Legal update

New federal environmental assessment legislation: Bill C-69

February 2018
Environmental

The Government of Canada recently introduced Bill C-69 to revise its environmental assessment (EA) regime. The government describes the changes as a significant overhaul, consistent with its "Back to the Future" messaging concerning other recent changes to environmental legislation. However, key features of the current regime remain, and government messaging also insists the new regime will satisfy the elusive "one project, one review" objective.

Bill C-69 renames EA “impact assessment” (IA) and the National Energy Board (NEB) as the Canadian Energy Regulator (CER). The IA of large pipeline projects would henceforth be processed by the new Impact Assessment Agency (IAA) (the renamed Canadian Environmental Assessment Agency, or CEAA), instead of the NEB/CER. Importantly, the concept of a “list-based” approach that establishes which projects require an IA remains, although the project list regulation remains under development. Bill C-69 would also amend and rename the Navigation Protection Act, yet similarly retain the list-based protective approach to navigable waters introduced in 2012.

What is the new process, and how does it change from the status quo?

Under the existing Canadian Environmental Assessment Act 2012 (CEAA 2012) process, a project proponent files a project description (PD) with the CEAA if the project is listed as a “designated project.” The CEAA screens PDs within 45 days, selecting those expected to have significant adverse effects for full EAs.

Under the new process, reflecting the “early engagement” activities contemplated by government discussion papers, the proponent files an initial PD that forms the basis for IAA and stakeholder engagement. The IAA then provides the proponent a list of issues for a revised PD to address. No time limits apply to this “planning phase,” which is otherwise reminiscent of the previous “screening” phase. Once, and if, the IAA accepts and publicly posts the “detailed” PD, it has 180 days to assess whether an IA is required, and would have 300 days to complete it if so. The minister then has 30 days to either make a decision, or refer the project to Cabinet to assess whether predicted adverse effects are in the public interest. Cabinet would then have 90 days to make that determination.

Like the current process, complex projects may be, at the minister’s discretion, considered by project-specific review panels instead of the IAA, with project-specific terms of reference. Review panels have 600 days to complete reviews, following which Cabinet again has 90 days to make a decision. Major Canadian Energy Regulator Act projects (designated by regulation) will be subject to IAA-led review panel assessments (albeit with one CER member). Projects that are not designated will remain entirely with the CER.

Other notable changes include:
Explicit statutory references to both positive and negative health, social and economic “impacts,” which government messaging claims is a change from the current focus on adverse environmental effects. In practice, however, health, social and economic factors, both positive and negative, are typically currently considered under the umbrella of environmental effects.

CER members will have a 10-year term limit and be governed by a board of directors in addition to a chief executive officer. In each case, one member must be Indigenous.

Increased Indigenous engagement, through planned partnerships between the IAA and Indigenous peoples, and more explicit consideration of Indigenous traditional knowledge (from “may take into account” to “must take into account”).

Following multiple court cases touching on whether EA processes properly considered infringements to Indigenous rights, the proposed statutory language requires the Governor-in-Council, the minister and the IAA to consider impacts to the section 35 rights of Indigenous peoples, in addition to the current requirement to consider effects on Indigenous peoples’ traditional practices. The IAA and/or review panels will probably have to grapple with rights issues more, theoretically displacing a role presently assumed by the courts. Discharging that incremental role successfully will require incremental resources and support.

The “standing” test for public participation has been removed, and more funding for public participation has been announced. Those factors may result in more vigorous public opposition to projects. That said, the current standing test has been relatively liberally applied. If current sophisticated participants remain the same, increased funding may be offset with an increased number and/or length of project review processes, with perhaps little overall change.

The provincial “substitution” provision remains, but with additional conditions for its acceptance, including mandatory consultation of Indigenous groups. Under the CEAA 2012 substitution provisions, many British Columbia projects in particular did not undergo federal environmental assessments because the CEAA agreed to rely on the provincial environmental assessment regime. However, given the bill’s broadened scope of inquiry, the IAA may well consider provincial regimes as no longer “substantially similar” to the new Impact Assessment Act.

Consistent with other environmental assessment regimes, individual assessments must consider completed higher-level “strategic” assessments. The federal government has announced that the first such assessment will address climate change.

The government has somewhat less time to make project decisions (600 days instead of up to two years for panel reviews, and 300 days instead of one year for IAA assessments), but the ability to “stop the clock” remains and the timelines do not apply to consultation surrounding the “first” PD. Despite claims the new regime will “reduce duplication and red tape” and “[p]roject reviews [will] benefit from reduced timelines,” this bill risks keeping or extending the same timelines.

How do the new processes deviate from the preliminary reports?

In the process of developing the legislation, the government published two reports issued by independent panels that received significant commentary: a May 2017 report on the modernization of the NEB, and an April 2017 report concerning Canada’s environmental assessment regime.

The April 2017 report proposed changing how the federal regulatory regime addresses cumulative effects; early engagement and planning; transparency and public participation; science, evidence and Indigenous knowledge; impact assessment; partnering with Indigenous peoples; and cooperation with jurisdictions.

The Impact Assessment Act targets most of these areas. One notable absence, however, is moving NEB functions away from Calgary to Ottawa (using geography to both enable better federal coordination and, purportedly, avoid energy industry “capture”), including establishing a standalone “Canadian Energy Information Agency.” But requiring
designated CER projects to be assessed by IAA panels (and associated support staff) is likely intended to achieve some of those objectives.

Another key omission is the fact the federal Cabinet retains making the national interest determination, as opposed to returning aspects of it to assessment and regulatory processes (although Cabinet will no longer be able to approve projects the CER might have recommended against).

Conclusions

In summary, the major changes include likely longer overall assessment timing due to early IAA engagement, increased Indigenous participation, increased regulator consideration of Indigenous rights infringements, and removal of the jurisdiction of the old NEB (soon to become the CER) to assess major projects.

More projects may undergo deeper reviews, but interprovincial pipeline or power line projects will be more distant from regulatory staff with energy expertise. The new legislative language seeks to address friction points from the current regime but, like any legislation, may result in unintended consequences. To manage that risk, project developers should track and seek to participate in elements of the regime that will be established by regulation, policy and matters of practice.

Matthew D. Keen
Michael Manhas

For further information, please contact one of the following lawyers:

> Andrew Pritchard Ottawa +1 613.780.8607 andrew.pritchard@nortonrosefulbright.com
> Jean Piette Québec +1 418.640.5002 jean.piette@nortonrosefulbright.com
> Janet Bobechko Toronto +1 416.216.1886 janet.bobechko@nortonrosefulbright.com
> Alan Harvie Calgary +1 403.267.9411 alan.harvie@nortonrosefulbright.com
> Max Collett Vancouver +1 604.641.4912 max.collett@nortonrosefulbright.com
> Matthew D. Keen Vancouver +1 604.641.4913 matthew.keen@nortonrosefulbright.com