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## **Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations**

**By:** David Laidlaw

**Legislation Commented On:** *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* ([Bill C-69](#))

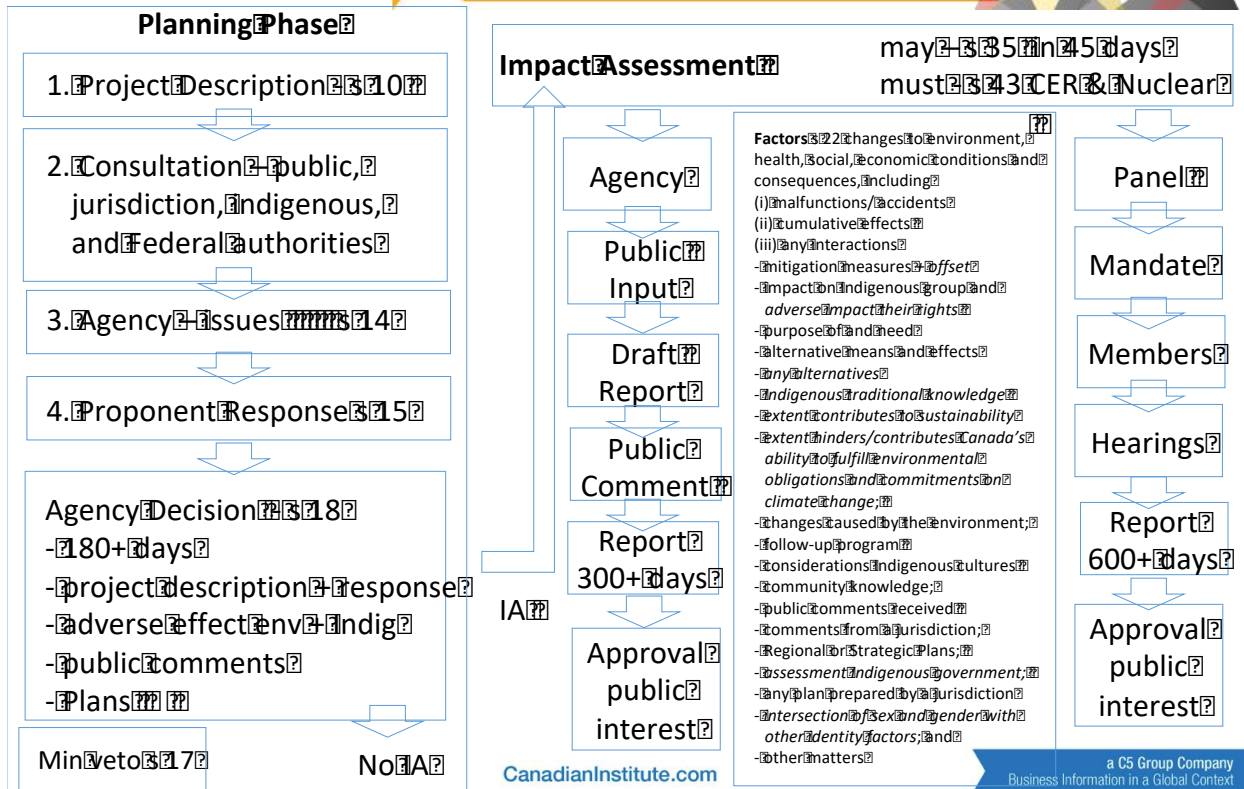
On February 8, 2018, the Minister of the Environment and Climate Change [Minister] submitted Bill C-69 for first reading. Bill C-69, should it pass, proposes to enact the *Impact Assessment Act* [IAA], continue the Canadian Environmental Assessment Agency under the name Impact Assessment Agency of Canada [Agency], establish the Canadian Energy Regulator [CER] to replace the National Energy Board, and amend the *Navigation Protection Act*, [RSC 1985, c N-22](#) with consequential amendments.

An [earlier post](#) by Professor Martin Olszynski looked at this legislation, as well as changes to the *Fisheries Act*, [RSC 1985, c F-14](#) in Bill C-68, from an environmental law perspective. Professor Nigel Bankes [commented](#) on the establishment of the Canadian Energy Regulator. Professor Shaun Fluker [commented](#) on the enforcement component. There is also a complementary [comment](#) by Professor David Wright on Indigenous aspects of the IAA including a discussion of UNDRIP.

As part of attending The Canadian Institute's 11th annual Western Indigenous Consultation & Engagement Conference in Edmonton on February 20-21, 2018, I made a presentation entitled "First Impressions of Bill C-69 the *Impact Assessment Act* and the *Canadian Energy Regulator Act* : Back to the Future?", looking at the legislation from an Aboriginal law perspective. In this post I will expand this perspective, focussing on the new process considerations in the IAA. References will be to sections in the IAA, unless otherwise noted.

### **Impact Assessment Process**

A graphical outline of the general process in the IAA is below with the *italicized* Factors in section 22 indicating new impact factors:



As noted in the ABlawg commentary on Bill C-69, the IAA can be considered a “beefed-up” environmental assessment – however I believe it can be much more.

### Federal Legislation and Aboriginal Rights – Honour of the Crown

Federal legislation has mentioned collectively held “Aboriginal rights” and section 35 of the [Constitution Act, 1982](#) in several circumstances:

- implementing legislation for Land Claim Agreements, for example in the Preamble to the *Nunavut Land Claims Agreement Act*, [SC 1993, c 29](#);
- modifying the description of appropriate bodies to include or exclude Aboriginal governments, for example the *Official Languages Act*, [RSC 1985, c 31 \(4<sup>th</sup> Supp\)](#) excludes them by definition in section 3(1)(j); and the *Canada Revenue Agency Act*, [SC 1999, c 17](#) includes them as bodies capable of entering into agreement in section 5(1)(d);
- dealing with Land Claims or other claim resolution processes as a foundational matter, for example the *Specific Claims Tribunal Act*, [SC 2008, c 22](#) exclusion of claims based on Aboriginal rights or title in section 15(1)(f); and
- the most common is “notwithstanding” mentions in modern legislation which are usually phrased as “... nothing in this Act shall be construed so as to abrogate or derogate from any

existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*” [Aboriginal rights], for example section 2.1 in the *Oceans Act*, [SC 1996, c 31](#) and section 2(3) in the *Migratory Birds Convention Act, 1994*, [SC 1994, c 22](#).

The IAA contains a notwithstanding mention in section 3, but it is the first piece of federal legislation that focuses, amongst other priorities, on consideration of the impacts on Aboriginal rights *and* effects on Indigenous groups in decision making. The IAA gives government discretionary power for approvals in the “public interest” as defined in section 63 which now includes Aboriginal rights as part of the public interest. It is unlikely that IAA processes will serve to determine Aboriginal rights – but it is a different focus than the current legislation.

In the landmark case of *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73 \(CanLII\)](#) establishing the Crown’s duty to consult and accommodate Aboriginal peoples prior to taking a contemplated action affecting them, the Court invited governments to develop “regulatory schemes to address the procedural requirements appropriate to different problems at different stages ... reducing recourse to the courts” (at para 51). Is the IAA such a “regulatory scheme” for designated projects? If so, what implications follow for example:

- The existing, policy-based, separate and overarching process to ascertain fulfilment of the Crown’s duty to consult and accommodate. For example in *Gitxaala Nation v Canada*, [2016 FCA 187 \(CanLII\)](#) involving the Northern Gateway Project, Crown consultation and accommodation was part of a separate process supplemental to the environmental assessment.
- Is there a risk that procedural administrative standards will override the reconciliatory purpose of the honour of the Crown?
- How will Indigenous groups fare in defining their Aboriginal rights and impacts on them, with limited resources, in a contested space - particularly in Panel hearings? This was already happening for major projects but that was under Panel Agreements such as the [Northern Gateway Joint Review Panel \(December 4, 2009\)](#) at page 6. The current contest in the existing legislation governing Agency assessments, is limited to the “current use of lands and resources for traditional purposes” whereas:
  - Aboriginal rights are activities central to the lifestyle of Indigenous Nations, being practised in a current form, that may include commercial aspects depending on trade at the time of contact, that relate to original practices prior to Canadian contact that have not been extinguished by explicit legislation prior to April 17, 1982, together with those ancillary rights necessarily or reasonably incidental to the exercise of the protected rights;
  - treaty rights engage the validity and interpretation of Treaties; and
  - in areas without land surrender treaties, Indigenous groups hold title communally with exclusive rights over lands and subsurface resources provided that any use takes into account future generations and can claim Aboriginal title, which cannot be transferred to anyone other than the Crown, in territories they exclusively occupied prior to the assertion of Canadian sovereignty.

The historical and legal issues in establishing these and any impacts on them in the IAA would impose additional expense and time for Indigenous groups for all assessments.

- Direct Aboriginal consultation on the IAA, the regulations are under consultation but not apparently the IAA itself—are normal parliamentary procedures adequate Aboriginal consultation?

If the IAA is not a regulatory scheme under *Haida*, then how does the Crown’s duty to consult and accommodate fit into the IAA scheme? Where is it located?

## Definitions

In current legislation, the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#) [CEAA-2012] “effects” were defined in section 5, this was moved to the IAA definitions in section 2 and with wording changes “effects” now mean “... unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the consequences of these changes”. This is incorporated into the IAA definition of “effects within federal jurisdiction” that broadens the consideration of the environment from the existing legislation but does not explicitly include rights recognized and affirmed by section 35 of the *Constitution Act, 1982* [Aboriginal rights]. Other changes in definitions include:

- removing the limiting definition of “interested party” as a person “directly affected by the project or has relevant information or expertise”;
- “Indigenous governing body” meaning a Band Council or other entity authorized to act on behalf of an Indigenous group, community or people that holds Aboriginal rights;
- mitigation measures now include offset measures, this accords with recent EA decisions approved by the courts; and
- replacing “sustainable development” with “sustainability”.

These changed definitions, are in part, a return to the prior legislation, the *Canadian Environmental Assessment Act, 1992*, [SC 1992, c 37](#) [CEAA-1992]. That legislation required environmental assessment based on federal involvement – with certain listed projects excluded. The IAA continues the impact assessment regime in the current legislation, CEAA-2012, that only requires assessment based on a list of designated projects [project] in the regulations that has limited the number of federal assessments by design. This is disappointing, especially given the revival of the *Fisheries Act* discussed by Professor Martin Olszynski and the changes in Bill C-69 to the *Navigation Protection Act*, [RSC 1985, c N-2](#) that limited 99.7% of Canada's lakes and 99.9% of Canada's rivers from federal oversight to the renamed *Canadian Navigable Waters Act* that restores federal protections.

However, the regulations are still under consultation as described by Professor Nigel Bankes in an earlier post. Also included in the IAA in section 9 is the Ministerial power to make a specific designation of projects that cause adverse effects within federal jurisdiction or public concerns related to those effects. This designation requires, among other things, that the Minister consider the adverse impacts on Aboriginal rights. The use of this power has the potential to address these concerns on a case by case basis.

## Purposes

The Purposes in section 6 have changed, including:

- changing “significant adverse impacts” to “adverse impacts” in all parts;
- removing the consideration of significance as a formal part of an assessment;
- adding in “adverse direct or incidental effects”;
- changing the purpose to “foster sustainability” to protect not only the environment but also “the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project”;
- including consideration of “positive effects” in impact assessments;
- ensuring that opportunities are provided for meaningful public participation; and
- ensuring respect for Aboriginal rights in impact assessments and decision making.

## Planning Phase

In the new Planning Phase under section 10 the Proponent of a project will file with the Agency an initial project description and information mandated in the regulations. The posting of this information on the Agency’s public registry [Internet] will be the start date for the Agency to make a decision as to whether the project should undergo an IA.

Under section 18 the Agency must, within 180 days indicate that an IA is required. This 180 day deadline is extendable by the Minister for a single 90 day period or extendable for any number of periods by the Governor-in-Council [GIC] and may be suspended by the Minister, to allow collection of information in accordance with the regulations [Variable Timeline]. However, there is no requirement in the IAA for the Agency to issue a decision that a project *does not require an IA* – other than the general requirement that the Agency must decide under section 16(1). This is little comfort for proponents who may be forced to press (or sue) the Agency for a decision.

Within the Planning Phase of 180+ days, the Agency:

1. Must solicit public comments on the project under section 11.
2. Must, under section 12, consult with Indigenous groups that may be affected by the project and,
  - any federal Minister or agency, certain Crown corporations, excluding the Governments of Yukon, the Northwest Territories or Nunavut [federal jurisdictions];
  - provincial governments and agencies;
  - any body, including a co-management body, established under Land Claim Agreements;
  - an Indigenous governing body, under a Land Claim Agreement, under an Act of Parliament other than this Act or under an Act of the legislature of a province, including a law that implements a self-government agreement or that has entered into an agreement with Canada as to control over existing or additional territory [Canadian jurisdictions];

- a government of a foreign state or a subdivision of it, or their institutions; and
  - international organization of states or their institutions [foreign jurisdictions],
  - with powers, duties or functions for an assessment of the environmental effects of a project.
3. May ask federal authorities to comment on the project under section 13.
  4. Must provide the Proponent with “a summary of issues with respect to that project that it considers relevant” including issues raised by the public, jurisdictions, affected Indigenous groups and federal authorities to be posted on the Internet under section 14 [Agency Issues].
  5. The Proponent will provide a Response Notice under section 15 as to how it intends to address Agency Issues and a “detailed description of the project” including information mandated in the regulations. The Agency may, if the project description information is incomplete, require the Proponent to revise this Response Notice. Once satisfied the Agency must post the final Response Notice on the Internet.

The Agency must decide under section 16(1) whether an IA is required for the project, taking into account the factors in 16(2) which include:

- the initial project description filed in section 10 and the final Proponent Response Notice;
- the possibility that the carrying out of the project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects;
- any adverse impact that the project may have on Aboriginal rights;
- any comments received from the public;
- any relevant Regional and Strategic Assessments;
- any study that is conducted or plan that is prepared by a jurisdiction in respect of a region that is related to the project, provided to the Agency; and
- any other factor that the Agency considers relevant.

If the Agency decides an IA is required, under section 18, it will provide the Proponent with a Notice of the Commencement of an IA that sets out the information or studies that the Agency considers necessary to conduct the IA; and the documents prescribed by regulations.

The Proponent is given 3 years to provide the required information or studies included in the Notice of Commencement. That deadline may be extended at the Proponent’s request although the Agency may require additional information or studies. If the Proponent does not provide that information within this timeframe the IA will be terminated. If the Proponent provides required information in the Notice of Commencement, the Agency will post a notice to the Internet under section 19(4) as a start date for the Agency’s IA Report.

Up until the Agency issues a Notice of the Commencement, the Minister may, under section 17, veto the IA if: any different federal authority indicates it will not permit a necessary activity for the project or, in the opinion of the Minister, it is clear that the project would cause unacceptable effects within federal jurisdiction or unacceptable direct or incidental effects. This veto, with the prohibition in section 7, will terminate any development of that project.

To my understanding the Planning Phase was included, in part, to get an early signal from the public and Indigenous groups about significant opposition to major projects. For some major projects 180 days is too short and for other projects it may be adequate to pre-clear a project. In either case a prudent Indigenous group would maintain their objection to the project until satisfied. Most projects will still see “Pre-Planning Phase consultation” with Indigenous groups, as it should and hopefully as early as possible in the project design phase.

### **Consultation, Coordination and Substituted Processes**

As in the current legislation, the Agency, or Minister if the IA is directed to a Panel, is required under section 21 to consult and cooperate with federal authorities, Canadian and foreign jurisdictions having duties or functions related to environmental assessment that may result in coordinated but separate processes under various arrangements or agreements.

Under section 31, Canadian jurisdictions may request a substitution of their review process for a federal IA review, with existing Panel Reviews and IAs under the specified legislation not eligible for substitution. The IAA now contains comprehensive provisions regarding substitution in section 33 that require the Minister to be satisfied that the proposed process includes:

- consideration of impacts listed in section 22 [Federal Impact Factors];
- participation for federal authorities with relevant expertise;
- entering into arrangements described in section 21 with other jurisdictions;
- consultation with affected Indigenous groups;
- public participation in the assessment with public access to records to provide meaningful participation, public comment on the Draft Report and Final Report made public; and
- any other condition the Minister deems appropriate.

A Report must be prepared, setting out effects that, in the opinion of the decision maker, are likely to be caused by the project; including those that are adverse effects within federal jurisdiction; and adverse direct or incidental effects; and specifying *the extent to which those effects are adverse* – this replaces the significance directions in the existing legislation [Report Requirements].

The substituted Report will be provided to the Minister for decision and the Minister may, under section 35, request additional information from the jurisdiction involved *or the Proponent*, prior to making a decision on the project as discussed below in Project Approval Decisions. A completed assessment by a Canadian jurisdiction may be substituted if the process and Report comply with these requirements. Existing *Equivalency Agreements* on the substitution of environmental assessment processes between jurisdictions may have to be revised.

### **Impact Review Mechanisms**

There are several impact review mechanisms in the IAA:

- Agency Review, is the default process unless the Minister directs a Panel Review.
- A federal Panel Review is required under section 43 if the activities are regulated by the CER or the Canadian Nuclear Safety Commission [CNSC] as Joint Panels are not allowed under section 39(2).
- A Panel Review may be directed by the Minister under section 36, within 45 days of the Agency posting a Notice of Commencement of an IA on the Internet, if it is in the “public interest” and that must include consideration of:
  - the extent to which the effects within federal jurisdiction or the direct or incidental effects of the project are adverse;
  - public concerns related to those effects; and
  - opportunities for cooperation with any jurisdiction.
- Joint Panel Review, under section 39, may be conducted with federal jurisdictions under the specified enactments or on federal lands, Canadian or foreign jurisdictions as may be relevant under a Joint Panel Agreement that must include consideration of the Federal Impact Factors in the Panels’ Terms of Reference. There are similar provisions for impact assessment under the *Mackenzie Valley Resource Management Act*, [SC 1998, c 25](#), in section 40.

### **Agency Review**

The completion of a Final Agency Report and submission to the Minister for decision will, under section 28(2) take at most 300 days from the Proponent’s completion of the Notice of Commencement requirements. This timeline may be adjusted under the Variable Timeline.

Within these 300± days the Agency must conduct an IA based on the Federal Impact Factors and prepare a Report to the Minister, under section 25, and may delegate the conduct of all or part of an IA and preparation of a Report to: a federal authority, agency or body with environmental assessment functions; or a Canadian jurisdiction under section 29.

The Agency must ensure that the public is provided with an opportunity to participate in the impact assessment of a project under section 27, including the preparation of a Draft Report in accordance with Report Requirements to be published or a description as to how a copy may be obtained on the Internet with a Notice inviting public comments on the Draft Report within the time the Agency specifies. After taking into account public comments received, the Agency will finalize the Report and present it to the Minister for decision, as described below under Project Approval Decisions. A copy of the Final Report or summary or a description of how it may be obtained will be posted on the Internet. As Professor Olszynski says, this requirement is not a model of transparency.

### **Review Panel Terms of Reference and Appointments**

The Minister must, under section 41, establish the Review Panel’s terms of reference [Terms of Reference] and appoint members of the Panel who have knowledge of the interests and concerns of the Indigenous peoples that are relevant to the assessment. Under section 42, the Terms of Reference established by the Minister, or contained in a Joint Panel Agreement which are always



subject to the Minister's approval, must, in section 49, include consideration of the Agency Issues. It should be noted that public input, aside from inclusion in Agency Issues, is not required in setting Panel Terms of Reference – although they are published on the Internet.

Once the minimum number of members required has been appointed to the Panel, under section 37, the Panel Report must be supplied to the Minister within 600 days. This timeline may be adjusted under the Variable Timeline.

## **Panel Review**

Within the 600± days, a Review Panel must, under section 51, in accordance with its Terms of Reference:

1. Conduct an IA of the project in accordance with the Federal Impact Factors while ensuring the information used is made available to the public.
2. Hold hearings in a manner that offers the public an opportunity to participate in the IA. Panels have standard powers in the conduct of public hearings, including compelling witnesses and protecting confidential information. The IAA includes regulatory powers to further detail those hearings. The IAA directs, in section 54, that the Panel must conduct public hearings in an informal fashion consistent with procedural fairness and natural justice.
3. Prepare a Panel Report with respect to the IA,
  - including Report Requirements;
  - summarizing any comments received from the public; and
  - setting out the Panel's rationale, conclusions and recommendations, including conclusions and recommendations with respect to any mitigation measures and follow-up programs.
4. Submit the Panel Report to the Minister, and at the Minister's request, clarify any of the conclusions and recommendations in its Report.

The Minister must on receipt, post the Panel Report on the Internet in accordance with section 55 and under section 56 may, prior to referring it to the GIC for decision, require the Proponent to collect any information or undertake any studies necessary for the GIC to make that decision.

## **Federal Impact Factors**

Agency and Panel IA Review are governed by an extensive list of factors in section 22(1) that must be considered, and with the changed definition of "effects" these can be paraphrased as follows:

- (a) the changes to the environment or to health, social or economic conditions and the consequences of these changes of the project, including
  - (i) the changes to the environment or to health, social or economic conditions and the consequences of these changes with malfunctions or accidents that may occur in connection with the project,

- (ii) any cumulative changes to the environment or to health, social or economic conditions and the consequences of these changes that are likely to result from the project in combination with other physical activities that have been or will be carried out, and
- (iii) the result of any interaction between those changes to the environment or to health, social or economic conditions and the consequences of these changes;
- (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse changes to the environment or to health, social or economic conditions and the consequences of these changes of the project;
- (c) the impact that the project may have on any Indigenous group and any adverse impact that the project may have on Aboriginal rights;
- (d) the purpose of and need for the project;
- (e) alternative means of carrying out the project that are technically and economically feasible, including through the use of best available technologies, and the changes to the environment or to health, social or economic conditions and the consequences of these changes of those means;
- (f) any alternatives to the project;
- (g) traditional knowledge of the Indigenous peoples of Canada provided with respect to the project;
- (h) the extent to which the project contributes to sustainability;
- (i) the extent to which the effects of the project hinder or contribute to Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- (j) any change to the project that may be caused by the environment;
- (k) the requirements of the follow-up program in respect of the project;
- (l) considerations related to Indigenous cultures raised with respect to the project;
- (m) community knowledge provided with respect to the project;*
- (n) comments received from the public;*
- (o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;*
- (p) any relevant assessment referred to in section 92, 93 or 95;*
- (q) any assessment of the effects of the project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the project;*
- (r) any study or plan that is conducted or prepared by a jurisdiction, that is in respect of a region related to the project and that has been provided with respect to the project;*
- (s) the intersection of sex and gender with other identity factors; and
- (t) any other matter relevant to the impact assessment that the Agency or if the impact assessment is referred to a review panel, the Minister requires to be taken into account.

The “scope” of some of these factors is subject to determination by the Agency or the Minister in the Panel Terms of Reference – with the *italicized factors* listing the considerations not subject to scoping under section 22(2). This scoping may limit the extent of consideration of these factors and it must be noted that these impacts need *only be considered*. The existing legislation, CEEA-2012, has a different scoping of EA factors in section 19(2), with only the equivalent of:

- (p) any relevant assessment referred to in section 92, 93 or 95;*
- (d) the purpose of and need for the project;

*(n) comments received from the public;*

being unscoped. The rationale for this difference is unclear.

The existing legislation, CEAA-2012, has environmental assessment factors with the principal new factors in the IAA, aside from the changes in definitions, including:

(c) 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, as described above, a significant change from the existing legislation.

*(q) 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 project.*

This factor may not be scoped. It is interesting to note, that the Tsleil-Waututh First Nation, a principal opponent to Kinder Morgan's Trans Mountain Pipeline Expansion has conducted [their own environmental assessment](#). If the IAA was in effect – consideration of that assessment would be required and unscoped. For an interesting overview of the politics involved see [here](#).

(h) The extent to which the project contributes to sustainability.

In the IAA, sustainability is defined as “the ability to protect the environment, contribute to the social and *economic well-being* of the people of Canada and preserve their health in a manner that benefits present and future generations”. This is one of the few references to economic matters and a way to incorporate potential economic benefits as positive impacts of the project.

(i) The extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

There are legislative and policy directions on the environment including Canada's commitment to the [Paris Accords](#) (2015). Current EA processes including this factor have phrased this requirement as the incremental contribution of the project to greenhouse gases *in relation* to Canada's commitments. With few projects generating significant incremental contributions, this phrasing and any potential scoping are unlikely, rightly or wrongly, to allow this impact factor to be dispositive (see for example the recent [Towerbirch Expansion Project Review of Related Upstream Greenhouse Gas Emissions Estimates](#)).

(s) The intersection of sex and gender with other identity factors.

Quoting from the [Federal Updated Guidelines for Federal Officials to Fulfill the Duty to Consult \(2011\)](#) at page 23,

National Aboriginal Organizations such as the Native Women's Association of Canada,

Pauktuutit and the Assembly of First Nations have created Culturally-relevant Gender-Based Analysis tools to promote fairness and equity of federal programs, services and processes directed at Aboriginal women and men. In the context of the engagement process on consultation and accommodation, Native Women's Association of Canada and Pauktuutit have examined Aboriginal consultation and accommodation using the Culturally-relevant Gender-Based Analysis lens and proposed some questions to be considered when preparing for consultations with Aboriginal communities such as:

1. At what stage of a consultation process should gender issues be considered? How can a Culturally-relevant Gender-Based Analysis be used to ensure adequate consideration of gender?
2. What should be the role of the Crown, if any, in ensuring that a consultation process and any ensuing agreements between a community and industry are inclusive of gender issues? How can this be achieved?
3. What questions and issues should the proponent and an Aboriginal community routinely consider in any consultation process to ensure that the perspective of both women and men are sought in the examination of the nature and extent of impacts on the community and options for addressing them?

Further details can be found at their websites: the [Native Women's Association of Canada](#) has [a report](#), and a specific [part](#) of their website; [Pauktuutit](#) has a [report](#); [Assembly of First Nations](#) has an [overview](#) of issues from 2009 and [potential strategies in the resource sector](#); the [Indian and Northern Affairs Canada Gender –Based Policy Analysis](#); [Indigenous and Northern Affairs](#); and [the Federal Status of Women Canada discussing GBA+](#).

An existing factor in CEAA-2012 that has been continued under the IAA, of concern to Indigenous groups in Alberta is the inclusion of:

*(p) any relevant assessment referred to in section 92, 93 or 95;*

Section 92 describes Regional Plans on exclusively federal lands, section 93 describes mixed jurisdiction lands and section 95 talks of Strategic Plans. The contentious [Lower Athabasca Regional Plan, 2012](#) [LARP] which saw flawed and limited Aboriginal consultation (see the non-binding [Review Panel Report \(2015\)](#)) in its formulation is a cabinet level planning document that requires provincial decision makers to comply with it. It has also been described as a “blueprint for the oil sands industry” with many of the purported governing frameworks still incomplete (see [2013 ABAER 017](#): Teck Resources Limited, Application for Oil Sands Evaluation Well Licences Undefined Field, October 21, 2013, at 63: “The AER accepts that LARP reflects government policy on land development as set out in the plan and that bitumen resource development is a priority use for the Lower Athabasca region”). In the [Joint Review Panel Report \(2013\)](#) on the Jackpine Mine Expansion Project at paragraph 14, LARP was described as “an appropriate mechanism for identifying and managing regional cumulative effects”. The receipt of LARP under section 22(1)(p), with this factor being unscoped, would see the potential governance of LARP on cumulative effects as a concern.

In addition, a new factor in the IAA is:

*(r) any study or plan that is conducted or prepared by a jurisdiction, that is in respect of a region related to the designated project and that has been provided with respect to the project;*

LARP is likely to qualify under this as an Alberta Regional Plan and as this factor is unscoped the potential governance of LARP on cumulative effects is a concern.

### **Project Approval Decisions**

The Minister can make decisions based on an Agency Report or that decision may be referred by the Minister under section 60(1) and Panel Reports must, under section 61, be referred to the GIC. The Minister's referral to the GIC for decision, any Ministerial project approval decision and the GIC approval decision under section 62 are governed by consideration of the "public interest" which must include consideration of the factors listed in section 63, as follows:

- the extent to which the project contributes to sustainability;
- the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects of the project in the Report are adverse;
- implementation of the mitigation measures that the Minister or the GIC, as the case may be, considers appropriate;
- the impact that the project may have on any Indigenous group and any adverse impact that the project may have on Aboriginal rights; and
- the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change. [Public Interest Factors]

This is a prescriptive list but there may be other factors that warrant consideration. The Minister, under section 65, is required to make this decision in a Decision Statement that must be made within 30 days, and if referred to the GIC within 90 days of the relevant Report being filed on the Internet. The Minister may extend these deadlines for a maximum of 90 days and the GIC may extend this deadline for any number of extensions.

A Decision Statement will include reasons that *must* demonstrate that the Minister or the GIC, as the case may be, considered all of the Public Interest Factors but cabinet confidentiality for the GIC is maintained under section 74.

### **Potential Indigenous Concerns**

Areas of concern for Indigenous groups, in my opinion, include:

- Continuation of the designated project regime in the IAA – that has limited the number of federal assessments under the current legislation.

- Potential details in the forthcoming regulations that may impair in a practical fashion consideration of impacts on Aboriginal rights and Indigenous groups.
- The Proponent having the “last word” in decision making, for example:
  - in deciding whether an IA is required, under section 16(1), the Agency considers the Proponent’s Response Notice including a *detailed project description* without public or Indigenous input on those documents;
  - in considering project approval in a Substituted Process, under section 35, the Proponent may be requested to provide information without public or Indigenous input on that information; and
  - after a Report is received, the Proponent may, under section 56, be asked to provide information without public or Indigenous input on that information, before a decision is made by the GIC.
- The potential scoping in the consideration of Aboriginal rights in Federal Impact Factors under section 22(2) by the Agency, or in Panel Terms of Reference. Consultation with Indigenous groups is an iterative process that may require deeper consultation with additional information but the scoping may be fixed.
- Lack of Indigenous or public input into Terms of Reference, insofar as the Terms of Reference form part of the design – particularly in the scoping of Federal Impact Factors, where allowed. It should be noted that the CEEA Agency’s [current policy](#) is to *not invite* Aboriginal groups to the design committee, but merely to invite comments from them.
- In Alberta, the potential consideration of the flawed LARP to govern cumulative effects.
- Lack of funding through the existing Participant Funding Program—which may doubly impact Indigenous groups in proving Aboriginal rights and title.

The IAA is not perfect but as proposed legislation it is open to change.

The questions arising from the IAA’s potential to be a regulatory process contemplated in *Haida* invite clarification by Canada. This may be just be a terminology issue as in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017 SCC 41 \(CanLII\)](#) the Court considered the National Energy Board procedures as satisfying the duty to consult – would those processes be considered *Haida* regulatory schemes? In *Chippewas* the NEB was the decision maker—does this close the circle when an IAA Panel under the CER is making recommendations? See Professor Nigel Bankes’ [comment](#) on that case.

One thing is clear – the Crown has signalled that it will be relying on IAA process to satisfy the Crown’s duty to consult and accommodate Indigenous peoples – the question is to what extent.

*Thanks are given to Professor Martin Olszynski for his helpful comments on this post.*

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