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What Should Require Federal Impact Assessment? Proposed Triggers for a Credible Federal Impact Assessment Regime

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On June 29, 2017, the Government of Canada released a Discussion Paper outlining a series of “system-wide changes” under consideration “to strengthen Canada’s environmental assessment and regulatory processes” (at 7). In earlier posts, I [provide](#) an overview of the Discussion Paper; Professor Bankes [discusses](#) the Discussion Paper’s response to the [Report of the Expert Panel on the Modernization of the National Energy Board](#); and Professor Kwasniak [considers](#) how to fill the gaps in the Discussion Paper to regain public trust in federal assessment processes. Professor Kwasniak’s post focuses, in particular, on the core questions of what impacts should be assessed, to what end impacts should be assessed, and how assessments should figure in decision-making relating to project approval or disapproval. This post focuses on filling the gaps in the Discussion Paper relating to another core question—what should require federal impact assessment? The answer to this question is, of course, central to the Government of Canada’s commitment to deliver credible impact assessment and regulatory processes that both regain public trust and protect the environment.

Recommendations of the Expert Panel for the Review of Environmental Assessment Processes

In a [previous post](#), I discussed the recommendations made by the Expert Panel for the Review of Environmental Assessment Processes (Expert Panel) in its Report [Building Common Ground: A New Vision for Impact Assessment in Canada](#) (Expert Report) relating to the question of what should require federal impact assessment. In summary, the Expert Panel made the following recommendations.

First, the Expert Panel recommended that federal impact assessment processes “should only be conducted on a project, plan or policy that has clear links to matters of federal interest” (at 18). Second, the Expert Panel recommended “an appropriate threshold for effects on federal interests” should be set, so that trivial impacts do not trigger federal impact assessment. The Expert Panel recommended a “consequential impact” threshold, tied to a sustainability framework. The Expert Panel recommended the use of three different triggers to ensure that proposed projects with consequential impacts are subject to federal impact assessment: (1) a new Project List designating projects that are “likely to adversely impact matters of federal interest in a way that is consequential for present and future generations” which automatically trigger federal impact assessment; (2) a trigger based on clear statutory criteria requiring federal impact assessment of projects likely to have a consequential impact on present and future generations;

and (3) a mechanism allowing a proponent or any other person or group to request a federal impact assessment, with the decision-maker determining, based on “applicable statutory criteria”, whether the federal assessment process should be triggered.

Trigger Mechanisms Under Consideration in the Discussion Paper

In keeping with the approach adopted throughout the Discussion Paper, the essential question of what projects should require—or trigger—federal impact assessment, is addressed briefly and at a fairly high level of generality. Specifically, under the heading “What is Assessed” the Discussion Paper states the following to be under consideration (at 18):

Reviewing the Project List Regulations and establishing criteria and a transparent process to periodically review and update the Project List to ensure those types of major projects that have the greatest potential impacts in areas of federal jurisdiction are assessed

Maintaining authority to designate a non-listed project that **could have adverse impacts** on areas of federal jurisdiction where warranted, based on clear criteria and a more transparent process

Maintaining the flexibility to **exclude designated projects** from assessment under certain conditions based on clear criteria and a transparent process

Enhancing transparency and requirements for the **assessment of projects on federal lands**

Relying on the life-cycle regulators (i.e. National Energy Board, Canadian Nuclear Safety Commission, Offshore Petroleum Boards) for the **assessment of non-designated projects** (e.g. delineation wells in the off shore) (emphasis in original)

Designing Effective Triggers – Clear Criteria and Transparent Processes

With the important addition of clear criteria and transparent processes, it appears that the Government of Canada is considering triggers resembling those found in the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19](#) (CEAA 2012). CEAA 2012 uses a Project List approach (*Regulations Designating Physical Activities*, [SOR/2012-147](#)) to designate projects that trigger the federal assessment process. It also grants the Minister authority to designate a physical activity not otherwise on the Project List if, in the Minister’s opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation (CEAA 2012, s 14(2)). Clearly the Government of Canada prefers the CEAA 2012 “Project List plus” trigger approach to that found in the earlier *Canadian Environmental Assessment Act*, [SC 1992, c 37](#) (CEAA 1992). CEAA 1992 required the assessment of all proposed activities under the responsibility of a federal authority for which there is a trigger unless the activity was excluded by regulation. The difference in approach is significant, with the number of projects subject to some level of federal impact assessment annually falling from thousands under CEAA 1992 to dozens under CEAA 2012 (Expert Report FN 27).

However, the number of assessments carried out in any given year is not the measure of a credible federal process. Rather, the measure of a credible federal impact assessment process is whether projects that may have more than a trivial impact on matters of federal interest are subject to federal impact assessment. Key to achieving this goal is ensuring that clear criteria—which in my view should set a uniform threshold for federal assessments—and transparent processes are built into the triggers the Government of Canada is currently considering.

Clear Criteria—Defining the Threshold

In my view, the answer to the question of what should require federal impact assessment must be based on an articulated threshold. Once articulated, that threshold should provide the basis for determinations as to which classes of projects should, and should not, be listed on a revised Project List, it should serve as the basis for determinations as to when the assessment of non-listed projects “is warranted”, and it should ground determinations that otherwise listed projects should be excluded from assessment.

The Discussion Paper does not refer to a threshold. In the context of periodically reviewing and updating the Project List it mentions the need “to ensure that *major projects with the greatest potential impacts in federal jurisdiction* are assessed” (at 18, emphasis added)—with views sought on the criteria that should be used to consider potential changes to the Project List (at 14). It also references maintaining the authority to designate a non-listed project that “*could have adverse impacts on areas of federal jurisdiction where warranted*” for assessment (at 18, emphasis added), on the basis of clear criteria (at 14).

However, drawing on the extensive public input it received, the Expert Panel has already provided advice and recommendations to ground the threshold / criteria discussion. Specifically, the Expert Panel recommended that the federal impact assessment process be triggered by projects that are likely to adversely impact matters of federal interest in a way that is consequential for present and future generations (at 56, 57). This seems an appropriate articulation of the threshold alluded to in the Discussion Paper—justifying the inclusion of major projects with the greatest potential impacts on the Project List and warranting the assessment of non-listed projects on the basis of their adverse impacts.

“Consequential Impact”

The trick is, of course, defining when a project is likely to have a consequential impact for present and future generations. While not providing an exhaustive list, the Expert Panel offered the following examples:

- impacts that affect multiple matters of federal interest;
- impacts that are of a duration that will be multi-generational; and/or
- impacts that extend beyond a project site in geographic extent.

It suggested that other factors - such as impacts in an ecologically or culturally sensitive area, or the potential to contribute to cumulative impacts - may also be deemed consequential impacts to present and future generations.

I believe the Expert Panel’s list of examples and factors provides a good starting point. To this, I would perhaps add impacts that involve the release into the environment of a substance that, on the basis of a screening assessment conducted under s 74 of the *Canadian Environmental Protection Act*, 1999, [SC 1999, c 33](#), has been determined to be toxic or capable of becoming toxic; and, the release of living organisms in their natural or modified form to which “biotechnology” (s 3(1)), as defined in the *Canadian Environmental Protection Act*, has been applied. In keeping with the specific fiduciary obligations imposed on government when Aboriginal title is infringed without consent articulated by the Supreme Court of Canada in the *Tsilhqot’in* decision (see my discussion of this aspect of that case [here](#)), I would also add to this list impacts that have the potential to substantially deprive future generations of Aboriginal title holders of the benefit of their land. I would also provide an inclusive list of those areas that are considered ecologically or culturally sensitive from a federal perspective. I suggest the following definition:

consequential impacts means impacts that:

- (a) affect multiple matters of federal interest;
- (b) are of a duration that will be multi-generational;
- (c) extend beyond a project site in geographic extent;
- (d) involve the release into the environment of a substance that, on the basis of a screening assessment conducted under s 74 of the *Canadian Environmental Protection Act*, has been determined to be toxic or capable of becoming toxic;
- (e) involve the release of living organisms in their natural or modified form to which “biotechnology”, as defined in the *Canadian Environmental Protection Act*, has been applied;
- (f) substantially deprive future generations of Aboriginal title holders of the benefit of the land;
- (g) contribute to cumulative impacts;
- (h) affect an ecologically or culturally sensitive area including impacts that:
 - i affect species classified as extinct, extirpated, endangered, threatened or of special concern under the *Species at Risk Act*, [SC 2002, c 29](#);
 - ii occur in a National Park;
 - iii affect Ramsar wetlands listed under the 1971 [Convention on Wetlands of International Importance](#);
 - iv affect designated World Heritage sites;
 - v involve the harmful alteration, disruption or destruction of fish habitat;or
- (i) are defined as “consequential impacts” in the regulations.

“Likely”, “Impact” and “Effect”

In addition to defining “consequential impacts”, as I noted in my [earlier post](#) drawing on the Australian experience, ensuring that environmental assessment legislation establishes a credible threshold also requires the terms “likely”, “impact” and “effect” to be properly defined. “Likely” must be defined to capture not only those impacts that are “more likely than not” to occur but also those impacts for which there is a real possibility of occurrence. As Justice Branson of the Australian Federal Court of Appeal said in *Booth v Bosworth* [\[2001\] FCA 1453 \(AustLII\)](#),

It might well be thought that it would be consistent with the objects of the [EPBC Act] ... for the expression “likely” [...] to be understood in the sense of “prone”, “with a propensity” or “liable”. Such an approach would be consistent with the “precautionary principle” which informs much environmental protection and conservation work [...] It would consequently tend to avoid the risk to biological diversity and the environment generally which would flow from the need for scientific certainty or confidence about the potential impacts of actions concerning which there has been limited scientific study. (at para 98)

Defining “impact” broadly will help ensure that cumulative and successive direct and indirect impacts are integrated into the assessment process, which is an essential feature of a credible assessment process. As commentators Godden and Peel have noted in their book *Environmental Law Scientific, Policy and Regulatory Dimensions*, the manner in which the Australian [Environment Protection and Biodiversity Conservation Act 1999](#) (EPBC Act) defines “impact” gives it “an enhanced potential to adopt a more integrated assessment framework that can contemplate successive and incremental changes that may cumulatively constitute ‘death by a thousand cuts’” (see [s 527E](#) of the EPBC Act for the definition of “impact” adopted in the Australian legislation). To ensure that the effects captured within the definition of “impact” include the sustainability approach endorsed by both the Expert Panel and the Discussion Paper, “effect” must also be broadly defined. I suggest the following definitions:

effect means:

- (a) any change in the environment;
- (b) any change to the social, cultural or economic conditions of humans, including such changes specific to sex, gender, race, ethnicity, religion, age, and mental or physical disability; or
- (c) any change to a structure, site or thing that is of historical, archaeological, paleontological or architectural significance,

whether such change occurs within or outside Canada;

likely means a real or not remote chance or possibility, and may include less than a 50% chance;

impact means an event, circumstance or effect that:

- (a) is a direct consequence of the project; or
- (b) is a likely indirect consequence of the project, whether within the control of the proponent or not.

“Matters of Federal Interest”

Also essential to establishing a clear threshold is a definition of the areas of federal jurisdiction referred to in the Discussion Paper, or in the terminology of the Expert Panel, “matters of federal interest”, to which the federal impact assessment legislation applies. “At a minimum”, the Expert Panel recommended that matters of federal interest should include: federal lands; federal

funding; federal government as proponent; species at risk; fish; marine plants; migratory birds; Indigenous Peoples and lands; greenhouse gas emissions of national significance; watershed or airshed effects crossing provincial or national boundaries; navigation and shipping; aeronautics; activities crossing provincial or national boundaries and works related to those activities; or activities related to nuclear energy. To the Expert Panel's list I would add: wetlands of international importance; listed World Heritage Sites and those on the Government of Canada's [Tentative List for World Heritage Sites](#); national wildlife areas; marine protected areas; substances that are toxic or capable of becoming toxic; living organisms to which biotechnology has been applied; and, land that is not subject to a treaty or land claim agreement in relation to which there remain outstanding claims to Aboriginal title. I would also allow for matters of federal interest to be designated by regulation. I suggest the following definition:

matters of federal interest means:

- (a) federal lands, meaning
 - i those lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut;
 - ii the following lands and areas:
 - A. the internal waters of Canada, in any area of the sea not within a province;
 - B. the territorial sea of Canada, in any area of the sea not within a province;
 - C. the exclusive economic zone of Canada; and
 - D. the continental shelf of Canada;
 - iii reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the [Indian Act](#) and all waters on and airspace above those reserves or lands;
- (b) species listed under the *Species at Risk Act*, and those species' critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*;
- (c) fish and fish habitat;
- (d) migratory birds under the *Migratory Birds Convention Act*, 1994, [SC 1994, c 22](#), and migratory bird sanctuaries listed under the *Migratory Bird Sanctuary Regulations*, [CRC, c 1036](#);
- (e) marine protected areas established under the *Oceans Act*, [SC 1996, c 31](#), marine wildlife areas and national marine conservation areas;
- (f) national wildlife areas established under the *Canada Wildlife Act*, [RSC 1985, c W-9](#);
- (g) Indigenous Peoples and lands;
- (h) land that is not subject to a treaty or land claim agreement and in relation to which there is an outstanding claim to Aboriginal title;
- (i) greenhouse gas emissions;
- (j) watershed or airshed effects crossing provincial or national boundaries;
- (k) navigation and shipping;
- (l) aeronautics;

- (m) activities crossing provincial or national boundaries and works related to those activities;
- (n) activities related to nuclear energy;
- (o) wetlands of international importance (Ramsar Sites) designated under the 1971 [Convention on Wetlands of International Importance \(Ramsar\)](#);
- (p) listed World Heritage Sites under the 1972 [Convention Concerning the Protection of the World Cultural and Natural Heritage](#) and sites on the Government of Canada's [Tentative List for World Heritage Sites](#);
- (q) substances determined to be toxic or capable of becoming toxic under the *Canadian Environmental Protection Act*;
- (r) living organisms in their natural or modified form to which “biotechnology”, as defined in the *Canadian Environmental Protection Act*, has been applied; and
- (s) any other matter of national importance designated by regulation.

With the threshold properly defined, the Project List trigger and a project specific trigger for non-listed projects can then be developed in a manner that is comprehensive, rational and transparent.

The Project List as a Trigger

Reliance on a new or revised Project List to designate classes of major projects that require mandatory impact assessment can go some way towards ensuring a credible federal impact assessment process. The extent to which the Project List does so, of course, depends on which projects are on the list. To this end, the Discussion Paper offers only a review of the current Project List regulation and the establishment of “clear criteria” and a transparent process to periodically review and update the Project List “to ensure that major projects with the greatest potential impacts in federal jurisdiction are assessed” (at 13). As with the criteria, there is no indication in the Discussion Paper as to what the process might look like – rather this too is a matter in relation to which the Discussion Paper is expressly “seeking your views” (at 9).

As discussed above, the consequential impact threshold should guide determinations of what classes of major projects should, and should not, be on the Project List. Those classes of projects that, in the abstract, exceed the defined threshold should be on the Project List and trigger an impact assessment, as follows:

X.1 (1) A project designated on the Project List is subject to an impact assessment in accordance with the provisions of this Act.

The principles of sustainable development, including the precautionary principle and the principles of inter- and intra-generational equity should be mandatory considerations in determining whether or not a class of projects should be listed, as follows:

X.2 (1) A project must be designated by regulation if a determination is made that the project will have, has the potential to have, or is likely to have, an adverse consequential impact for present and future generations on a matter of federal interest (the *Project List*).

(2) In making a determination under subsection (1)

- (a) all adverse impacts that a project will have, has the potential to have, or is likely to have, must be considered;
- (b) the principles of intra and inter-generational equity must be considered; and
- (c) if scientific uncertainty exists as to the adverse impacts that a project will have, has the potential to have, or is likely to have, the precautionary principle must be applied.

A determination as to whether or not a particular class of projects will have, has the potential to have or is likely to have adverse consequential impacts for present and future generations on a matter of federal interest does not involve a policy choice. This is a scientific and technical question. Given this, decisions as to whether or not projects should be listed on the Project List should be made, or at least informed, by a committee with relevant scientific (including social-scientific), technical and traditional Indigenous knowledge expertise. A credible process could assign an expert committee responsible for creating a Project List at the commencement of the Act (assuming the comprehensive changes to the federal assessment process contemplated in the Discussion Paper will be established in new legislation rather than a less ambitious amendment to *CEAA 2012*) and thereafter conducting a periodic review of the Project List to determine whether non-designated projects should be added to the List and/or designated projects should be removed from the List. Alternatively, a two-step process, providing a measure of “constrained discretion” similar to that used in the *Species at Risk Act*, could be adopted, with the expert committee having responsibility for conducting the periodic reviews and making recommendations to the Minister for determination.

Whatever alternative is chosen, the legislation must specify a period of review, and the period should be relatively short to ensure the Project List remains responsive to changing scientific and technological knowledge. In order to ensure the process is transparent and restores public trust, “any person” should be able to nominate projects to the expert committee for inclusion on, or removal from, the Project List. And while the expert committee should consult life-cycle regulators and other federal departments and agencies with relevant regulatory authority, the expert committee should be independent. Reasons for recommendations and/or determinations as to the addition or removal of projects from the Project List must be provided and any determination should also be open to judicial review. Sample provisions are as follows:

Project List means a regulation made in accordance with section X.2(1)

Project List Expert Committee means the Committee established by section X.3

X.3 (1) The functions of the Project List Expert Committee are to

- (a) immediately upon the commencement of this Act assess the impacts associated with projects or classes of projects and determine which projects or classes of projects will have, have the potential to have, or are likely to have, an adverse impact on a matter of federal interest in a way that is consequential for present and future generations in order to require that the project be designated on the Project List;
- (b) conduct a review every two years after the commencement of this Act to determine whether a non-designated project should be designated on the

Project List or whether a designated project on the Project List should be non-designated; and

- (c) provide advice to the Minister and perform any other functions that the Minister may assign.

(2) The Project List Expert Committee must carry out its functions on the basis of the best available information on the environmental, social, cultural, health and economic impacts of projects, including scientific knowledge, community knowledge and Indigenous traditional knowledge and in a manner consistent with the use of Gender-Based Analysis Plus (GBA+).

X.4 (1) The Project List Expert Committee is to be composed of members appointed by the Minister after consultation with the Canadian Environmental Assessment Agency, and with any experts and expert bodies that the Minister considers to have relevant expertise.

(2) Each member must have expertise relevant to the assessment of project- related bio-physical, social, cultural, health and economics impacts and the use of GBA+, drawn from disciplines such as conservation biology [...] or with expertise in Indigenous traditional knowledge.

(3) Each member of the Project List Expert Committee must exercise discretion in an independent manner.

X.5 (1) Any person may apply to the Project List Expert Committee for an assessment of a project or class of projects for the purposes of determining whether a project or class of projects should be designated on the Project List or whether a project or class of projects should be removed from designation on the Project List.

(2) When an application is made, the Project List Expert Committee must conduct an assessment as to whether the project or class of projects should be designated or removed from designation when the regulation is next reviewed in accordance with paragraph X.3(1)(b).

(3) In conducting the assessment under (2) the Project List Expert Committee must:

- (a) consider all adverse impacts that a project (or class of projects) will have, has the potential to have, or is likely to have;
- (b) consider the principles of intra- and inter-generational equity;
- (c) if scientific uncertainty exists as to the adverse impacts that a project (or class of projects) will have, has the potential to have, or is likely to have, apply the precautionary principle; and
- (d) consider any public submissions made in relation to the assessment.

(4) In conducting the assessment under (2) the Project List Expert Committee may seek advice from life-cycle regulators or other agencies and departments with relevant expertise.

X.6 (1) When the Project List Expert Committee completes an assessment of a project or class of projects, it must provide the Minister and the Canadian Environmental

Assessment Agency with a copy of the assessment and a recommendation as to whether the project or class of projects should be designated by the regulation in accordance with subsection X.2(1) or removed from designation together with reasons for its recommendation. A copy of the assessment, recommendation and reasons must also be included in the public registry.

- (2) On receiving a copy of an assessment from the Project List Expert Committee under subsection (1), the Minister must, within 90 days, make a decision to
 - (a) accept the assessment and add the project or class of projects to the Project List;
 - (b) decide not to add the project or class of projects to the Project List; or
 - (c) refer the matter back to Project List Expert Committee for further information or consideration.
- (3) In reaching a decision under subsection (2), the Minister must
 - (a) consider all adverse impacts that a project or class of projects will have, has the potential to have, or is likely to have;
 - (b) consider the principles of intra- and inter-generational equity; and
 - (c) if uncertainty exists as to the adverse impacts that a project or class of projects will have, has the potential to have, or is likely to have, apply the precautionary principle.
- (4) The Minister must include in the public registry a decision made under subsection (2), which must include a statement setting out the reasons for the decision.
- (5) The Minister must, by order, amend the Project List to designate the project or class of projects or remove the project or class of projects in accordance with the decision made under this section.

Mechanism to Trigger the Impact Assessment Process for Projects Not Designated on the Project List – the Project Specific Trigger

The Project List alone is too blunt an instrument to ensure a credible federal assessment process. The impact of a project varies depending on the receiving environment. A small project located in, for example, an ecologically or culturally sensitive receiving environment may have the potential to result in consequential adverse impacts. As these impacts are not possible to anticipate in the abstract, the project may not be designated on the Project List, yet a federal impact assessment is still warranted. The Discussion Paper recognizes this potential gap and proposes to address it by “maintaining authority to designate a non-listed project that could have adverse impacts on areas of federal jurisdiction where warranted, based on clear criteria and a more transparent process” (at 18). For its part, the Expert Panel recommended that this gap be addressed by the inclusion of a trigger based on statutory criteria requiring an impact assessment of projects that have the potential to impact present and future generations in a way that is consequential. The Expert Panel also recommended a trigger that “allows proponents or any person or group to request that a project require a federal project IA” with the ultimate decision as to whether an impact assessment is required in this situation based on “applicable statutory

criteria” (at 57). While seemingly dissimilar in approach, an express threshold and a transparent process may go some way to incorporating the recommendations of the Expert Panel and the proposal considered in the Discussion Paper to build an effective trigger to support the Project List to meet the objectives of a credible federal assessment process and treat all projects equitably.

Again, to create a credible federal impact assessment process, the threshold used to determine whether a non-designated project triggers a federal impact assessment should be the same as that used to determine whether a designated project triggers a federal impact assessment. The only difference is that this trigger must operate on a project specific basis and will therefore be informed by the actual, potential, or likely impacts of the project on the specific receiving environment. This proposal departs from the Expert Panel’s recommendation that the criteria for a project specific trigger “should be clear so that discretion is not required” meaning that “no decision should be required for ... a project that meets the criteria of consequential impact” (at 57). However, as I noted in my [earlier post](#) drawing lessons from Australia’s federal impact assessment process, it is difficult to state an impacts based threshold with the level of specificity suggested by the Expert Panel. Indeed, such an approach may not even be desirable. While this does lead to valid concerns about resulting uncertainty as to which projects must undergo federal impact assessment, this uncertainty is to some extent unavoidable if smaller projects with the potential to cause consequential impacts are not to fall through the cracks.

However, to a certain extent, these concerns can be reduced if careful attention is paid to creating a clear and transparent process in relation to a project-specific trigger. Drawing on the Australian approach, the approach I propose starts with the prohibition backed by a mechanism for the proponent and/or relevant government decision-makers to refer the project into the assessment process. This offers an effective means to ensure proponents undertake self-assessment of the potential impacts associated with their project and refer into the process if required. Sample provisions follow:

X.7 It is an offence for a project that will have, has the potential to have, or is likely to have, an adverse consequential impact for present and future generations on a matter of federal interest to proceed without approval under this Act.

X.8 (1) A person proposing to commence a project not designated on the Project List that the person believes may be prohibited under section X.7 must refer the proposal to the Minister for the Minister’s decision whether or not the project is subject to an impact assessment in accordance with the provisions of this Act.

(2) A person proposing to commence a project not designated on the Project List that the person believes is not prohibited under section X.7 may refer the proposal to the Minister for the Minister’s decision whether or not the project is subject to an impact assessment in accordance with the provisions of this Act.

X.9 (1) A Province, Territory or agency of a Province or Territory that is aware of a proposal by a person to commence a project may refer the project to the Minister for a decision whether or not an impact assessment is required in accordance with the provisions of this Act, if the Province, Territory or agency has administrative responsibilities relating to the project.

(2) A Federal life-cycle regulator or agency that is aware of a proposal by a person to commence a project may refer the project to the Minister for a decision whether or not an impact assessment is required in accordance with the provisions of this Act, if the Federal life-cycle regulator or agency has administrative responsibilities relating to the project.

(3) If the Minister believes a person proposes to commence a project that the Minister thinks may be prohibited by section X.7, the Minister may request the person to refer the project to the Minister.

Following the approach taken in the Australian *EPBC Act*, in the event a project that should be referred is not, an interested person or organization should be given the ability to seek an injunction to stop the commission of an offence, as follows:

X.10 (1) If a person has engaged, engages, or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:

- (a) the Minister;
- (b) an interested person; or
- (c) a person acting on behalf of an unincorporated organisation that is an interested person

may apply to the Federal Court for an injunction.

(2) If a person has engaged, is engaging, or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.

When a referral is made, a decision must be made, on a project-specific, case-by-case basis, whether the threshold is crossed and a federal impact assessment process is triggered. While the definition of “consequential impact” proposed above provides strong guidance to the decision-maker, a clear and transparent decision-making process is required to ensure this trigger is both credible and inspires public trust. Opportunities must exist for relevant life-cycle regulators, agencies and departments, Aboriginal treaty, title and rights holders, and the public to provide input before a decision is made as to whether or not the process is triggered. The legislation must impose mandatory considerations on decision-makers. Decisions as to whether a project does, or does not, cross the threshold and trigger the federal impact assessment process must be publicly available with reasons. The decision-maker should be able to request more information or require the larger project to be referred before a decision is made as to whether the project triggers the impact assessment process. Suggested provisions are as follows:

X.11 After receiving a referral of a project, the Minister may request further information from the proponent before making a determination as to whether an assessment is required under the Act.

X.12 Before making a determination as to whether an assessment is required under the Act, the Minister must invite comment on the project from:

- (a) relevant life-cycle regulators, federal agencies and departments;
- (b) Aboriginal treaty, title and rights holders whose interests are potentially affected by the project;
- (c) relevant provincial and territorial Ministers; and
- (d) the public

before a decision is made as to whether or not the process is triggered.

X.13 (1) If the Minister receives a referral in relation to a project and the Minister is satisfied the project is a component of a larger project the person proposes to take on, the Minister may decide to not accept the referral unless the larger project is referred.

(2) Any decision under subsection (1) must be made available by the Minister, with reasons, to the public.

X.14 In making a determination whether a project that has been referred under section XX requires an assessment under the Act, the Minister,

- (a) must consider all comments received under section X.12; and
- (b) must:
 - (i) consider all adverse impacts that a project will have, has the potential to have, or is likely to have on a matter of federal interest;
 - (ii) consider the principles of intra- and inter-generational equity; and
 - (iii) apply the precautionary principle, if scientific uncertainty exists as to the adverse impacts that a project will have, has the potential to have, or is likely to have.

X.15 Upon deciding whether a project referred to the Minister under section X.7 and X.8 requires an impact assessment, the Minister must:

- (a) give written notice of the decision, with reasons for the decision, to the proponent of the project; and
- (b) make available to the public written notice of the decision, with reasons for the decision.

Excluding Some Projects that Cross the Threshold from Federal Impact Assessment

Finally, it is worth noting that the Discussion Paper also refers to “maintaining the flexibility to exclude designated projects from assessment under certain conditions based on clear criteria and a transparent process” (at 18) Based on the approach taken above, I would propose that this be reframed to allow for the exclusion of projects that otherwise cross the threshold in specified circumstances. Here I propose the following projects should be excluded: projects approved under an approved strategic assessment; projects approved under a regional assessment, provided the consequential impacts of the project have been fully considered in the assessment and the project is undertaken in accordance with the conditions specified in the assessment; and, projects falling within a specified class of projects declared to be exempt provided they are undertaken in accordance with an accredited code or process specified by way of regulation. While the Discussion Paper contemplates a role for life-cycle regulators in the assessment of non-

designated projects, for those projects with the potential to cause consequential impacts for present and future generations, I propose that life-cycle regulators, together with relevant federal agencies and departments, are assigned such a role through a strategic assessment process under the Act. In that way, it will possible to ensure that all consequential impacts are managed within the context of the federal impact assessment legislation and its objectives.

Conclusion

A credible federal impact assessment process must be designed to ensure that those projects with consequential impacts for present and future generations trigger the impact assessment process. A defined threshold, together with clear and transparent processes, could go a long way to ensuring that this occurs. This post endeavours to provide the government with specific provisions that would satisfy these criteria, and will be submitted to the government as part of its consultation process.

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