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As Bill C-69 Receives Royal Assent, Will the Project List Deliver on the Promise?

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Matter Commented On: [Discussion Paper on the Proposed Project List](#)

Last week, Bill C-69 finally passed through the Senate and received Royal Assent. That the legislative process has been long and fraught goes without saying. On its first passage through the Senate, a total of 229 amendments were made to the legislation. While 130 of those amendments were ultimately rejected, Bill C-69 incorporates 99 of them - 62 as proposed by the Senate and 37 with government alterations. This [reportedly](#) is “the highest number of amendments on any piece of legislation since at least 1946.”

At the end of the day, the heavily amended Bill C-69 that now finds its way into law preserves the core elements of the Trudeau governments’ reformed federal impact assessment process. Meanwhile, the government’s [proposed Project List](#) is flying quietly under the radar. The Project List – which represents the primary means to designate projects that may trigger the federal impact assessment process - is a vital piece of the Bill C-69 puzzle. Absent designation on the Project List, only the exercise of Ministerial discretion can bring a proposed project into the impact assessment process. The Harper government’s *Canadian Environmental Assessment Act 2012 (CEAA 2012)* adopted a similar approach and, if past practice is anything to go on, such Ministerial discretion will seldom, if ever, be exercised.

Yet, the proposed Project List, as detailed in the [Discussion Paper](#) released by the Canadian Environmental Assessment Agency in May 2019, contains many surprises – particularly given the position taken by the government on various Senate amendments to Bill C-69.

Of particular note is the fact that the Project List proposed in the Discussion Paper increases several of the quantitative thresholds found in the current Project List under *CEAA 2012*. Most notable in this regard are the increased ore production capacity thresholds for most mining projects (e.g. the thresholds for metal mines, coal mines and diamond mines are proposed to increase from the current 3000 t/day to 5000 t/day). More surprisingly, for [legislation dubbed](#) by Alberta’s United Conservative Party as the “No More Pipelines Act”, the proposed Project List would actually relax the existing *CEAA 2012* Project List threshold for new pipeline with a length of 40 km or more to pipelines “with a length of 75 km or more in new right of way.” This proposal means that, absent the exercise of Ministerial discretion, twinning projects, or even new pipelines, built on existing rights of way would be left to the Canadian Energy Regulator’s processes (i.e. just a regulatory review, not a full IA). In contrast, more stringent thresholds are proposed for tidal power generating facilities.

The explanation for these changes is again surprising, particularly when considered in conjunction with the government's response to the package of Senate amendments. For starters, the government rejected Senate attempts to refocus the purpose of the Bill C-69 on protecting from or avoiding *significant adverse effects* (ISG-1.09a V2; ISG-1.09C V2), rather than *adverse effects*, caused by designated projects (s 6(b) to 6(c)). The government also rejected Senate amendments allowing the exercise of Ministerial discretion to designate a project not otherwise on the Project List away from *adverse effects* within federal jurisdiction and public concern to *significant adverse effects* that are *complex* and *novel* (CPC-1.13a). Yet, the Discussion Paper's "[Decision Tree for Applying the Approach to Create the New Project List](#)" (at 6) starts by asking the question "Does the project type have the greatest potential for adverse and complex effects on areas of federal jurisdiction related to the environment?" If the answer is no, the project was not considered for the Project List as proposed in the Discussion Paper. Noting again that the Project List is the primary means to trigger Bill C-69's federal impact assessment process, this approach appears to align more to achieving the legislative purpose proposed in the Senate amendments than those retained in Bill C-69.

Senate amendments that would have made federal environmental assessment decisions subject to provincial policies and decisions were also rejected (CC-1.42c). Here again there is a mismatch with the approach to the proposed Project List in the Discussion Paper. Unless multiple areas of federal jurisdiction related to the environment are engaged and/or a federal decision is required, if a project is regulated provincially, the decision tree indicates that this fact can displace the need for a federal assessment. This is despite [expert opinion](#) that where the federal government has exclusive jurisdiction over a matter, for legal, moral, trust-related, and practical reasons, provincial regulatory processes (or even assessment processes) are bound to be inadequate. As a consequence, while the Government asserted its constitutional authority in Bill C-69 (and see [here](#) for my colleagues discussion of the ample federal jurisdiction for doing so), the approach underpinning the proposed Project List appears to move in the opposite direction - intentionally devolving, relinquishing, or even abandoning federal constitutional authority to the provinces.

The government also rejected Senate amendments to Bill C-69 designed to further weaken already imperfect consideration of climate change (ISG-1.42d v2 and CPC-1.42d and CPC-10.173c). As a result, consideration of "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change" remains intact in final version of the Bill. Yet, the proposed Project List contains no specific climate change or greenhouse gas emissions-based trigger and many large emissions intensive projects, such as new cement production facilities, are nowhere to be found. New and expanded *in situ* oil sands with a bitumen production capacity of 2000 m3/day are a new addition to the proposed Project List. This means such a project would require an assessment under the new Act "unless it is within a legislated hard cap on greenhouse gas emissions." This means *in situ* oil sands operations are exempt provided a cap such as Alberta's [100 megatonne cap](#) with its [presumed](#) room for emissions growth is in place. In other words, while relevant under Bill C-69 for project assessment and approval, the draft Project List would make consideration of Canada's climate change commitments incomplete, sporadic and inconsistent.

So the battle over Bill C-69 has now been fought. Despite the political fire, the government has for the most part held its ground. However, a crucial piece of the puzzle remains to be put in place. The next time Canadians see the Project List it may well be in the form of a final regulation published in *Canada Gazette, Part II*. Unless it undergoes substantive revision from that proposed in the Discussion Paper, there is a real danger that the promise of Bill C-69, as defended through the parliamentary processes, may not be delivered.

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