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## Multi-Jurisdictional Assessment and Bill C-69 – The Further Fading Federal Presence in Environmental Assessment

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**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 make consequential amendments to other Acts*

This is a continuation of the series of ABlawg posts on Bill C-69. The *Impact Assessment Act* (IAA) part of Bill C-69 is intended to replace the Canadian Environmental Assessment Act, 2012, [SC 2012, c 19, s 52](#) (CEAA 2012). This post concerns how the proposed IAA addresses the situation where more than one jurisdiction has decision-making authority over a project and each jurisdiction requires an impact assessment (IA). A key question for federal legislators is should there be two (or more) assessments or one assessment? And if one, what is the nature of that process, and what roles must the respective jurisdictions play in the assessment? The Expert Panel, which the Minister of Environment and Climate Change established to review the federal assessment process, describes in its [Report \*Building Common Ground: A New Vision for Impact Assessment in Canada\*](#), possible methods to handle a multi-jurisdictional assessment situation:

**Delegation:** When a part of one jurisdiction's (A) process is carried out by another person, body or jurisdiction. The process of jurisdiction A is applied by the delegated body.

**Co-operation [harmonization]:** Co-ordinate EA processes with the objective of "one project, one assessment". All jurisdictions conduct their respective EAs, while aligning their processes to the extent possible.

**Substitution:** When an EA law or process of one jurisdiction (A) is substituted for an EA law or process of another jurisdiction (B). The process of jurisdiction A is applied to meet the obligations of jurisdiction B. Jurisdiction B makes its decisions based on the results of A's process.

**Equivalency:** When it is determined that Jurisdiction A's process is equal to Jurisdiction B's process and they are therefore essentially the same. An assessment under B's process is therefore not required and only A makes a decision at the end of the EA. (Expert Panel Report 2.2)

I have written on multi-jurisdictional assessments in earlier ABlawg posts, such as the "[Fading Federal Presence in Environmental Assessment](#)" in 2011. In addition, following the release of the Expert Panel's Report, among the Faculty posts on it, was my "[Federal Environmental Assessment Re-Envisioned to Regain Public Trust – The Expert Panel Report](#)". In that post, in

the context of reviewing the Panel's recommendations, I consider how multi-jurisdictional IAs are best handled so that each jurisdiction has the appropriate involvement in a single assessment process; each acquires the needed information during it to decide whether to issue the authorizations to permit the proposed project to proceed, and if so, under what conditions; and so that the single IA process provides a meaningful forum for interested persons to participate, without unduly burdening proponents of projects, governments, the public, Indigenous communities, and others affected by projects. I also discuss these and similar issues in my [commissioned report](#) on this topic to the Expert Panel. In these, and elsewhere (Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward," 20 (JELP) 1, pp 1-35) I argue that substitution is not necessary, is ill-advised, and is fraught with problems. I maintain that although "one project one assessment" is a desirable goal, the goal should be accomplished through a harmonized assessment, as characterized by the Expert Panel (quoted above). Although I will not repeat the arguments in full for rejecting substitution, here is a partial summary of why provinces, the federal government and other jurisdictions cannot reliably, efficiently, and effectively exercise another jurisdiction's impact assessment obligations.

- The federal government and provinces, for example, carry out assessments and subsequent regulatory powers pursuant to legislation falling under different heads of constitutional power. For example, a province may be assessing a project for impacts on water quality generally (under section 92 of the *Constitution Act, 1867*, [30 & 31 Vict, c 3](#)) while the federal government is assessing it for impacts on a fishery (under section 91 of the *Constitution Act*). Each jurisdiction's focus, interests, inquiries, and objectives will be driven by what it manages under its constitutional authority. It is unrealistic to assume that one jurisdiction can do the job as well as the other, and inefficient to attempt since the knowledge and expertise are at the jurisdictional level that will regulate a matter falling under a constitutional head of power.
- What a jurisdiction needs to make an informed decision at the end of an assessment may evolve during the course of the assessment. One inquiry may lead to another. Each jurisdiction needs to be at the IA table throughout the process.
- The nature of the conditions a jurisdiction proposes to put on a project approval, and mitigation measures it may impose, also may evolve during a process through involvement of a jurisdiction and information exchange. The presence of all involved jurisdictions is required throughout an IA for this evolution to fully proceed. As conditions and mitigation measures may relate to exercises of constitutional power, they should be developed by the level of government that regulates and enforces them.
- Restoring public and Indigenous trust in federal IA requires a federal presence as well as the presence of other involved jurisdictions throughout the assessment process.
- In the past, a federal and provincial assessment on an identical project (Taseko Prosperity Mines), using the same terms of reference and addressing the same issues led to provincial approval and federal rejection (see Mark Haddock, "[Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine](#)" (Smithers, Northwest Institute, 2011)). This supports the need for the federal government to be involved throughout an assessment process and not to just rely on a substituted provincial one.

- A well designed harmonized assessment can ensure the one project one assessment objective without suffering from the problems with substitution. This is especially so if the involved jurisdictions' assessment legislation permits flexibility to facilitate harmonized assessment.

So where did Bill C-69 land?

In a nutshell, Bill C-69:

- does not permit equivalency *per se* in that it does not mention “equivalency”;
- does, however, contain a broad delegation provision;
- encourages cooperation in the assessment processes and includes some new mechanisms to facilitate it;
- permits substitution under certain conditions, but precludes federal participant funding for substituted processes.

The remainder of this post discusses these points.

## Delegation

The Bill C-69 delegation authority reads as follows:

29 The Agency may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 the carrying out of any part of the impact assessment of the designated project and the preparation of the report with respect to the impact assessment of the designated project.

The breadth of section 29 is illuminated by comparing it to the delegation authority in CEAA 2012, itself very broad:

26 (1) The responsible authority with respect to a designated project may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (f) of the definition jurisdiction in subsection 2(1) the carrying out of any part of the environmental assessment of the designated project and the preparation of the report with respect to the environmental assessment of the designated project, but must not delegate the duty to make decisions under subsection 27(1). (emphasis added)

The duty to make decisions under CEAA 2012 subsection 27(1) refers to a decision maker making a determination whether a project is likely to cause significant adverse environmental effects. If so, then the matter is referred to Cabinet or the Minister, depending on the situation, to determine if the effects are justified in the circumstances.

Perhaps the underlined part was left out of Bill C-69 since the Bill does not include determinations of significant adverse environmental effects for designated projects. Once a designated project is assessed, under section 60 of Bill C-69 the assessment report goes to the Minister to make a determination whether any adverse effects are in federal jurisdiction and

whether in light of factors set out in section 63 of the Act the project is in the public interest. Alternatively, under section 60, instead of the Minister making the determinations, the Minister may refer the matter to Cabinet to make them. Despite this explanation, we still may ask why doesn't section 29 of Bill C-69 specifically provide that the duty to make the section 60 decisions cannot be delegated? The presence of such a clause in CEAA 2012 and its absence in Bill C-69 could indicate legislative intent that such decisions can be delegated under Bill C-69. If so, could the Minister delegate this decision to a province or other jurisdiction when there is a substituted assessment? I cannot provide a conclusive answer, but if a section 60 decision may be delegated, then a *delegation* could amount to *equivalency* in that another jurisdiction in effect would be delegated the right to make a decision as to whether a project may go ahead.

Irrespective of the *equivalency* question, I see nothing in Bill C-69 that would preclude the Agency delegating so much of the impact assessment process to another jurisdiction to effect a *substitution* in result if not in name, without the Minister having to comply with the conditions to approve a substitution (discussed below).

### **Cooperative Assessment**

The Expert Panel considered together the notions of *co-operation* and *harmonization*, under the heading Co-operation. As noted above:

Co-operation [harmonization]: Co-ordinate EA processes with the objective of “one project, one assessment.” All jurisdictions conduct their respective EAs, while aligning their processes to the extent possible.

It would be a mistake to think that by “cooperation” Bill C-69 means a harmonized assessment as characterized by the Expert Panel. In Bill C-69 “cooperation” is a more general term aimed at facilitating and encouraging cooperation among jurisdictions apparently no matter how an assessment is carried out, whether by panel review, substitution, delegation, or presumably, by harmonization. The Bill certainly does not rule out harmonized assessment; it just does not isolate it as an assessment method. By the process of elimination any “one project one assessment” multi-jurisdictional assessment that is not by panel review, delegation, substitution, or under an agreement with an Indigenous governing body, would be by what the Expert Panel characterizes as a harmonized assessment. Although the Bill does not mention harmonization agreements *per se*, it generally authorizes the Minister to enter into agreements with any jurisdiction regarding cooperation and coordination of assessment of effects (s 114 (c) and (f)) and specifically authorizes such agreements with respect to panel reviews (s 39).

There have been numerous harmonized assessments over the years. In researching the commissioned paper to the Expert Panel I read all of the comments posted on the Panel's website on multijurisdictional assessment. Although harmonization was a favored method to achieve one project one assessment (British Columbia was the only province that had had engaged in substitution) concerns were expressed. These included that federal assessment processes were not flexible enough, especially with respect to timelines, that the federal government did not always cooperate with the other jurisdiction in a timely or effective manner, that public

participation opportunities were lacking in harmonized assessment, and that generally there was still too much duplication of assessment requirements.

Bill C-69 contains a number of provisions obviously aimed at addressing some of this criticism:

[Purposes]

6 (e) to promote cooperation and coordinated action between federal and provincial governments, and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;

(f) to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;

21 The Agency — or the Minister if the impact assessment of the designated project has been referred to a review panel — must offer to consult and cooperate with respect to the impact assessment of the designated project with [any relevant jurisdiction that has the powers, duties, or functions in relation to an assessment of the environmental effects of a designated project];

28 (5) Before the commencement of the impact assessment [of a designated project], the Minister may, by order, establish

(a) a longer time limit than the [prescribed] time limit ... to allow the Agency to cooperate with a jurisdiction referred to in section 21 with respect to the impact assessment of the designated project or to take into account circumstances that are specific to that project; or

(b) a shorter time limit than the time limit referred to in subsection (2), for any reason that the Minister considers appropriate.

The order must include the Minister's reasons for making the order.

(6) The Minister may extend the time limit ... by any period — up to a maximum of 90 days — that is necessary to permit the Agency to cooperate with a jurisdiction referred to in section 21 or to take into account circumstances that are specific to the designated project. [In section 37 there are comparable provisions to 28(5) and (6) for assessments by Panel Review.]

## **Substitution**

Although substitution, in my view, is problematic and unnecessary, Bill C-69's provisions are somewhat an improvement over CEAA 2012.

For comparison's sake, here are key substitution points under CEAA 2012:

- Under CEAA 2012, on the request of a province, the Minister *must* approve a substitution if the Minister is of the opinion that the Province's legislated assessment process is an "appropriate substitute" for the federal process (s 32). However, for requests made by

Indigenous Land Claim or self-government bodies (s 2, definition of “jurisdiction”, (e) and (f)), the Minister *may* approve a substitution.

- CEAA 2012 does not require any public or other consultation regarding a requested substitution, though substitution approval must be posted on the CEAA Registry (s 32(4)).
- Under CEAA 2012 (s 34), the Minister may only approve a substitution if satisfied that:
  - (a) the process to be substituted will include a consideration of the factors set out in subsection 19(1) [subsection 19(1) contains the factors that must be considered in a federal assessment such as environmental effects, significance of effects, mitigation measures, comments from the public, and so on];
  - (b) the public will be given an opportunity to participate in the assessment;
  - (c) the public will have access to records in relation to the assessment to enable their meaningful participation;
  - (d) at the end of the assessment, a report will be submitted to the responsible authority;
  - (e) the report will be made available to the public; and
  - (f) any other conditions that the Minister establishes are or will be met.
- Substitution is not permissible for projects under the *Canada Oil and Gas Operations Act*, [RSC 1985, c O-7](#) (e.g. National Energy Board processes) or Canadian Nuclear Safety Commission assessment processes, or for Panel Reviews (s 33).
- The substituted assessment “is considered to be an environmental assessment under this Act and to satisfy any requirements of this Act and the regulations in respect of an environmental assessment” (s 34).
- The federal government’s participant funding program does not apply to substituted designated projects (s 52(4)).

Here are key substitution points under Bill C-69:

- Bill C-69 provides that the Minister *may* approve a substitution whether a province or an Indigenous jurisdiction requested it (ss 32(1) and (2)). Accordingly, unlike CEAA 2012 there is no requirement to approve a provincial request, and Indigenous Land Claim or Indigenous self-governing bodies are treated the same as provinces.
- As an improvement over CEAA 2012, Bill C-69 requires that notice of a proposed substitution be posted and the public given 30 days to comment and the Minister must consider comments (s 32).
- Like CEAA 2012, Bill C-69 provides that the Minister’s decision on substitution must be posted (ss 32(2)-(34)) and there is no appeal.
- Like CEAA 2012, the Bill states that no substitution is permitted for projects under the *Canada Oil and Gas Operations Act*. Additionally, under C-69 no substitution is permitted for assessment of projects under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, [SC 1988, c 28](#); the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, [SC 1987, c 3](#); or the *Canada Transportation Act*, [SC 1996, c 10](#). As well, Bill C-69 states that there is no substitution for assessments referred to a review panel, which would include (among others) designated projects under the *Nuclear Safety and Control Act*, [SC 1997, c 9](#).

- Bill C-69 contains the following conditions for the Minister approving substitutions. The ones in italics are not in CEAA 2012:
  - 33 (1) The Minister may only approve a substitution if he or she is satisfied that
    - (a) the process to be substituted will include a consideration of the factors set out in *subsection 22(1)*; [further discussed below]
    - (b) *federal authorities that are in possession of relevant specialist or expert information or knowledge will be given an opportunity to participate in the assessment;*
    - (c) *the jurisdiction that is following the process to be substituted has the ability to enter into an arrangement with any jurisdiction referred to in paragraphs (e) to (g) of the definition jurisdiction in section 2 respecting cooperation between those jurisdictions in the conduct of the assessment;*
    - (d) *the process to be substituted will include consultations with any Indigenous group that may be affected by the carrying out of the designated project;*
    - (e) the public will be given an opportunity to participate in the assessment *and to provide comments on a draft report;*
    - (f) the public will have access to records in relation to the assessment to enable its meaningful participation;
    - (g) at the end of the assessment, a report will be submitted to the Minister;
    - (h) the report will be made available to the public; and
    - (i) any other conditions that the Minister establishes are or will be met.
- Like CEAA 2012, in Bill C-69 the Minister merely must be “satisfied” that the conditions for approving a substitution are met. This test is pretty subjective and would be hard to challenge.
- Like CEAA 2012, Bill C-69 deems the substituted process to be “considered” an impact assessment under the Act and to satisfy any IA requirements of the Act or regulations (s 34). This provision is meant to solidify the validity of substitutions, apparently even if the conditions for the Minister being “satisfied” were not clearly met.
- Bill C-69 provides for the Minister requesting further information from the substituted jurisdiction and the proponent if the assessment report is not sufficient for making the required assessment decisions (s 35). This is a clear improvement over CEAA 2012.
- Like CEAA 2012, the federal government’s participant funding program does not apply to substituted designated projects (s 74(2)).

The last bullet sets out a particularly egregious shortcoming of Bill C-69. If the federal legislation is going to permit federal processes to be carried out by another jurisdiction, and also require meaningful public participation, it should provide funding opportunities for interested persons to participate in substituted processes.

On its face, a stumbling block to the Minister approving federal/provincial/territorial substitution is the requirement that “the process to be substituted will include a consideration of the factors set out in subsection 22(1)”. Section 22(1) includes an assessment of the “effects of the designated project” and the “result of any interaction between those effects” ((a) and (a)(iii)). Bill C-69 defines “effects” as “changes to the environment or to health, social or economic conditions and the consequences of these changes”. A quick and non-comprehensive search of [CanLII.org](http://CanLII.org) suggests that British Columbia’s assessment legislation may be the only provincial

assessment legislation that specifically requires assessment of environmental, health, social, and economic effects (*Environmental Assessment Act*, [SBC 2002, c 43](#), s 6). But the magnitude of the possible stumbling block diminishes when one recalls that this is a condition that must be met to the Minister’s “satisfaction” and that the Bill deems a substituted process to meet any IA requirements under the federal Act. Besides, just because a jurisdiction’s legislation does not specifically require a kind of effect to be assessed, it does not necessarily follow that the jurisdiction cannot assess a project for that kind of effect. However it seems to me to be a lot for a jurisdiction to take on if it agrees to assess effects and aspects of projects that it is not required to assess by its own legislation and it would be more efficient, direct, and logical to conduct a harmonized assessment where each jurisdiction meets its own legislated requirements in a single process.

In summary, although Bill C-69 includes a few improvements over CEAA 2012 with respect to multi-jurisdictional IA processes, despite its “cooperation” language, the Bill at heart embraces a fading federal presence in impact assessment in Canada. For all of the reasons aforesaid, this is unfortunate.

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