

May 2, 2018

Bills C-68 and C-69 and the Consideration of Sex, Gender and Other Identity Factors

By: Jennifer Koshan

Legislation Commented On: *An Act to amend the Fisheries Act and other Acts in consequence* ([Bill C-68](#)) and *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* ([Bill C-69](#))

Over the past couple of months, several of my colleagues have posted comments on Bill C-68 and Bill C-69 (see [here](#)). My focus in this post is on one section that is common to Bills C-68 and C-69, which provides that when making a decision under the relevant *Act*, the decision-maker may or indeed must consider, among other things, “the intersection of sex and gender with other identity factors” (see proposed section 2.5(i) of the *Fisheries Act* (“may”), section 22(1)(s) of the proposed *Impact Assessment Act* (“must”), and sections 183(2)(c), 262(2)(c) and 298(3)(c) of the proposed *Canadian Energy Regulator Act* (“must”). The preamble of Bill C-69 also states that “the Government of Canada is committed to assessing how groups of women, men and gender-diverse people may experience policies, programs and projects and to taking actions that contribute to an inclusive and democratic society and allow all Canadians to participate fully in all spheres of their lives.”

The need for these sort of provisions was identified in the April 2017 report of the Expert Panel on the Review of Federal Environmental Assessment Processes, [Building Common Ground: A New Vision for Impact Assessment in Canada](#), which noted that participants in the Panel’s consultation process “highlighted gaps in guidance and standards in specific areas, including... gender-based analysis...” (see section 2.5 on Evidence-Based Impact Assessment). The Government of Canada’s [June 2017 discussion paper](#) on Environmental and Regulatory Reviews foreshadowed their intention to require that “the economic, social and health effects associated with a project must be considered... [and] include a Gender-Based Analysis Plus (GBA+)” (at 13). The government’s [GBA+ Policy](#) mandates consideration of whether federally regulated policies, programs, initiatives and services have impacts on the basis of sex or gender as those identities intersect with race, ethnicity, religion, age, and mental or physical disability.

To my knowledge, Bill C-68 and C-69 mark the first time that federal environmental legislation has stipulated sex, gender and other identity factors (apart from Indigenous citizenship) to be relevant considerations for impact assessments and project approvals, although some regional benefit agreements include such considerations. As I will discuss, gender-based policy-making has been recommended at the international level and by Global Affairs Canada in the context of its international development work on extractive industries operating outside Canada. In light of

recent reports in Canada documenting gender-specific impacts of the natural resource sectors, it is high time for Canada to make these considerations mandatory in its own legislation.

The International Context

In the last five years, several international reports have identified the gender-based impacts of resource development and how gender may intersect with other aspects of identity in this context (see e.g. World Bank, [Extracting Lessons on Gender in the Oil and Gas Sector](#) (2013); UN Women, [Promoting Women's Participation in the Extractive Industries Sector: Examples of Emerging Good Practices](#) (2016); Oxfam International, [Position Paper on Gender Justice and the Extractive Industries](#) (2017)). Generally, the reports indicate that the benefits of resource development tend to accrue to men, and the costs of such development are borne disproportionately by women. These adverse gender-based impacts include the following:

- woman may experience lack of consultation and collaboration with representatives of extractive and resource-development industries, and play a limited role in decision-making around projects;
- women may be left out of negotiations and compensation for loss of their land, resulting in impacts on their sources of income and in food insecurity;
- the environmental and other consequences of resource development may impact women's roles with respect to gathering and producing food, water and fuel;
- resource development may increase women's caregiving responsibilities when their spouses leave home to work or are injured on the job;
- women face a lack of employment and training opportunities in the resource sector, especially in jobs requiring heavy labour and at higher wage levels, and when they do work in the sector they may experience discrimination, harassment and more dangerous working conditions;
- women encounter security concerns, including an increased risk of gender-based violence by migrant and other workers in the resource sector. [General Recommendation 35](#) of the Committee on the Elimination of all forms of Discrimination Against Women (2017) recognizes that gender-based violence against women is exacerbated by increased globalization of economic activities, including extractive and offshore industries and by the destruction of natural resources (at para 14);
- rates of domestic violence also tend to increase in communities where resource industries are based, due to shifts in gendered power relations and stresses within families caused by increased costs of living and other factors;
- women may be drawn into sex work and human trafficking in areas where extractive industries are centred and may experience related health concerns, for example an increased risk of HIV / AIDS, other sexually transmitted illnesses, and unwanted pregnancies;
- women experience access to justice issues in enforcing their rights in this context, given a lack of knowledge of relevant laws and dispute resolution mechanisms.

Some of these gender-based issues and impacts have also been identified in relation to sustainable energy projects (see UN Women, [Sustainable Energy for All: The Gender Dimensions](#) (2014)).

Canada has made efforts on these issues in the international arena. Global Affairs Canada's [Promoting Gender Equality in the Extractive Sector: A Tool Kit](#) is intended to assist the department's staff "to support equality between women and men in programming and policy dialogue related to the extractive sector" in their international development work. The Tool Kit focuses on gender issues in three areas: improving resource governance capacity, supporting local economic development, and enabling communities to maximize the benefits of resource development.

Global Affairs Canada is also contributing to a five-year project, [Supporting Inclusive Resource Development in East Africa](#) (SIRD), being undertaken by the Canadian Bar Association International Initiatives in partnership with the Law Society of Kenya, Tanganyika Law Society, Uganda Law Society and East African Law Society. The SIRD project aims to support these East African law societies in advocating for law reform that reflects principles of transparency, gender sensitivity and accountability in the extractive industries, and supporting increased community participation, particularly of women, in initiatives to advance their rights in the context of extractive industries. I had the honour of participating in the SIRD project's first forum in Arusha in December 2017, where representatives of governments, law societies, civil society, and the extractive industries came together to share ideas, practices and strategies.

The Domestic Context

Lest one might think that the extractive industries' gender-based impacts are only experienced by women in the Global South, a number of recent Canadian reports also document such impacts in our own country (see also Annie Rochette, "Climate Change is a Social Justice Issue: The Need for a Gender-Based Analysis of Mitigation and Adaptation Policies in Canada and Quebec" (2016) 29 *Journal of Environmental Law and Practice* 383 for a discussion of the gendered impacts of climate change and a critique of gender-blind climate change policies).

Amnesty International's 2016 report [Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia](#) found that energy projects in northeast BC have had unintended consequences for wellness and safety, with a disproportionate impact on Indigenous peoples and especially Indigenous women and girls. These impacts include higher rates of violence, food and housing insecurity, spiritual harms, and inadequate law enforcement and provision of social services.

Reports by the Parkland Institute have found that women in Alberta have not benefitted from the growth of extractive industries in this province in the same way men have (see Ian Hussey & Emma Jackson, [Gendering the downturn: Is the NDP doing enough for Alberta women?](#) (May 2017); Nicole Hill, Angele Alook, Ian Hussey, [How gender and race shape experiences of work in Alberta's oil industry](#) (June 2017)). Alberta has the highest pay gap between men and women in the country, with women earning an average of 80.17% of men's wages, compared to a

national average of 86.25% (see also Kathleen Lahey, [Equal Worth: Designing Effective Pay Equity Laws For Alberta](#) (March 2016)). The Parkland Institute argues that Alberta's extractive industries have created this "second-order labour market" (Hussey et al), with women lacking employment opportunities and experiencing occupational segregation in this sector (within which women's wages are only 70% of men's). Women make up only 25% of workers in the mining and oil and gas extraction sectors but constitute 45.5% of the available labour market in Alberta. Evidence also shows that these gaps disproportionately affect Indigenous and racialized women. Women and racialized workers are "highly overrepresented in feminized and invisible service, retail, and care work in the oil sands region" (Hill et al). In addition, women face adverse consequences as a result of Alberta's boom and bust economy, due to their disproportionate reliance on services that tend to be cut during economic downturns.

These Canadian reports show that the impacts of resource extraction on women can also intersect with other factors such as Indigeneity. On this point, it bears noting that Bills C-68 and 69 also include provisions requiring that impact assessments include consideration of the traditional knowledge and rights of the Indigenous peoples of Canada and the impact that the designated project may have on any Indigenous group (see e.g. s 22 of the *Impact Assessment Act*). For further discussion of Bills C-68 and 69 and the rights of Indigenous peoples, see the ABlawg posts of [David V Wright](#) and [David Laidlaw](#) on this topic.

What has been done in Canada to date to address these kinds of impacts?

Broadly speaking, Canada's *Employment Equity Act*, [SC 1995, c 44](#), requires certain federally regulated private and public sector employers and contractors to implement employment equity measures "to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities" (s 2). This legislation may apply to some employers in the resource development sector. However, it operates by way of planning and reporting obligations and has been criticized for not having a complaints mechanism and sanctions to give it teeth (see generally Carol Agocs, ed, *Employment Equity in Canada: The Legacy of the Abella Report* (University of Toronto Press, 2014)). The most recent [statistics](#) for the *Employment Equity Act* show that in 2016, women comprised 40.7% of the Canadian workforce covered by the Act. Although this figure is better than the Alberta statistics cited above, it is only 84.4% of the attainment target, down from 85.1% in 2015 (and with an overall downward trend that is concerning).

Most provinces and territories also have pay equity provisions in their human rights statutes, but the *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#) is deficient in not mandating equal pay for work of equal value, only for "the same or substantially similar work" (s 6(1); see also Lahey).

More specific to the extractive sector, there is a promising regional example that I am grateful to my student Andrea Williams for bringing to my attention. The *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, [SC 1987, c 3](#), implements an agreement between Canada and Newfoundland and Labrador on offshore petroleum resource management and revenue sharing. The Canada–Newfoundland and Labrador Offshore Petroleum Board is created under the Act, and before it approves any development plan or authorizes any work or activity under the Act, "a Canada–Newfoundland and Labrador benefits plan shall be submitted to and

approved by the Board” (s 45(2)). The benefits plan must give first priority for training, employment and provision of goods and services to individuals resident in the province (s 45(3)), and may include affirmative action provisions to ensure that designated individuals and groups have access to those training, employment and goods and services priorities (s 45(4); see also the Board’s [website](#), which specifies that the designated groups include women, visible minorities, Aboriginal peoples, and persons with disabilities).

One example is the [Hebron Project Benefits Plan](#), under which ExxonMobil Canada Properties (EMCP) is required to develop and implement a Gender Equity and Diversity Program addressing employment and business access for the four designated groups, including development of a Women’s Employment Plan. More specifically, EMCP is required to:

- create training and recruitment programs for women and designated groups in consultation with training and educational institutions in the Province;
- provide facilities for the Hebron Project that are accommodative of women in terms of living accommodations and a safe and respectful working environment;
- set longer-term qualitative goals to employ more women in occupational areas where women are historically under-represented;
- develop an implementation schedule for the Program and monitor and report progress to the Board ([Hebron Project Benefits Plan](#) at B-5).

EMCP also commits to:

- partner with organizations or support programs that expose designated groups, particularly women, to math, science, technology or engineering to further support the option of non-traditional career choices;
- establish scholarship and support programs to encourage members of the designated groups, particularly women, to complete training programs that will allow them to meet skills demand;
- design Hebron platform living quarters to provide women a safe, secure, comfortable and respectful residential environment ([Hebron Project Benefits Plan](#) at B-13, B-17).

The Hebron Plan undertakes some of the best practices recommended in international and domestic reports, which I discuss below. However, as Andrea Williams noted in her paper for my Feminist Legal Theory class, the Plan has had mixed results in achieving its employment equity goals, likely due to the same lack of enforcement mechanisms identified in respect of the federal *Employment Equity Act*. Statistics also fail to account for women experiencing intersectional inequalities, and EMCP does not report on more qualitative outcomes such as rates of harassment (see [its most recent annual report](#)).

Best Practices

Bills C-68 and C-69 are currently before Standing Committees, but there is little doubt that whatever happens with these Bills, the government’s commitment to GBA+ analysis will extend

to its oversight of the resource development sector. The need for assessment of gender-based impacts in this context clearly flows from Canada's domestic and international human rights obligations. In addition, there are business case arguments that can be made for ensuring that extractive industries do not adversely impact communities on the basis of gender and other factors, such that this type of analysis should be seen as a benefit rather than barrier (see e.g. UN Women at 6-7; World Bank at 5).

Accordingly, the federal government, its provincial counterparts, and the resource development sector should bear in mind the best practices for gender sensitivity, transparency and accountability that have been identified in the reports cited earlier in this post:

- GBA+ impact assessments for all extractive industry projects, done in consultation with women's organizations;
- strong legislative and policy frameworks, including those on gender-based violence and providing for social and economic rights, human rights protections against private actors, employment and pay equity and occupational health and safety;
- adequate enforcement mechanisms and resources for these laws, including training for enforcement personnel on gender and cultural competency issues;
- requirements for corporate GBA+ policies and practices;
- oversight mechanisms, including data collection and monitoring of gender and other intersectional impacts in the private and public sectors;
- assessment and provision of infrastructure and service needs for communities affected by resource extraction;
- fair taxation and royalty regimes, and the redistribution of revenues from extractive industries in services and programs promoting gender and other forms of equality (e.g. child care);
- public education on gender and other issues in the extractive sector;
- support for education and training for women and girls to facilitate their participation in the sector;
- support for access to justice and for civil society and women's organizations engaged in this work.

In addition to being sensitive to gender and other identity factors, best practices should be sustainable environmentally, economically and socially, focused on participation and capacity-building, technically feasible, and risk-avoiding (UN Women at 9).

Conclusion

As is evident from previous ABlawg posts on Bill C-68 and C-69, the impact assessment process will evaluate the direct and incidental effects of proposed projects on the environment and on health, social and economic conditions, with several mandatory considerations to be balanced. The Bills' inclusion of sex and gender as they intersect with other identity factors should require

transparent reporting of likely gender-based impacts, and assessment of these impacts and proposed mitigation measures as a key part of decision-making on resource development projects. The production of knowledge about these impacts will itself be an important outcome of the Bills, especially if that information is made available and aggregated so that cumulative gender-based impacts can be assessed.

However, the overarching criterion for project approvals is the public interest, the definition of which does not explicitly include gender (see s 63 of the proposed *Impact Assessment Act*). Will large extractive projects with adverse gender (and other intersectional) impacts nonetheless be permitted where they have significant economic benefits seen to be in the public interest? And if they are, to what extent can these sorts of decisions be challenged? Although sex, gender and other identity factors are constitutionally protected, judicial review only requires administrative decision-makers to have acted reasonably in limiting *Charter* rights and to have appropriately balanced those rights with the government's objectives (see *Doré v Barreau du Québec*, [2012 SCC 12 \(CanLII\)](#)). While I began with the argument that it is high time for Canada to make sex, gender and other identity factors mandatory considerations in its environmental legislation, it remains to be seen how effective the impact assessment process will be in addressing these factors.

The author wishes to thank David Laidlaw, Sharon Mascher, Kristen van de Biezenbos and David Wright for helpful comments on an earlier draft of this post.

This post may be cited as: Jennifer Koshan “Bills C-68 and C-69 and the Consideration of Sex, Gender and Other Identity Factors” (2 May, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/05/Blog_JK_Bills_C68_69.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

