project at any time after the Agency determines that an impact assessment is required at the end of the planning phase, but before the Agency announces the start of the impact assessment. If the Minister is of the opinion that the project would cause "unacceptable effects within federal jurisdiction" or unacceptable "direct or incidental effects." Some industry participants had advocated in favour of moving the political/national interest determination from the end of the review process to the beginning of the review process. Instead, the federal government appears to want to make political determinations affecting the fate of projects at *both* ends of the review process.

The "information gathering" and "decision-making" phases

As a general rule, the Agency would be required to conduct an impact assessment and prepare a report to the Minister setting out the effects that are likely to be caused by a designated project during the "information gathering" phase. The Minister also has discretion to refer an impact assessment of a designated project to a review panel. Impact assessments for federally regulated oil or and gas pipelines, if required, must be referred by the Minister to a review panel that would also meet the requirements of the *Canadian Energy Regulator Act*. The Agency or review panel would be required to conduct an impact assessment and to submit a report to the Minister within prescribed time limits. Project proponents would be responsible for providing any data or information required by the Agency or review panel performing the assessment.

As with CEAA 2012, final decisions following impact assessments would be made at the political level. If a report is submitted to the Minister following an Agency-led impact assessment, the Minister could approve (but not reject) the project based on a report from the Agency, or the Minister could refer the Agency's report to federal Cabinet for approval or rejection. Reports submitted to the Minister following a review panel-led impact assessment would always be referred to federal Cabinet for approval or dismissal.

A significant feature of the *Impact Assessment Act* is the shift away from environmental assessments toward broader "impact assessments". The new legislation would enshrine a number of factors which must be considered by the Agency or a review panel when preparing an impact assessment, many of which go beyond the factors expressly listed in CEAA 2012. Project proponents will be familiar with some of the factors listed in the *Impact Assessment Act* which, though not codified in CEAA 2012, are considered as part of the existing federal environmental assessment process in practice. Some of those factors include:

- the impact that a designated project may have on any Indigenous group *and* any adverse impact on the

constitutionally protected rights of Indigenous people;

- considerations related to Indigenous cultures raised with respect to the designated project; and
- the extent to which the project "contributes to sustainability."

Currently, the federal government relies on its consultation framework and the environmental assessment process to fulfil its Aboriginal consultation obligations. Until recently there was some uncertainty about whether that approach could discharge the Crown's constitutional duty to consult. Following the Supreme Court of Canada decisions in *Clyde River (Hamlet)* and *Chippewas* (see our bulletin, **here**), the federal government, proponents, and indigenous groups have a measure of certainty that the government may rely on the federal impact assessment process to fulfil the duty to consult. The federal government is now proposing to update the federal project review framework to reflect these recent common law developments.

Similarly, parties have previously debated whether sustainability principles should be included within the scope of an environmental assessment and, if so, how those principles should be considered. Under the new legislation, parties would have certainty that a project's contribution to sustainability will be included in an impact assessment. The proposed legislation defines "sustainability" as the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits future generations."

While the codification of factors such as those outlined above gives proponents some certainty, the inclusion of others may create some uncertainty. In particular, federal impact assessments would be required to consider:

- the extent to which the effects of the designated project may hinder or contribute to Canada's ability to meet its "environmental obligations and commitments in respect of climate change"; and
- the intersection of sex and gender with other identity factors.

The addition of these new factors creates uncertainty for project proponents since it is not clear how these factors, which are subjective and difficult to assess, will be applied. To what extent can a designated project detract from Canada's international climate change commitments and still be approved? Similarly, how will the "intersection of gender and sexuality with other identity factors" apply to approval of a pipeline, a mine, industrial facility or any other project?

Process timelines

Under CEAA 2012, public input at the screening phase is expressly limited to a 20-day comment period and the entire screening phase must be completed within a firm 45-day time limit. By contrast, the *Impact Assessment Act* would effectively establish a 180-day time frame for the entire planning phase. However, the Minister and federal Cabinet could extend that time limit for any reason, or "stop the clock" for reasons that will be prescribed in regulations.

On Agency-led impact assessments, the Agency would have 300 days from the day the Agency announces the commencement of the impact assessment process to conduct the impact assessment and finalize its report to the Minister. The Minister would then have up to 30 days to approve the project, or refer the report to federal Cabinet, which would have 90 days to make a decision. By contrast, the report preparation and decision-making phase under CEAA 2012 is a combined 365 days.

Review panels conducting impact assessments would have 600 days from the date the review panel is appointed by the Minister to prepare a report, which would be referred to federal Cabinet for a decision within 90 days. By contrast, the review panel report preparation and decision-making phase under CEAA 2012, is approximately 720 days. Under the new legislation, the Minister, and federal Cabinet would be able to extend these time limits indefinitely or to

"suspend" the time limits in circumstances to be prescribed by the regulations, as is the case with CEAA 2012.

Assertions by the federal government that the legislated time limits for impact assessments would be reduced are questionable. Claims of reduced legislated time limits do not factor in time added to the planning phase or additional time for decision-making at the back end of the assessment process. The legislated time limit for a final decision on an Agency-led impact assessment (including planning, impact assessment and reporting, and decision-making phases) would be between 510-570 days (15-19 months) after filing the initial project description, compared with 410 days (14 months) under CEAA 2012. The legislated time limit for a review panel-led impact assessment would be 915 days (approximately 30 months), compared with approximately 770 days (27 months) under CEAA 2012.

Claims that legislated timelines have been reduced also do not account for the essentially unlimited ability of the Minister or federal Cabinet to extend time limits indefinitely or to suspend time limits for reasons prescribed by regulation, as is the case under CEAA 2012. These extensions and suspensions are frequently relied upon in practice. For example, as a result of extensions and "excluded periods":

- the Pacific Northwest LNG Project did not receive a decision statement until nearly 1300 days (42 months) after filing the project description;
- the Trans Mountain Expansion Project required over 1050 days (35 months) to receive a decision statement; and
- the Site C Clean Energy Project (review panel) required over 1200 days (40 months) to receive a decision statement.

Unless the project proponent correctly anticipates all or substantially all of the data and analysis before the planning phase finishes, including for baseline environmental studies and analysis on new issues, it can expect extensions and suspensions to push the impact assessment process well beyond the legislated time limits, while data is obtained and analysis performed. Even then, consultation and co-operation with other jurisdictions throughout the process could necessitate extensions to legislated time limits.

The *Impact Assessment Act* would also leave open the possibility that projects could be forced to complete environmental assessments at the provincial level in addition to the federal impact assessment. The Minister continues to have the ability to order that a provincial environmental assessment can be substituted for the federal impact assessment. However, that option is only available where provinces request substitution, and even then only where a number of specific criteria are met. Projects could still be subject to multiple assessments both at the federal and provincial levels, as was recently the case with the Trans Mountain Expansion Project and the Pacific Northwest LNG Project each of which completed both federal and British Columbia assessment processes.

Conclusions

The new impact assessment process would expand the scope of the required assessment and opportunities for Indigenous and stakeholder input on designated projects. The *Impact Assessment Act* would also preserve the ability of provincial governments to force proponents to duplicate efforts by completing federal and provincial environmental assessment processes. At the same time, ministers and federal Cabinet would continue to have discretion to extend the impact assessment beyond legislated time limits.

Federal government assurances that industry would benefit from "legislated timelines to provide clarity and regulatory certainty" are questionable based on post-2012 project experience with time limit extensions and "time-out" provisions that have resulted in some proceedings taking much longer than legislated timelines.

The federal government has announced a public consultation process to solicit input on key regulations that would be

established under the *Impact Assessment Act*. The discussion paper posted to the **government website** indicates that the scope of designated projects will be determined using a "criteria-based approach." The federal government has **also announced** a public consultation process to solicit input on the information that proponents would be required to provide the Agency during the planning phase, as well as the circumstances where the Minister could "stop the clock" on the legislated timelines. In each case, an initial round of consultation is open until April 15, 2018. The government intends to hold two additional rounds of consultation on each draft regulation this year before publishing draft regulations in the fall of 2018. Much of the resulting change will be determined by those regulations and, ultimately, the approach taken by the Agency and the federal government in implementing the new impact assessment review process.

Your Key Contacts

Bernie (Bernard) J. Roth
Partner, Calgary
D +1 403 268 6888
bernard.roth@dentons.com

Mira Gauvin
Partner, Montréal
D +1 514 878 5812
M +1 514 214 2172
mira.gauvin@dentons.com

Laura K. Estep
Partner, Calgary
D +1 403 268 6308
laura.estep@dentons.com

Dan Collins
Senior Associate, Calgary
D +1 403 268 6837
dan.collins@dentons.com