Update on Bill C-69 and Bill C-48: Major changes are almost here

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Introduction

Bill C-69 was tabled in the House of Commons in February 2018, proposing to significantly alter the environmental review and management process for major projects. From the outset, industry groups and many others criticized it for making an already difficult regulatory environment even more difficult to navigate. The main concerns raised regarding Bill C-69 included, among other things:

1. The scope of factors to be considered in a project review (a change away from "environmental assessments" to broader "impact assessments" that consider, in addition to environmental factors, things such as economic, social and health impacts, and gender-based analysis);
2. Uncertainty regarding the timelines for project reviews and potentially longer timelines than under existing processes; and
3. Increased stakeholder participation in the project review process.

For a detailed discussion of the changes to the impact assessment process and to the National Energy Board (NEB), see our past bulletins here and here.

Bill C-69 proceeded through the House of Commons and Senate, where it underwent extensive study and public input, including a review by the Standing Senate Committee on Energy, the Environment and Natural Resources (Senate Standing Committee). The Senate Standing Committee recommended 188 amendments to Bill C-69, the majority of which the federal government did not adopt. Following passage in both Houses, Bill C-69, along with Bill C-68 and Bill C-48, received Royal Assent on June 21, 2019.

Bill C-69 repeals the *National Energy Board Act* and replaces it with the *Canadian Energy Regulator Act*. This Act establishes the Canadian Energy Regulator, which will replace the NEB as the primary authority responsible for federally regulated oil and gas pipelines and power lines. The Bill also repeals the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), and replaces it with the *Impact Assessment Act*. The Impact Assessment Agency of Canada (Agency) will replace the Canadian Environmental Assessment Agency, and will be the authority responsible for impact assessments under the Act.[1]

Bill C-48, *Oil Tanker Moratorium Act,* implements a ban on oil tankers that are carrying more than 12,500 metric tons of crude oil or persistent oil as cargo from stopping, or unloading crude or persistent oil, at ports or marine installations located along British Columbia's north coast. This moratorium is in effect from the northern tip of Vancouver Island to the Alaska border. Violation of the Act can lead to fines of up to CA$5 million. [2]

Bill C-68 contains several amendments to the *Fisheries Act*, some of which are relevant to project development and management.

As discussed in further detail below, the main provisions of Bill C-69 (and Bill C-68) are not yet in effect. They will come into force on a date determined by the Governor in Council. To date, the requisite Order in Council has not yet been filed in the *Canada Gazette*. In contrast, Bill C-48 is currently in full force and effect.

Senate review

As noted above, the Senate Standing Committee recommended 188 amendments to Bill C-69, all of which the Senate adopted. Bill C-69 then went back to the House of Commons, where the federal government accepted 62 of those Senate amendments, along with portions of 37 others, but did not adopt most of the key Senate amendments. The result is, from a resource industry perspective, a somewhat more balanced, but still significantly uncertain, regulatory review process.

One of the most notable Senate recommendations adopted by the federal government was giving the Agency the power to allow public participation in project reviews "in a manner that the Agency considers appropriate", and use its discretion to restrict public participation. Bill C-69, as originally drafted, had removed the "standing test" for public participation, which had raised concerns that this would result in unworkably large numbers of participants and which would overwhelm the regulatory process. With this amendment, interested parties will still have the ability to participate meaningfully in project reviews, but within limits that will presumably create processes that are more efficient.

The federal government also adopted Senate amendments that provided the Agency with increased autonomy from government interference. In particular, these amendments removed the ability of the Minister of Environment to direct the President of the Agency, or any of its employees or review panel members with respect to a report, decision or order. The amendments also transferred the power from the Minister to the Agency to start and stop project review timelines.

The federal government also adopted the Senate recommendations that clarified the transitional provisions of the *Impact Assessment Act* and the *Canadian Energy Regulator Act*. The Senate proposed that any environmental assessment of a designated project by the NEB commenced under CEAA 2012 **before** the *Impact Assessment Act* comes into force, be continued as if the CEAA 2012 remained in force, provided that the assessment was commenced and a decision statement was not yet decided at the time of entry into force of the *Impact Assessment Act*.

However, the federal government rejected most of the key Senate amendments, including the following:

- The Senate had included wording in the *Impact Assessment Act,* which stipulated that one of the purposes of the Act was to improve investor confidence and strengthen the Canadian economy.
- The Senate had proposed that the environmental review process be limited to "significant" adverse effects. The federal government did not adopt this change, and it removed the word "significant".
- The Senate proposed to include a "privative clause" that would make the Minister's and Agency's decisions "final and conclusive", which would have made it more difficult to judicially challenge project approvals.
- The Senate had proposed to exempt certain types of facilities from the application of the *Impact Assessment Act,* including certain types of oil sands operations, wind and solar plants, natural gas plants, natural gas liquid plants, petroleum refineries, and natural gas related generation units.
- The federal government rejected the proposed Senate amendments that would have excluded "greenhouse gas emissions generated from another physical activity or designated project located downstream from the designated

project" from the definition of "direct or incidental effects."

- The Senate had proposed the introduction of the "principle of proportionality" to weigh the time and money invested in the information and studies involved in a project review with the nature and complexity of the project.

Coming into force and next steps

The main provisions of Bill C-69, including the *Canada Energy Regulator Act* and the *Impact Assessment Act*, come into force on a date determined by the Governor in Council. Before the Governor in Council can issue the Order in Council, putting this legislation into effect, the government will likely need to prepare the regulations associated with the *Impact Assessment Act* first, as these regulations determine the types of projects that will be subject to the Act and timelines for the review process. Earlier this year, the federal government released two discussion papers that set out the main provisions of the two sets of regulations under the *Impact Assessment Act* (the *Regulations Designating Physical Activities* – otherwise known as the Project List, and the *Information Requirements and Time Management Regulations)*.[3] The government accepted public input on these discussion papers, with a deadline of May 31, 2019, for submission of comments.[4]

At this point, it is not clear whether the government will finalize the drafting of the regulations and the implementation of Bill C-69 before the upcoming federal election. Depending on the volume of public comments received and the number of changes to be made, finalization of the regulations may take some time to complete. Regulations must be carefully drafted, as there are a number of legal constraints that must be complied with, including the *Statutory Instruments Act* and *Statutory Instruments Regulations*, and the scope of the delegated authority in the parent legislation, and several government departments will need to be included in the process.

The federal election will take place on or before October 21, 2019. The election period must last a minimum of 36 days and a maximum of 50 days,[5] which means that Parliament must be dissolved by September 13 at the latest. This leaves less than two months for the finalization of the regulations and the coming into force of Bill C-69. It is certainly possible, but it may be difficult to complete this work within that time frame. In the alternative, the government may decide to include implementation of Bill C-69 as an election campaign issue, and follow through on bringing it into force following the election.

Conclusions

Bill C-69 and, in particular, the *Impact Assessment Act,* have significantly altered the regulatory landscape for the review of major projects in Canada. Whether this new process will, as its critics fear, discourage investment and make new project approvals almost impossible to obtain, remains to be seen. We will not be able to assess the effectiveness of the new legislation until one or more major projects go through the new assessment process. However, it is important to remember that legislation is sometimes implemented in unexpected ways. A perfect example of this was the *Canadian Environmental Assessment Act, 2012.* When it was first enacted, CEAA 2012 was widely considered industry-friendly legislation, which would expedite the approval of major resource development projects. Those predictions turned out to be wrong, and dramatically so.

At this point, the future of the major project approval process remains uncertain. If Bill C-69 comes into force before the federal election, a change in government may mean that both Bill C-69 and Bill C-48 will be short-lived. Other potential roadblocks also exist. Several provinces have argued that Bill C-69 interferes with provincial constitutional authority over natural resource development, and Alberta Premier Jason Kenney has indicated that Alberta will legally challenge both Bill C-69 and Bill C-48. Several Indigenous groups, including those supporting the proposed Eagle

Spirit Pipeline, have argued that Bill C-48 violates their Indigenous rights, and have indicated they will challenge the law on the ground that Crown failed to comply with its duty to consult when it enacted Bill C-48. All of which means that the latest chapter in the evolution of Canada's regime for the approval of major projects may remain to be written.

For more information, please contact Joe Sebestyen or another member of the Energy group.

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1. *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, 1st Ses, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 28, ("Bill C-69")* .↩
2. *Bill C-48,Oil Tanker Moratorium Act, 1st Ses, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 26, ("Bill C-48")* ↩
3. Government of Canada, *Discussion Paper on the Proposed Project List (May 2019).* Government of Canada*, Discussion Paper on Information Requirements and Time Management Regulatory Proposal (May 2019)* ↩
4. Government of Canada,*"Impact Assessment Regulations" (May, 12, 2018).* ↩
5. *Canada Elections Act* (S.C. 2000, c. 9), s. 37.↩

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