



Environmental Legislative Updates – Bill C-69, BC Environmental Assessment Act, Bill C-68

Rob Lonergan
Partner, Fasken

Ron Ezekiel
Partner, Fasken

▼ Overview

- Why are governments revamping environmental assessment?
- What does this mean for proponents?
- How will Bill C-69 change Federal impact assessment?
- How will Bill 51 change Provincial environmental assessment?

▼ Why Change?

- Canada introduced CEAA 2012 to ‘streamline’ environmental assessment
- Complaints:
 - Reduced public participation
 - Reduced project assessment criteria
 - Generally more difficult to participate in environmental assessment

▼ Federal Response

- Federal Liberals 2015 platform:
 - “We will make environmental assessments credible again”
 - Restore oversight/reduce political interference
 - Improve public participation
 - Modernize National Energy Board processes
 - Improve Indigenous Participation (UNDRIP)

▼ Results

- Bill C-69
 - More up front consultation
 - Commences with an application providing basic information:
 - Initial project description
 - Basic EA information
 - 180-day Planning Phase
 - Impact Assessment Agency consults with stakeholders and Indigenous groups
 - More information about “issues“

▼ C-69 continued

Conclusion of Planning Phase:

- Agency decides assessment not necessary
- Agency decides assessment necessary, then issues requirements
- Minister agrees to substitution:
 - Province or Indigenous governing body
- Minister gives notice under s. 17 (more below)

▼ Takeaways for Proponents

- Government response to process criticism:
 - more process
- “Social Licence” is real for government and First Nations
 - reduced political interference?
- Response:
 - Upfront (pre-application) consultation and engagement

▼ Bill C - 69: Some Key Legal Concepts

Key Legal Concepts:

- Definition of “Effects”
- The Prohibitions on the Proponent
- Public Interest Test for Approval
- Early Rejection of a Project

▼ Bill C - 69: Some Key Legal Concepts

Definition of “Effects”

- CEAA 2012, s. 5, “effects”
 - Direct effects:
 - Changes to the components of the environment
 - Indirect effects:
 - Effect of the change to the environment on social, economic, physical and cultural heritage, etc.

▼ Bill C - 69: Some Key Legal Concepts

Definition of “Effects”

- *Impact Assessment Act*, s. 2,
effects means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes
- Assessment of the “direct” health, social or economic “changes” and “consequences”

▼ Bill C - 69: Some Key Legal Concepts

Definition of “Effects”

- Some additional “effects” concepts introduced:
 - s. 17(1): “unacceptable environmental effects”
 - s 22(a)(iii): “interaction” between effects
 - ss. 60 - 62: “incidental effects”

▼ Bill C - 69: Some Key Legal Concepts

The Prohibitions on the Proponent

- CEAA 2012, s. 6:
 - Prohibits carrying out of a designated project, in whole or in part, if it may cause changes to environment within federal jurisdiction;
 - s. 6 effectively prohibits the effect of those changes on health, socio-economic conditions of Indigenous peoples - logically unnecessary to independently prohibit the indirect effects

▼ Bill C - 69: Some Key Legal Concepts

The Prohibitions on the Proponent

- *Impact Assessment Act, s. 7:*
 - In principle, the prohibition is broader:
 - changes to a federal component of the environment
 - effects of changes to the environment generally (not just the federal components) on certain Indigenous interests
 - direct effects on health, social or economic conditions of Indigenous persons

▼ Bill C - 69: Some Key Legal Concepts

Public Interest Test for Approval

- CEAA 2012:
 - s. 19(1)(b): “significance” is a factor
 - s. 52: GIC determines whether *significant adverse effects* are justified in the circumstances
 - s. 53: if not significant or if justified, the Minister must set conditions - and the Project can proceed

▼ Bill C - 69: Some Key Legal Concepts

Public Interest Test for Approval

- *Impact Assessment Act:*

- s. 22: “significance” is not a factor

- ss. 60 - 62: the Minister or GIC must determine whether any adverse effect is in the “public interest”

▼ Bill C - 69: Some Key Legal Concepts

Public Interest Test for Approval

- *Impact Assessment Act*, ss. 63: The “public interest” factors:
 - Contribution of the Project to “sustainability” (defined in s. 2)
 - Extent to which effects are adverse (how bad are they?)
 - Mitigation measures appropriate to the Minister or GIC
 - Impact on Indigenous peoples and s. 35 rights
 - Impact on Canada’s “environmental obligations” and climate change commitments.

▼ Bill C - 69: Some Key Legal Concepts

Public Interest Test for Approval

- *Every Project with any adverse effect within federal jurisdiction must be justified in terms of federal public policy*
- Contrast: projects by Federal authorities and on Federal lands have an advantage:
 - The “significant adverse effect” test and “justification” threshold continue to apply (s. 82)
 - The purpose of assessment of federal projects differs: see s. 6(1)(l)

▼ Bill C - 69: Some Key Legal Concepts

- Section 17(1):

“... if a federal authority advises the Minister that it will not be exercising a power conferred on it ... “

“... or the Minister is of the opinion that it is clear that the designated project would cause unacceptable environmental effects within federal jurisdiction ...

“... the Minister must provide the proponent with a written notice...”

▼ Bill C - 69: Some Key Legal Concepts

- Implications of s 17 notice?
 - Is the assessment terminated ?
- Tautology?
 - Can the Minister judge the effects before they are assessed?
- Legality?
 - Can a federal authority simply refuse to exercise a power?

▼ Bill C - 69: Some Key Legal Concepts

Section 17 Notice:

- Receiving the notice *after* the Minister makes the s. 17 determination: unfair?

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”

Baker v. Canada, [1999] 2 SCR 817



Questions?

▼ Provincial Response to EA Reform

- BCNDP 2017 Election Platform – “We’ll make environmental decisions you can trust” including:
 - Updating our environmental assessment legislation and processes
 - Respecting the Rights of First Nations

▼ Provincial Response to EA Reform

- Bill 51 Timeline
 - Nov 5 – First Reading
 - Nov 8 – Second Reading
 - Nov 22 – Reported from Committee
 - Nov 26 – Third Reading (no material changes)
 - Nov 27 – Royal Assent
- Not yet in force; comes into force by regulation; anticipated late 2019

▼ Many elements remain the same...

New EAA

- If a reviewable project:
 - no related activity
 - may not construct / operate / modify / etc.
 - no other approvals
- unless:
 - EA Certificate
 - Exemption Order

Old Act

- If a reviewable project:
 - no related activity
 - may not construct / operate / modify / etc.
 - no other approvals
- unless
 - EA Certificate
 - 10(1)(b) order (i.e. assessment not required)

Some changes seem big, but aren't...

Example: Required Assessment Matters (s. 25)

- positive and negative direct and indirect effects of the reviewable project, including environmental, economic, social, cultural and health effects and adverse cumulative effects;
- risks and uncertainties associated with those effects, including the results of any interaction between effects;
- risks of malfunctions or accidents;
- disproportionate effects on distinct human populations, including populations identified by gender;
- effects on biophysical factors that support ecosystem function
- effects on current and future generations;
- consistency with any land-use plan of the government or an Indigenous nation if the plan is relevant to the assessment and to any assessment conducted under section 35 or 73;
- greenhouse gas emissions, including the potential effects on the province being able to meet its targets under the *GGRTA*;
- alternative means of carrying out the project that are technically and economically feasible, [...]
- potential changes to the reviewable project that may be caused by the environment;

▼ While some that seem small are big...

New Purposes for EAO

2(2)(b)(i) Promote **sustainability** by protecting environment and fostering sound economy and well-being of British Columbians and their communities by...

- Carrying out assessments in thorough, timely, transparent and impartial way, considering the environmental, economic, social cultural and health effects of assessed projects,
- Facilitating meaningful public participation throughout assessments,
- Using best available science, Indigenous knowledge and local knowledge [...], and
- Coordinating assessments with other governments, [...] including Indigenous nations

2(2)(b)(ii) Support **reconciliation** with Indigenous peoples in British Columbia by...

- Supporting the implementation of UNDRIP
- Recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves,
- Collaborating with Indigenous nations in relation to reviewable projects, consistent with UNDRIP, and
- Acknowledging Indigenous peoples' rights under Section 35(1), in assessments and in decision making

Some Changes Still to Come – How Projects become “Reviewable”

New EAA

**Reviewable Project
(s. 9)**

**“Notifiable” Project
(s. 10)**

**Ministerial Designation
(s. 11)**

**Proponent Opt-In
(s. 12)**

Old Act

**Reviewable Project
(s. 5)**

**Ministerial Designation
(s. 6)**

**Proponent Opt-In
(s. 7)**

▼ How Projects become “Reviewable” ...

New EAA

**Reviewable Project
(s. 9)**

**“Notifiable” Project
(s. 10)**

**Ministerial Designation
(s. 11)**

**Proponent Opt-In
(s. 12)**

New EAA makes no changes, but government has indicated that changes will be made to Reviewable Project Regulation, including to project types & to quantitative thresholds.

▼ How Projects become “Reviewable” ...

New EAA

**Reviewable Project
(s. 9)**

**“Notifiable” Project
(s. 10)**

**Ministerial Designation
(s. 11)**

**Proponent Opt-In
(s. 12)**

A new category of prescribed projects will be created. “Notifiable” projects will be of the same type as “Reviewable projects”, but will have lower thresholds.

- Must notify *before* undertaking activities / construction / etc.
- Must provide required information
- EAO has 60 days to consider

▼ How Projects become “Reviewable” ...

New EAA

**Reviewable Project
(s. 9)**

**“Notifiable” Project
(s. 10)**

**Ministerial Designation
(s. 11)**

**Proponent Opt-In
(s. 12)**

Under old Act, Minister *may* designate project as “reviewable”, but under new EAA, anyone can *apply* to have a “project” designated as reviewable (if not substantially started). Minister *must* respond.

- Minister must decide in 30 days
- Minister must take into account:
 - Whether applicant is Indigenous Nation
 - Section 2(2) Purposes

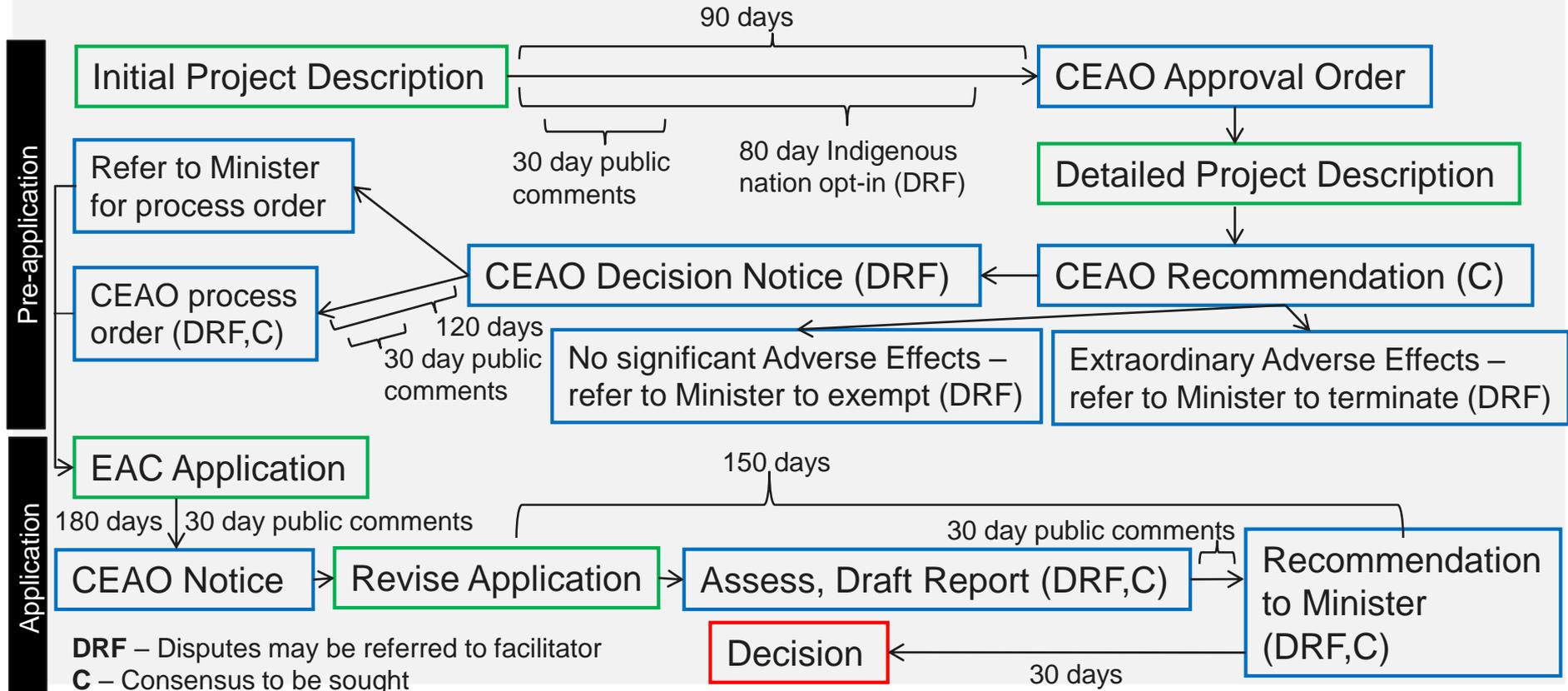
▼ Statutory Role for Indigenous Nations

- New mechanism for deciding who should be “participating Indigenous nations” – opt in, subject to exclusion for no reasonable possibility of adverse effect
- New EAA requires formal Indigenous input at key steps (“seek consensus” vs. “request consent”)
- Dispute Resolution process is untested
- Power to Delegate to Indigenous-led EA processes

▼ Process Changes to obtain EAC

- Front-loading of key statutory decisions
- 4 public comment periods (up from 2), occurring both earlier & later in the EA process
- More statutory timelines, but little reduction in overall “schedule risk”; Minister or CEAO may extend timelines
- Higher costs (cost recovery / participation tariff)

Process – New EAA



▼ Risks once EA Certificate approved

- Increased focus on Compliance & Enforcement
- Changes to penalty regime (10x increase to maximum fines; “continuing offences”; AMPs)
- EAC term until construction now up to 10+5 instead of 3-5+5 years; seek consensus for extension
- More grounds for EAO to suspend EAC or amend conditions (e.g. non-compliance with EAA or EAC)

▼ Key Issues for Proponents

- Key focus for proponents: Regulations
- Proponents with projects “in process” should pay particular attention to transitional issues
- Statutory Processes vs. Legal Background (Duty to Consult; Opportunity to be Heard)
- Proponents should be sensitive to likely impacts on IBA negotiations (current & future)



Questions?

▼ Bill C - 68:

An Act to Amend the *Fisheries Act*

- Bill C-68 went through 2nd reading in the Senate on December 3

The government has heard the concerns of industry, members of the public regarding project designations, and indeed this chamber. I would argue that the development of codes of practice as well as authorization and permitting processes will ensure that industry and the agricultural sector are clear on what is required of them.

▼ Bill C - 68:

An Act to Amend the *Fisheries Act*

- Bill C-68 went through 2nd reading in the Senate on December 3:

“However, the government has indicated its openness to considering how the proposed processes can be improved and clarified, including through a Senate amendment.”

“Another area around which the government has heard concerns are the amendments proposed under section 2(2) of the bill, the so-called “deeming” provision regarding water flow. There has been a great deal of speculation as to what this change means. There are legitimate questions surrounding the government’s intent, scope and application of the water flow deeming clause amongst stakeholders, particularly agricultural and resource stakeholders. In this regard, the government has indicated it is open to amendments that would clarify this provision to allay any fears that it extends the definition of fish habitat.”

▼ Bill C - 68:

An Act to Amend the *Fisheries Act*

- Extending the reach of the Act
 - s. 2: “fish habitat”:
 - Broadened, deemed to include “...flow...”
 - s. 2: “fishery”:
 - “...whether ... fished or not...”
 - s. 34.4:
 - Prohibits death of fish
- Constitutional Issue

▼ Bill C - 68:

An Act to Amend the *Fisheries Act*

- s. 34.2:
 - Standards and codes of practice: instead of a permit
- S. 34:
 - But “designated project” must have a permit (s 35.1)
 - Relation to *Impact Assessment Act*?



Questions?