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Bill C-69 and the Proposed *Impact Assessment Act*: Rebuilding Trust or Continuing the "Trust Us" Approach to Triggering Federal Impact Assessment?

By: Sharon Mascher

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)

Consultation Paper Commented On: Consultation Paper on Approach to Revising the Project List: A proposed Impact Assessment System

On February 8, 2018 the Government of Canada tabled Bill C-69. My colleague Martin Olszynski provided an initial overview of Part 1 of the Bill, the proposed *Impact Assessment Act* (*IAA*), in an earlier post. Several of my colleagues have now posted on various aspects of the proposed *IAA*, including Nigel Bankes, Shaun Fluker, David Wright, Kristen van de Biezenbos, Alastair Lucas, David Laidlaw, and Arlene Kwasniak. This post focuses on the question of what projects will trigger the federal impact assessment process under the proposed *IAA*. As I have noted previously, how this question is answered is *essential* to assessing whether the proposed *IAA* fulfills the Liberals' promise to develop a new impact assessment process that restores the trust of Canadians and protects our environment. It goes without saying that in order for the impact assessment process to become relevant, it must first be initiated. Without effective and transparent triggers, therefore, the rest of the process becomes immaterial.

In his post, Professor Olsyznski described the proposed *IAA* as "a bulked-up version" of the current *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19 s 52 (*CEAA* 2012). Drawing on that analogy, I would suggest that while at first glance the proposed *IAA* trigger provisions may appear slightly bulked-up, on closer examination it turns out that they are really just "greased-up" *CEAA* 2012 triggers, lacking in both definition and strength. This is not good enough. In my opinion, all stakeholders—indeed all Canadians—should continue to expect more.

Discretion and the Existing *CEAA 2012* Triggers

CEAA 2012 uses a Project List to designate physical activities to trigger the federal assessment process. Made by way of regulation (*Regulations Designating Physical Activities*, SOR/2012-147), designation of physical activities on the Project List is signed off on by the Minister following recommendations by the Canadian Environmental Assessment Agency. And, even when designated on the Project List, for most projects federal assessment is not automatic. Rather, assessment is only undertaken where the federal government exercises its discretion to

conduct an assessment (s 10(b))—this is typically described as the "screening" decision. The exercise of the discretion to designate a physical activity on the Project List, or to determine if a federal assessment is required, is not constrained by a *legislated* environmental threshold or *legislated* criteria.

The resulting Project List—the main trigger for *CEAA* 2012—was essentially a copy of the *Comprehensive Study List Regulations*, SOR/94-638 under the previous *Canadian Environmental Assessment Act*, SC 1992, c 37 (*CEAA* 1992), with further amendments in 2013. However, under the previous *CEAA* 1992, the Comprehensive Study List contained projects or classes of projects that the Minister, at her or his discretion, was satisfied were "likely to have significant adverse environmental effects" (s 58(1)(i)). This does not mean, however, that the *CEAA* 2012 Project List is made up of all projects or classes of projects that cross the "likely to have significant adverse environmental effects" threshold. This is made evident by the fact that, despite their presence on the *CEAA* 1992 Comprehensive Study List, projects within National Parks or other federal heritage sites—some of Canada's most environmentally sensitive areas—were not copied into the Project List. Meanwhile heavy oil and oil sands processing facilities were removed from the Project List when it was amended in 2013, while oil sands mines were not. Why are projects in National Parks and heavy oil and oil sands processing facilities not on the Project List? Why are other projects on the Project List? *CEAA* 2012 offers no answer to these questions. No *legislative* threshold or criteria guide the designation of projects on the Project List. This adopts what I think is a "trust us" approach.

Beyond the Project List, *CEAA* 2012 does give the Minister discretion to designate a physical activity if, in the Minister's opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation (s 14(2)). For projects carried out on federal lands, *CEAA* 2012 also gives the relevant federal authority the discretion to determine if a project is likely to cause significant adverse environmental effects so as to trigger a federal assessment (s 67). However, the (in)effectiveness of these discretionary triggers is exemplified by the fact that no project undertaken within a national park between 2013-2016—"even major developments through wildlife corridors, into legally protected wilderness, and where proposals would explicitly harm endangered species listed under the federal *Species at Risk Act*" (as detailed in the submission to the Expert Panel made by the University of Calgary's Public Interest Law Clinic on behalf of the Canadian Parks and Wilderness Society Southern Alberta Chapter)—triggered federal assessment. And, with no legislated threshold or criteria to constrain the exercise of this discretion, *CEAA* 2012 offers no opportunity for judicial oversight. These discretionary triggers also adopt a "trust us" approach.

Expert Panel's Recommendations and the Government of Canada's Response

I have previously provided detailed comments on the recommendations relating to triggers made by the Expert Panel in its report "Building Common Ground: A New Vision for Impact Assessment in Canada". I won't re-hash that commentary here. Suffice it to say that the Expert Panel made several significant recommendations relating to triggers. First, it recommended that the federal impact assessment process focus on projects, plans or policies that have clear links to matters of federal interest (at 18). Second, the Expert Panel recommended setting "an appropriate

threshold for effects on federal interests"—and specifically a "consequential impact" threshold. Finally, the Expert Panel recommended three project level triggers: (1) a new Project List designating projects that are "likely to adversely impact matters of federal interest in a way that is consequential for present and future generations"; (2) a trigger based on clear statutory criteria requiring federal impact assessment of projects likely to have a consequential impact on present and future generations; and (3) a mechanism allowing a proponent or any other person or group to request a federal impact assessment, with the decision-maker determining, based on "applicable statutory criteria", whether the federal assessment process should be triggered.

In essence, the Expert Panel recommended that the federal impact assessment process should be triggered when a project was likely have a "consequential impact on present and future generations". This threshold would determine what projects were designated on a new Project List. Beyond the new Project List, this threshold, directed by clear *statutory* criteria, would also determine which projects triggered the federal impact assessment process.

The Government of Canada responded to the Expert Panel report with the Environmental and Regulatory Reviews Discussion Paper, which stated that the Government was considering (at 18):

> Reviewing the Project List Regulations and *establishing criteria and a transparent process to periodically review and update the Project List* to ensure those types of major projects that have the greatest potential impacts in areas of federal jurisdiction are assessed
>
> Maintaining authority to designate a non-listed project that could have adverse impacts on areas of federal jurisdiction where warranted, *based on clear criteria and a more transparent process*
>
> Maintaining the flexibility to exclude designated projects from assessment under certain conditions *based on clear criteria and a transparent process*
>
> *Enhancing transparency and requirements* for the assessment of projects on federal lands

Based on this, it was reasonable to conclude—or perhaps just my naive hope—that the Government of Canada was considering triggers resembling those found in *CEAA* 2012 with the important addition of clear *legislated* criteria and transparent, or at least *more* transparent, processes. My detailed views, building on the Expert Panel's "consequential impact" threshold recommendation on both the criteria (or threshold) that should apply to trigger federal impact assessments as well as the process, are available here.

Proposed *IAA* Triggers

So, what are the triggers in the proposed *IAA*?

(i) Project List

As foreshadowed in the Government of Canada's Discussion Paper, the proposed *IAA* continues the Project List approach to designate projects. In this respect, it provides as follows:

> **Definitions**
> **2** The following definitions apply in this Act.
>
> ***designated project*** means one or more physical activities that
> **(a)** are carried out in Canada or on federal lands; and
>
> **(b)** are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1).
>
> It includes any physical activity that is incidental to those physical activities. (*projet désigné*)
>
> **Regulations — Governor in Council**
> **109** The Governor in Council may make regulations
>
> **(b)** for the purpose of the definition *designated project* in section 2, designating a physical activity or class of physical activities;
>
> **(g)** prescribing the way in which anything that is required or authorized by this Act to be prescribed is to be determined

So what is missing?

No bonus points for this answer, as it is simply too glaringly obvious. There is no *statutory* threshold, criteria or process to guide the periodic review and update the Project List. Should a proposed ski resort within a National Park that would explicitly harm endangered species listed under the federal *Species at Risk Act* be on the Project List? Based on the proposed *IAA*, the answer is it depends on whether the Governor in Council exercises its discretion to designate it. Trust us. Should an activity with a potentially minimal impact on an area of federal jurisdiction be designated on the Project List? Based on the proposed *IAA*, the answer is again that it depends on how the Governor in Council decides to exercise its discretion. Trust us.

(ii) Discretionary Trigger

In addition to the Project List, the proposed *IAA* retains Ministerial discretion to designate projects not otherwise on the Project List. The relevant sections in the proposed *IAA* provide the following:

> **Minister's power to designate**
> **9 (1)** The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in

his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.

Factors to be taken into account
(2) Before making the 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 recognized and affirmed by section 35 of the *Constitution Act, 1982* as well as any relevant assessment referred to in section 92, 93 or 95.

What's missing? Again, there is no *statutory* threshold, criteria or process to guide the exercise of this discretion. Instead, the Minister *may* designate a physical activity if any person requests her or him to do so, or she or he otherwise decides to do so. All that is required is the discretionary opinion that the physical activity may cause adverse effects within federal jurisdiction or adverse incidental affects (as defined in the Act) or there is public concern relating to the project. Will a non-designated proposal with potentially significant adverse effects within federal jurisdiction trigger federal impact assessment? Maybe, if the Minister decides to exercise her or his discretion to designate it. What about a physical activity which has the potential to significantly adversely impact the constitutionally protected rights of the Indigenous peoples of Canada, will it then trigger federal impact assessment? Well, then after taking into account those adverse impacts the Minister "may" decide to designate the project. Will the resulting decision to assess, or not assess, the proposed project be subject to judicial review? No, but trust us.

(iii) Projects Carried Out on Federal Lands or Outside Canada

As with *CEAA* 2012, the proposed *IAA* makes special provision for projects carried out on federal lands (meaning lands: belonging to Canada; within the internal waters, territorial sea, exclusive economic zone or continental shelf; or reserves, surrendered lands or lands set aside for the use and benefit of a band subject to the *Indian Act*, RSC 1985, c I-5).

Project carried out on federal lands

82 An authority must not carry out a project on federal lands, exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a project to be carried out, in whole or in part, on federal lands or provide financial assistance to any person for the purpose of enabling that project to be carried out, in whole or in part, on federal lands, unless

(a) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

(b) the authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides, under subsection 90(3), that those effects are justified in the circumstances.

Similar provision is made in section 83 for projects outside Canada.

Applying, presumably, when a project on federal lands is not otherwise designated, section 84 includes a list of factors that "must be considered" in making a determination as to whether the project is likely to cause significant adverse environmental effects. Two points are worth noting here. It is left to the authority's discretion to determine whether the project is likely to cause a significant adverse effect on the environment on federal lands or outside Canada. And, making explicit that the section 9 discretionary trigger creates no understandable threshold, even those projects that are likely to cause significant adverse environmental effects on federal lands—say for example a National Park, for which the Canada National Parks Act, SC 2000, c 32, dictates the maintenance or restoration of ecological integrity is to be the Minister's first priority—need not trigger the federal impact assessment process. Does that mean such a project won't trigger the federal process? Not necessarily, it may be on the Project List or designated under section 9. Will it be? Well, based on the proposed *IAA* it can't be said for sure. Trust us.

So What Type of Projects will be Subject to Federal Assessment Under the IAA? What is the Threshold? What are the Criteria for Triggering the Act?

So where does that leave us? The first sentence of the Consultation Paper on the approach to revising the Project List released by the Government of Canada in conjunction with the proposed *IAA* says it all: "The Government of Canada is beginning public consultations on what type of projects would be subject to impact assessment under the proposed Impact Assessment Act" (at 1). Let me say that again, after receiving the recommendations of the Expert Panel (informed by hundreds of meetings held in 31 different cities and thousands of in-person, on-line and written comments and expert opinions), releasing a Discussion Paper and receiving written submissions and hosting several follow-up meetings with stakeholder groups, and promising next generation legislation that restores trust in the process and protects the environment, the Government of Canada's proposed *IAA* offers *no guidance* on what type of projects should be on the Project List and subject to federal impact assessment. The question as to what type of projects will be subject to federal assessment remains wide open.

And yes, the Consultation Paper does confirm a criteria-based approach to revising the Project List is being developed and does "seek views" on the proposed criteria (at 2). The Consultation Paper also states that the approach to revising the Project List will "also structure the approach to guide the review of requests for designation" (at 9). The Consultation Paper even suggests a threshold to guide determinations to retain or add a project type to the Project List (at 5):

> A determination to retain or add a project type to the Project List could be made when there are potential project effects in one or more areas of federal jurisdiction and one of the following applies:
>
> - There is potential for such effects to be medium to high (see Annex B);
> - Project type effects are complex and may require a complex set of mitigation measures;
> - The project type is novel and the severity of effects or mitigations are unknown (use of the precautionary approach).

And, later, in the context of a determination that a designated project does not require an impact assessment, the Discussion Paper suggests that the Project List should identify "those projects that have the most potential for adverse effects in areas of federal jurisdiction" (at 10). These statements together hint at some formulation of a threshold—probably not too far from the "consequential impact" threshold recommended by the Expert Panel.

The development of a criteria-based approach to revising the Project List and to designating projects on a case-by-case basis responds to the recommendation made by the Commissioner of the Environment and Sustainable Development in her Fall 2014 Report (at 4.26). My question, however, is why the articulation of what type of projects will be subject to federal impact assessment is left to a policy document. In my view, Canadians should expect next generation impact assessment legislation to articulate a *statutory* threshold, or *statutory* criteria, as to what type of projects will, or will not, be subject to the extra scrutiny of federal impact assessment. We should expect the certainty and transparency associated with doing so. And, we should expect any future government that wishes to alter this essential starting point to the federal impact assessment process to put forward legislative amendments, with—as my colleague Martin Olszynski noted in his earlier blog—all of the potential for democratic accountability associated with doing so.

While the proposed *IAA* is now in Committee, it is not too late to address this significant shortcoming in the proposed *IAA*. Failure to do so will undermine the credibility of Canada's federal impact assessment process – trust me.

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