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Indigenous Engagement and Consideration in the Newly Proposed *Impact Assessment Act*: The Fog Persists

By: David V. Wright

Bill Commented On: [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*

On February 8, the Trudeau government tabled [Bill C-69](#). This is a complex Bill that aims to overhaul several of Canada's foundational environmental laws, with a particular focus on the regime for review and approval (or rejection) of major projects such as mines, dams and pipelines. My colleagues have also generated ABlawg posts on this Bill; you can read them [here](#), [here](#), and [here](#) (with more to come).

In this post, I focus on Indigenous engagement dimensions of the proposed *Impact Assessment Act*. First, I offer some introductory comments on the path to this point, then I move on to a high-level inventory of notable Indigenous engagement features in the proposed Act, noting differences from the current assessment regime in places. I then offer some preliminary reflections and comments with respect to the proposed Act in relation to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the duty to consult. While the latter sub-topics could be major research projects in and of themselves, this post simply puts forward starting points for further examination, and, hopefully, further discussion toward improving the proposed legislation before it is finalized. In a nutshell, the proposed Act builds in more authority and avenues for Indigenous engagement, but fails to seize the opportunity to generate much needed clarity around UNDRIP and the duty to consult in the impact assessment realm. This, unfortunately, may serve to thicken a fog that has persisted in this area for some time.

Path to Bill C-69

Bill C-69 follows through on key [election commitments](#) of the Trudeau Government. Soon after the election, the Prime Minister's [mandate letter](#) to Catherine McKenna, Minister of Environment and Climate Change Canada (ECCC), directed her to “immediately review Canada's environmental assessment process” to, among other things, “regain public trust”. Similar direction was given to the Minister of Natural Resources [with respect to modernizing the National Energy Board](#) and its enabling statutes, the Minister of Fisheries [with respect to the Fisheries Act](#), the Minister of Transport [with respect to federal navigation legislation](#), all with a focus on restoring lost protections and incorporating modern safeguards. Together, the four regimes were reviewed under the umbrella of the federal government's [Review of Environmental and Regulatory Processes](#). To follow through on direction to ECCC specifically, Minister

McKenna set up a comprehensive review process led by an [Expert Panel](#). That Panel's work included substantial engagement across the country, including Indigenous engagement sessions. The Panel concluded its work with the release of a final report on April 5, 2017, entitled, [Building Common Ground: A New Vision for Impact Assessment in Canada](#).

That report, and the three other reports generated through the reviews of the energy, fisheries and navigation regimes, ultimately led to the federal government's release of a [Discussion Paper](#) last June, which purported to consolidate all the work of the reviews in a high-level proposal for overhauling the regulatory regimes. A widely held view at the time was that much was lost in the translation between the review reports and the Discussion Paper (see this excellent [post](#) from last year by my colleague, Sharon Mascher). I think it's safe to say that much – though not all – has also been lost in the translation from the Expert Panel's work to the proposed *Impact Assessment Act*, including with respect to Indigenous engagement. As indicated in Martin Olszynski's [ABlawg post](#), the proposed *Act* could be fairly characterized as a “bulked” up version of the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#). Or, to use a different analogy, I see Bill C-69 as a relatively modest renovation of the existing statute rather than the tear down and rebuild that many Indigenous groups and others hoped for (and made [submissions to the Expert Panel](#) in support of).

Summary of Indigenous Engagement in the Proposed *Impact Assessment Act*

Opening provisions

Indigenous dimensions figure prominently from the outset starting with two preambular clauses. One focuses on integrating scientific information and “the traditional knowledge of Indigenous peoples”, and the other emphasizes the Government of Canada's commitment to respecting the rights of Indigenous peoples of Canada under s 35 of the *Constitution Act, 1982*, and to fostering reconciliation and working in partnership with Canada's Indigenous peoples. This tone and prominence continues in the purposes set out in s 6, which explicitly includes the purposes of promoting cooperation and coordinated action between governments, including “Indigenous governing bodies” (s 6(e)); promoting communication and cooperation with Indigenous peoples (s 6(f)); ensuring respect for the rights of Indigenous peoples in the course of impact assessments and decision-making (s 6(g)); and ensuring that an impact assessment takes into account traditional knowledge of the Indigenous peoples of Canada (s 6(j)).

It is also noteworthy that the definitions in s 2 include the new term “Indigenous governing body”, which means “a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*”. The definition of “jurisdiction” in s 2 also includes reference to Indigenous governing bodies, which has particular significance in the context of cooperation and coordination of impact assessments, which I discuss below. The s 2 definition of “Indigenous” makes clear that throughout the *Act* this term has the same meaning as the definition of Aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*. This is consistent with recent practice of the federal government to primarily use the term Indigenous, not Aboriginal. Finally, s 3 is a non-derogation clause explicitly clarifying that

nothing in the Act would abrogate or derogate from protections provided under s 35 of the *Constitution Act, 1982*. This is an expected but important provision.

Planning Phase and Scoping

The proposed *Act* now features an initial “planning phase”, which is basically an expanded version of *CEAA, 2012*’s screening step. There are several notable features in the planning phase. First, the Agency *must* offer to consult with any Indigenous group that may be affected by the proposed project (s 12, emphasis added). Next, the Agency’s summary of issues raised by any Indigenous group must be provided to the project proponent as part of a summary of relevant issues (s 14(1)) and that summary must be posted on the Agency’s internet site (s 14(2)). In then making its determination as to whether an impact assessment is required (often referred to as a “screening decision”), the Agency must consider several factors set out in s 16(2), including “any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada”. Section 16(3) requires that the Agency post that decision on the registry, along with reasons (such legislated requirement for reasons appears in several places throughout the *Act*).

All of this is to take place within 180 days (s 18), which is significantly longer than the 45-day period for the screening step under *CEAA, 2012*. This longer timeframe is potentially good news in terms of Indigenous engagement, and the total time can be extended by the Minister a single time by up to 90 days (s 18(3)) or by the Governor in Council basically indefinitely (18(4)). However, what this new planning phase will practically look like will be further determined through regulation, guidance and interpretation. The *Act* essentially sets out a few check points along this new planning phase pathway. In its present form, it looks to be a primarily proponent-driven phase, meaning Indigenous groups and proponents alike would have to work hard to ensure meaningful engagement during this important early stage (which may well be a challenge for some capacity and resource-strained Indigenous groups).

The proposed *Act* contains two impact assessment process options: a standard assessment and a review panel. This is virtually identical to *CEAA, 2012*. Both processes would assess and take into account certain effects of designated projects. The scope of effects pertaining to Indigenous peoples that the proposed *Act* would require to be assessed is very similar to those in *CEAA, 2012*. The definition of “effects within federal jurisdiction” in s 2 (which is mirrored in the general prohibition clause in s 7) sets out the specific effects with respect to the Indigenous peoples that are scoped in. Specifically, paragraphs (c) and (d) of the definition refer to, with respect to Indigenous peoples, impacts from the project on “physical and cultural heritage”; “the current use of lands and resources for traditional purposes”; “any structure site or thing that is of historical, archaeological, paleontological or architectural significance”; as well as “any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada”. In this regard, the scope of the assessment to be done has changed minimally from *CEAA, 2012*. As I discuss below, however, this scope of assessment is to some degree augmented by other provisions requiring broad consideration of potential impacts on the rights of Indigenous peoples (e.g. s 22(1)(c)).

The actual application of the *Act* will be primarily dictated by a project list, which is the same approach as *CEAA, 2012*. The list will, again, be set out in a regulation (pursuant to s 109(b)),

something on which the government [is now consulting](#). Similar to *CEAA, 2012*, the proposed *Act* provides the Minister a power to designate projects not on the list. A new feature in that mechanism is the requirement that before making such an order, the Minister must take into account any adverse impact that a physical activity may have on the rights of the Indigenous peoples of Canada (s 9(2)). Presumably some engagement would take place with potentially affected Indigenous groups, though the degree of such would likely be determined on a case-by-case basis.

Cooperation and Substitution

Perhaps the most *potentially* significant development in terms of Indigenous engagement and consideration in the proposed federal assessment regime comes through the *Act*'s expanded basis for recognition of – and cooperation with – Indigenous groups. Section 21 requires the Agency (in a standard assessment context) or Minister (in a review panel context) to offer to consult and cooperate on impact assessment with other jurisdictions, including an “Indigenous governing body”, as defined in s 2. For Indigenous governing bodies under a land claim agreement or under another Act of Parliament or Act of a legislature of a province, including legislation that implements a self-government agreement, this requirement to offer to consult and cooperate automatically applies. For this requirement to apply to other Indigenous governing bodies, such groups must first enter into an agreement or arrangement under s 114(e). This latter pathway broadens the basis for cooperation beyond what's offered in the current regime. *CEAA, 2012*'s definition of jurisdiction only included Indigenous land claim governance bodies or Indigenous groups that have a self-government agreement in place. While this new basis pales in comparison to the notion of far-reaching inherent Indigenous jurisdiction (over impact assessment and beyond), it could be viewed as an improvement that holds the potential to significantly expand opportunities for coordinated or joint assessments between the federal government and Indigenous groups (by way of broader context, see [this example](#) of an assessment independently completed by the Tsleil-Waututh Nation). Notably, there is also a basis for cooperation between the Minister and Indigenous groups on Regional Assessments under s 93(1).

Like other jurisdictions recognized under the proposed *Act*, Indigenous groups may also substitute their own assessment process in accordance with the powers and requirements set out in ss 31-35. In cases of a proposed substitution (apparently including Indigenous groups' own impact assessment), the Minister must be satisfied that the substituted process will include consultations with any Indigenous group that may be affected by the project (s 33(1)(d)).

Factors to be Considered

All impact assessments under the proposed *Act*, including in cases of substitution (ss 31 – 35), would have to take into account the significantly expanded list of factors set out in s 22(1). Four of these twenty factors explicitly focus on Indigenous elements. They are as follows:

- the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982* (s 22(1)(c));

- traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project (s 22(1)(g));
- considerations related to Indigenous cultures raised with respect to the designated project (s 22(1)(l));
- any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project (s 22(1)(q)).

Meaningful consideration of these factors in impact assessment would require a significant amount of Indigenous engagement throughout the assessment process (though the specifics would be determined on a case-by-case basis). Of particular note in these specific factors is that the taking into account of traditional knowledge of Indigenous peoples would be mandatory. This was optional under *CEAA, 2012* (s 19(3)). It is also notable that the factor in s 22(1)(q) is another avenue for an Indigenous group to integrate its own assessment into the federal assessment, even if not formally coordinated under s 21 or s 114. However, discretion is granted to the Agency and Minister to scope this particular factor out pursuant to s 22(2).

Review Panel Composition

The proposed *Act* puts in place several additional requirements regarding composition of review panels, specifically with respect to panel appointees' knowledge of Indigenous interests and concerns. For example, s 41(1) would require that the Minister appoint "one or more" persons to a review panel who have knowledge or experience relevant to the designated project's anticipated effects *or* "knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment" (note that, given the "or", this is not mandatory). Pursuant to s 42(d), this appointee attribute would also apply in situations of a joint review panel (again, not mandatory). Similarly, it would apply with respect to review panels conducting assessments of designated projects regulated under the *Nuclear Safety and Control Act*, [SC 1997, c 9](#), (s 44(2) of the proposed *Act*) and under the new *Canadian Energy Regulator Act* (s 47(2) of the proposed *Act*). It would also apply to review panels struck for assessing a designated project with activities under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, [SC 1988, c 28](#), or the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, [SC 1988, c 28](#), (see the part of Bill C-69 titled "Amendments to the Impact Assessment Act" at paras 6 and 7, which would include these provisions as s 46.1 and s 48.1 of the proposed *Act*, respectively). Notably, there is no explicit requirement for there to be direct representation of Indigenous peoples on these panels. However, s 50 requires the Minister to develop rosters of people who may be appointed as members of review panels. One would hope that the Minister and Agency will ensure proportionate and appropriate representation of Indigenous individuals on that roster, and ultimately on review panels.

Decision-Making

As noted in Martin Olszynski's [post](#), under the proposed *Act*, final decision-making remains in the political realm. This is one of the starkest illustrations that the *Act* is a renovation and not a rebuild. There are, however, a few changes worth noting. One of the most significant changes is the explicit requirement that the Minister's or Governor in Council's final determination (depending on whether it is a standard assessment or review panel and, regarding the former,

depending on whether the Minister refers the decision to the Governor in Council) turns on whether the project, including adverse effects, is in the public interest. Section 63 sets out a non-exclusive list of five factors that must be considered in making this public interest determination. The factor in s 63(d) is explicitly focused on Indigenous peoples: “the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982”.

This is a significant change from *CEAA, 2012*, which, to simplify, only required a determination of whether the “significant adverse environmental effects” of the project were justified in the circumstances. That final decision-making step under *CEAA, 2012* in essence created a black box, including and especially with respect to how impacts on Indigenous peoples were factored in. In this regard, the proposed *Act* could be viewed as an improvement, notwithstanding challenges that can come with leaving the final decision as a political one (e.g. unpredictability, and, as I discuss below, a persisting fog around the duty to consult). Finally, it should be noted that s 65 requires that the Minister’s decision statement must include “detailed reasons” that demonstrate consideration of all the public interest factors listed in s 63. This seems to set the stage for better transparency and accountability over the *CEAA, 2012* regime.

To be clear, however, the architecture of the proposed *Act* leaves in place decision-making that is ultimately unilateral in nature, albeit with enhanced requirements for collaboration with Indigenous groups en route to that final decision. Put another way, similar to the reality that there is no hard and fast “no go” rule focused on the environment (as noted by Professor Olszynski), the proposed *Act* contains also no hard line with respect to Indigenous rights and interests (which I briefly discuss further in relation to UNDRIP below).

Projects on Federal Lands and Outside Canada

The proposed *Act* retains the *CEAA, 2012* process for informal assessment of projects that are on federal lands or outside of Canada and not on the designated project list. This includes 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*, RSC 1985, c I-5, and all waters on and airspace above those reserves or lands. The environmental effects definition for this part of the *Act* includes an element focused on Indigenous peoples: “environmental effects means changes to the environment and the impact of these changes on the Indigenous peoples of Canada and on health, social or economic conditions”. Additionally, s 84 sets out factors that must be considered. Similar to s 21(1)(c) discussed above, s 84(a) requires consideration of “any adverse impact that the project may have on the rights of the Indigenous peoples of Canada”. And similar to s 21(1)(g), consideration of traditional knowledge of Indigenous peoples is required in these types of assessments (s 84(b)).

Objects, Powers and Advisory Committees of the Impact Assessment Agency

The part of the proposed *Act* focused on the Impact Assessment Agency contains several specific provisions to facilitate engagement of Indigenous individuals and groups. These go further and are more explicit than what was contained in *CEAA, 2012*. First and most significantly, the

Agency's objects make clear that it is the Agency's responsibility to coordinate consultation with Indigenous groups. Section 155(b) sets out this object: "to coordinate — during the period that begins on the day on which a copy of the description of the project referred to in subsection 10(1) is posted on the Internet site, and that ends on the day on which the decision statement in respect of the project is issued — consultations with Indigenous groups that may be affected by the carrying out of a designated project" (on a bureaucratic side note, this raises a question about how the role of the [Major Projects Management Office](#) will now change). At a broader level, an Agency object in s 155(i) is also to engage in consultation with the Indigenous peoples of Canada on policy issues related to the *Act* (this is virtually identical to s 105(g) of *CEAA, 2012*).

The proposed *Act* includes new requirements to create an "expert committee" and an "advisory committee". The former is set out in s 157 and requires that at least one committee member be an Indigenous person. The latter, set out in s 158, is focused specifically on the "interests and concerns of Indigenous peoples" and requires that at least one member be an Indigenous person. It is also noteworthy that the power given to the Agency to establish research and advisory bodies set out in s 156(2)(e) explicitly includes reference to "the interests and concerns of Indigenous peoples of Canada". Finally, it is interesting to note that while s 117 requires the Minister to establish an advisory council, there is no legislative requirement for Indigenous representation on that body.

UNDRIP, The Duty to Consult, and the *Act*

What perhaps stands out in the proposed *Act* more starkly than anything else is that there is no mention at all of the *United Nations Declaration on the Rights of Indigenous Peoples* ([UNDRIP](#)). In fact, there is no mention of it anywhere at all in Bill C-69. What does this mean? A deeper analysis is definitely due on this specific question and on duty to consult dimensions, but I'll offer a few early thoughts.

For starters, this is a clear instance of the proposed legislation not fully adopting key suggestions of the Expert Panel (which mentioned UNDRIP more than 50 times), not to mention the many [submissions](#) to the Expert Panel from Indigenous and non-Indigenous groups that called for explicit reference to UNDRIP in legislation. More fundamentally, though, deliberately omitting reference to UNDRIP is sure to widen the expectations gap that has emerged between Indigenous groups and the federal government with respect to what implementing UNDRIP means in Canada. This is a particularly wide gap in the context of review and approval of major projects where the principle of free, prior and informed consent (FPIC) is often front and center. Building on my early point above in relation to decision-making, one has to wonder whether omitting UNDRIP in the Bill is the government quietly taking the position that FPIC cannot be squared with keeping ultimate decision-making authority as a unilateral decision to be made by the Crown. If so, this is a major problem for meaningfully – let alone collaboratively – pursuing the overarching objective of reconciliation. If nothing else, the government's approach with Bill C-69 certainly underscores that we are a long way from any kind of mutual understanding of what FPIC means.

Of course, there are other big moving parts shifting under and around Bill C-69. Regarding UNDRIP, the most notable development is the progression of [Bill C-262](#), which just passed

second reading. That statute would require the Government of Canada to “take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples” and to put in place an action plan to achieve this. There is also the [announcement of the PM](#) last week about a new “rights recognition framework” and associated legislative changes which may well have relevance in the impact assessment realm (but for now the announcement is rather thin on detail). Meanwhile, the “[review of laws and policies](#)” continues to roll out, which purports to “examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission’s Calls to Action”. There is also the new (though everything seems new, really) [Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples](#), released in July 2017, which cites UNDRIP as part of its underpinning. Together, finalizing and implementing these changes and others may well max out the s 35 “[full box of rights](#)” in a way that, over time, provides for the proposed *Act* to be a tool through which to implement UNDRIP and FPIC. But one has to think that more outside the “box” thinking should be incorporated into today’s legislative changes in a way that helps Bill C-69 better articulate the role it will play.

Finally, with respect to the duty to consult in relation to the proposed *Act*, two points stand out. First, the *Act* offers some – but far from total – clarity on the Agency’s role in consultation. Specifically, s 155(b) places responsibility with the Agency to coordinate consultation from the very first step of an impact assessment to the very last. This is welcomed clarity in a sense, especially as a basis and signal that the Crown will likely rely on impact assessment processes to fulfill the duty to consult. However, when viewed against the complex and evolving body of relevant jurisprudence, these changes seem superficial at best. At worst, they may generate more confusion and, ultimately, more litigation.

The changes in the proposed *Act* certainly don’t provide a complete answer regarding to what extent a review panel (in review panel assessments) can or ought to assess whether the duty to consult (and, if appropriate, accommodate) has been fulfilled. Contrary to the Expert Panel’s recommendation that the impact assessment authority be clearly designated an agent of the Crown that is accountable for the duty to consult and accommodate (Expert Panel report at p 31), the *Act* perpetuates a fog that has lingered around this question for some time now. If anything, it would seem that by leaving ultimate decision-making authority with the Minister or Cabinet, the *Act* makes it such that it is virtually impossible for the Agency or review panel process to completely fulfill the duty or assess whether the duty has been fulfilled (for those thinking [Gitxaala](#), we are in the phase four neighbourhood here). This is a product of the *Act* retaining a sequence whereby a further – and final – determination is made after the matter is out of Agency or review panel hands. In this way, the decision in *Gitxala Nation v Canada*, [2016 FCA 187 \(CanLII\)](#), especially its comments regarding review panels, will continue to be relevant given the ruling in that case that the subsequent final determination made by Cabinet attracts a further duty to consult. I would be remiss not to add that it seems an unfortunate irony that at a time when the Supreme Court of Canada has just clarified that a tribunal may completely fulfill the duty to consult and assess whether the duty has been fulfilled, *if the tribunal’s enabling legislation supports such authority (Clyde River (Hamlet) v Petroleum Geo-Services Inc., 2017 SCC 40*

([CanLII](#)); and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, [2017 SCC 41](#)), this new cornerstone statute for major project approvals in this country is drafted without embracing this valuable and timely guidance from the court. (*fog horn sound effect*)

Second, and linking back to UNDRIP dimensions, a “no” from an Indigenous group during the course of Crown consultation does not necessarily mean no under the *Act* as it is presently drafted. Rather, all the enhanced measures and consideration of Indigenous peoples still boil down to essentially procedural rights (notwithstanding potential accommodation and associated mitigation measures) that lead to Indigenous rights, interests and concerns being placed within the broader public interest determination to be made by Minister or Cabinet (even if Indigenous rights constitute a “special public interest that supersedes other concerns”, as so characterized in *Clyde River*, at para 40). Put another way, while the *Act* may set the stage for meaningful and “deep” consultation within the impact assessment process, the Crown may still choose to consider it not so deeply.

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