ABlawg.ca

February 26, 2018

Oversight and Enforcement in Bill C-69 Regarding the *Impact Assessment Act* and the *Canadian Energy Regulator Act*

By: Shaun Fluker

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*

This post continues the conversation on ABlawg regarding Bill C-69. Martin Olszynski and Nigel Bankes provided an overview of the proposed *Impact Assessment Act* and *Canadian Energy Regulator Act* here and here. This post examines some of the oversight and enforcement provisions in the Bill, looking specifically at changes with respect to oversight by the Federal Court and enforcement of project conditions. There are a couple of problems which deserve some attention as Bill C-69 makes its way through the legislative process.

Judicial Oversight

The Expert Panel recommended that an independent agency with quasi-judicial status have decision-making authority on federal environmental assessment (EA) and that these decisions be subject to an appeal before the Governor in Council on prescribed errors (Building Common Ground: A New Vision for Impact Assessment in Canada at pages 51-52). As noted in Martin Olszynski's post, Bill C-69 does not incorporate this recommendation and instead retains a politicized decision-making structure with final determinations made by either the Minister or Governor in Council under sections 60 to 62 on whether a designated project is in the public interest. As Martin points out, the rejection of these and other processes put forward by the Panel in the name of democratic oversight is significant and deeply disappointing considering the submissions made in the review process calling for a more independent and scientifically focussed federal EA process.

Aggrieved parties will turn to the courts for a remedy when the EA process leaves them unsatisfied. Bill C-69 is silent on an appeal or judicial review of public interest determinations by the Minister or Governor in Council under sections 60 to 62. Given this silence, judicial review is available pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Section 18.1 provides for an application by the federal Attorney General or any person directly affected to the Federal Court for judicial review of the EA public interest decision on a designated project. However, the prospect of judicial review seems remote given the politicized decision-making structure inherent in a public interest determination made by the Minister or Governor in Council. There is a long line of authority in Canadian administrative law that largely immunizes from judicial review broad policy decisions made by the Executive. A very recent illustration of

this in the context of environmental assessment is found in *Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII) at paras 128 to 157.

There is, however, another notable logistical complication in Bill C-69 that will arise in judicial review applications concerning a Governor in Council decision on whether to approve a designated project subject to the regulatory supervision of the Canadian Energy Regulator and the EA process under the *Impact Assessment Act*. Nigel Bankes' post describes how the same review panel will be charged with the preparation of two reports (or two parts within the same report) to discharge its mandate to make recommendations on a pipeline as a designated project under the *Impact Assessment Act* and *Canadian Energy Regulator Act*. One report (or part of the report) will concern a recommendation on whether to issue the certificate of public convenience and necessity for the pipeline. Another report (or part of the report) will concern the socio-ecological effects which are likely to be caused by the pipeline project. Both of these reports (or parts of the report) will go to the Governor in Council for a decision on whether or not the pipeline is in the public interest and whether to issue the certificate, and on what conditions. The complication arises when counsel is tasked with seeking judicial review of this Governor in Council decision (or decisions). Specifically, which court hears the application(s)?

Under the current provisions in Bill C-69, the portion of the Governor in Council decision concerning whether the pipeline is in the public interest under the *Impact Assessment Act* is subject to judicial review at the Federal Court and the portion of the decision concerning whether to issue a certificate of public convenience and necessity under the *Canadian Energy Regulator Act* is subject to judicial review at the Federal Court of Appeal. Moreover, in the case of the *Canadian Energy Regulator Act* approval, counsel will have to first seek leave or permission from the Federal Court of Appeal to go ahead with the application for judicial review under section 188. This inconsistency promises to create unnecessary complications that will require the Federal Court to deal with consolidation applications at the outset of a judicial review for designated projects subject to the *Canadian Energy Regulator Act* – see for example *Alberta Wilderness Association v Express Pipelines Ltd*, (1996) 137 DLR (4th) 177 (FCA), 1996 CanLII 12470. It would be best if this were addressed as Bill C-69 makes its way through the legislative process.

Enforcement

The Expert Panel heard concerns that under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (CEAA 2012), project proponents are not held accountable for non-compliance with conditions set out in EA approvals. In response to these concerns the Panel recommended (1) more resources for compliance and enforcement, (2) an increase in maximum fines for offences to enhance deterrence, and (3) a broader range of sentencing options other than fines (Building Common Ground: A New Vision for Impact Assessment in Canada at pp 70-72).

My discussion on enforcement will focus on non-compliance with an EA approval or the conditions attached thereto. Section 7 of Bill C-69 prohibits a project proponent from carrying out a designated project without either (1) a decision from the Agency that no EA approval is required or (2) compliance with conditions set out in an EA approval issued under section 64. Section 144 makes it an offence to contravene section 7 or to contravene a condition set out in an

EA approval under section 64. These provisions are more or less the same as what is in CEAA 2012.

The significant increase in maximum fines for committing an offence is noteworthy. For the corporate offender in particular, section 144(4) in Bill C-69 sets the maximum fine at $4 million for a first offence and $8 million for subsequent offences, as compared to $200,000 and $400,000 under section 99 of CEAA 2012.

However, Bill C-69 misses the mark on providing a broader range of sentencing options. It is surprisingly odd that the *Canadian Energy Regulator Act* includes provisions in section 175 that allow for creative sentencing options for offences concerning the release of substances from a pipeline, but the *Impact Assessment Act* does not provide for such options where a project proponent fails to comply with an EA approval condition. Surely this is an oversight.

Creative sentences are increasingly being used in environmental enforcement (see my earlier post on that topic here). At a minimum, the creative portion of a sentence is a sanction that is additional to the traditional penalty of a monetary fine. This principle of additionality is a key characteristic; a creative sentence is not imposed in substitution for a fine, it is in addition to the fine. The creative order is commonly thought of as more effective than a fine as a means to generate environmental good from a bad situation.

The authority of a trial judge to impose a creative sentence on an offender must be set out in legislation governing the offence – hence the surprising omission in Bill C-69 regarding the *Impact Assessment Act*. This omission is particularly noteworthy since the federal government has taken the lead in this area with the enactment of creative sentencing provisions in almost a dozen federal environmental statutes since 2009. These provisions are almost, if not entirely, a standard set as is provided in section 175 of the *Canadian Energy Regulator Act* – which were simply carried forward from section 132.1 of the existing *National Energy Board Act*, RSC 1985 c N-7. A sample of possible creative orders for an environmental offence would include: prohibiting the offender from engaging in an activity; directing the offender to take specified action, including the preparation of a pollution prevention plan or the implementation of an environmental management system; directing the offender to pay monies to the federal Crown for the purpose of promoting the conservation or protection of the environment; directing the offender to publish, or notify aggrieved persons specifically on, the details of its offence and subsequent punishment; directing the offender to pay for the cost of remedial or preventative action taken as a result of the offence; directing the offender to pay for environmental research, fund educational programs in environmental studies, or provide funding to community groups performing environmental work; requiring the offender to surrender regulatory authorizations; and prohibiting the offender from applying for new regulatory authorizations.

Federal environmental statutes also typically allow for, or require, fines collected to be placed into the federal Environmental Damages Fund. Monies directed into the Fund are administered by Environment Canada and provide funding for restoration, research, and educational projects. Environment Canada solicits applications for funding by region and specifies what type of projects have preference in receiving money from the Fund. Environment Canada also allocates

the aggregate amount of funding available by region. The following table sets out the allocation of funding by Environment Canada, as published in February 2018:

Jurisdiction	Funds Available ($)	Type of Project
British Columbia	2,850,000	Conservation, restoration, or protection of fish and fish habitat
Alberta	370,000	Conservation, restoration and protection of, fish, fish habitat and the environment
Manitoba	50,000	Endangered species recovery and protection
Quebec	112,500	Restoration and research in relation to fish habitat
New Brunswick	64,000	Conservation, management, or protection of fish and fish habitat
Newfoundland and Labrador	40,000	Conservation, management, or protection of fish and fish habitat

(Source: Environmental Damages Fund).

Given how common it is these days for federal environmental legislation to include creative sentencing options and the fact that the Expert Panel explicitly called for this in the EA reform process, it seems odd that the *Impact Assessment Act* doesn't include a provision much like what is set out in section 175 of the *Canadian Energy Regulator Act*.

This post may be cited as: Shaun Fluker "Oversight and Enforcement in Bill C-69 Regarding the *Impact Assessment Act* and the *Canadian Energy Regulator Act*" (26 February, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_SCF_BillC69.pdf

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

Follow us on Twitter @ABlawg