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FOR BETTER OR WORSE? CHANGES TO ENVIRONMENTAL (IMPACT) ASSESSMENT

HIGHLIGHTS

- The government of Canada initiated a review of environmental assessment in June 2016 and tabled Bill C-69 (Impact Assessment Act) in February 2018; it is now in third reading.
- British Columbia initiated a review of its Environmental Assessment Act and process in April 2018 and is scheduled to present proposed changes by the end of 2018 – too much too fast when combined with other reviews underway.
- Whatever the intentions of policy-makers, the changes being introduced to federal environmental assessment and energy regulatory regimes are likely to discourage investment and job creation in Canada's natural resources, infrastructure and manufacturing sectors by raising costs, further complicating project reviews, and adding to Canada's reputation as a place where large projects go to die.
- Most discouraging, BC may be on the same path as Canada. Only time will tell if the outcomes from the BC review are positive or negative.
- Neither Canada nor BC are in the middle of an environmental crisis despite messaging to the contrary from some politicians and interest groups.
- Ultimately, Canadians and British Columbians pay the price for the uncertainty created by the myriad of changes to our environmental and energy regulatory processes currently underway. Yet we seem intent on fixing a system that is NOT broken, undermining competitiveness in a world where we are price takers for the resources and manufactured good that dominate Canada's exports.

INTRODUCTION

It feels like back to the future – or like being on an endless treadmill – as governments in Canada take steps yet again to "reform" environmental assessment legislation while also pursuing a myriad of other changes to other environmental and energy regulatory processes. The pretext is political messaging about a lack of public confidence in "the system" for managing environmental issues. In our view, this is largely a manufactured crisis of words over substance. Neither Canada nor BC is on the verge of environmental Armageddon or decay, no matter how loudly some groups argue otherwise. Yet both in both Canada and BC, policy-makers seem to be intent on "fixing" a system that is not broken.

Canada initiated a review of the *Canadian Environmental Assessment Act* 2012 in June 2016, along with reviews of the *Fisheries Act* and *Navigation Protection Act.* These reviews are ending after 24 months of significant effort on the part of many stakeholders. But British Columbia has now decided to add to the uncertainty and rising costs facing industry by launching several environment-related reviews within its own jurisdiction. This includes a planned "revitalization" of the province's environmental assessment (EA) process.

From the business community's perspective, the changes proposed in the federal government's environmental/impact assessment processes are not improvements. Time will tell if the outcomes of the BC review are positive or negative.

EA: WHAT IS IT, REALLY?

We usually associate EA with the development of large infrastructure projects found on some sort of list (e.g., energy, mining, transportation,

industrial); but it can also be used to evaluate government programmes and policies, at least conceptually.

Both Canada and British Columbia have had some form of policy based review requirements since the 1970s, with varying degrees of reach. Canada has had a formal legislated environmental assessment process since 1995. BC's first broad-based legislation and related process was also implemented in 1995. The year 2012 represents the point when conflict was amplified over "what" environmental assessment is/should be. In our view, this debate has been more about ideology than substance.

The general high-level description of environmental assessment (EA) is an analytical review of a proposed industrial or infrastructure project, intended to systematically examine the possible environmental consequences from its construction and operation. This includes anticipating, avoiding, and minimizing any significant adverse effects from development proposals, in order to protect the productivity and capacity of natural systems and ecological processes. In practice, project proponents are expected to offset or compensate for any adverse impacts.[1]

Indisputably, we need some way of facilitating the review of these kinds of proposed developments. By the 1970s, almost all advanced countries (and many sub-national governments) had some form of project-oriented assessment process for large projects. It is also true that the credibility of any process depends on the balance struck among various interests and that, in the end, decisions about "how to" — the primary purpose of impact assessment — represent a compromise.

WHAT'S THE SAME AND WHAT'S DIFFERENT BETWEEN CEAA 2012 AND BILL C-69: IMPACT ASSESSMENT ACT

SAME

- Proponents are prohibited from constructing or operating a "designated project" unless there is a finding of no impact (i.e., project is exempted from review) or a review process is complete
- The types of projects subject to review are established through regulation or a Minister's Order designating them as reviewable (opt in by a proponent or on the Minister's initiative)
- There are assessment agency and panel reviews
- Decision-making ultimately rests with Ministers of the Crown
- Consideration is given to significant adverse negative environmental effects of proposals
- Central agency role in reviews
- The Minister or the federal Cabinet may extend time limits indefinitely or "suspend" the time limits
- There are prescribed time limits
- Regional studies (i.e., strategic assessment) and cumulative impact assessment are enabled.
- Substitution is maintained

DIFFERENT

- A new early planning phase is provided for, with new Ministerial powers to say "no" to a proposal at the end of this phase of review

EA EVOLUTIONARY TIMELINE

- 1973 Canada – 1st federal EA process
- 1974 BC – 1st provincial EA process, an informal working-level policy driven process for energy projects
- 1976 BC – EA process for Coal Mines
- 1976 BC – Northeast Coal Development Study
- 1977 BC – EA process for Linear Infrastructure Development
- 1978 BC/Canada – EA review cooperation began
- 1979 BC – EA process for Metal Mines
- 1980 BC – Utilities Commission Act, part 2 - Energy Project Review Process
- 1984 BC – Mine Development Review Process (combining coal & metal)
- 1984 Canada – Environmental Assessment Review Process Guidelines Order (policy)
- 1989 BC – Major Projects Review Process (policy) for ports & large industrial manufacturing plants
- 1991 BC – Mine Development Assessment Act
- 1995 Canada – Canadian Environmental Assessment Act (CEAA)
- 1995 BC – BC Environmental Assessment Act
- 2012 Canada - CEAA 2012, Fisheries Act and Navigable Waters Act amendments
- 2012 to 2017 BC – BC EA continuous improvement activities
- 2017 – 2018 Canada Bill C69, Bill C-68, Navigation Protection Act
- 2018 BC – EA revitalization process

[1] International Association of Impact Assessment

- There will be new yet undefined decision-making roles for Indigenous peoples
- Expanded Indigenous and stakeholder participation is enabled in all aspects of the process
- There is an expanded role for a new central agency to lead all initial reviews, including energy projects
- The government is creating a new Canadian energy regulator to replace the National Energy Board
- ALL energy projects are to be reviewed under a panel process with panel members selected from an "approved" roster
- Panel reviews and reports will not make recommendations but simply document effects
- Decision-makers are required to consider more factors in making decisions, including socio-economic, health as well as the implications of projects for climate change, gender, and alternatives to and public involvement in scoping the factors for a review
- There is to be consideration of both positive and negative effects
- Expanded prescribed time limits:
  - Agency review increases by 160 days
  - Panel reviews increase by 150 days
- Inclusion of various new terms such as sustainability with vague or no definitions
- Equivalency is eliminated
- Bill C-69 establishes a new permanent expert committee and a Ministerial Advisory Committee
- Stakeholders can request regional/strategic assessments
- The standing test under the National Energy Board process is eliminated
- Reasons for decisions must be documented
- There will now be an ability for amendments to certificates
- Decision-making is one step rather than two, and will be based on whether "a proposed project is in the public interest"
- Compliance and enforcement provisions are strengthened

With the expanded components in the revised federal assessment process, the terminology used in the legislation has been changed from Environmental Assessment to Impact Assessment. This simple, straight forward sounding term and definition does not match up well with reality. Let's be clear, impact assessment is a planning process that is not for the faint of heart. It is an expensive, time-consuming, and complicated formal procedure with no guaranteed outcome.

WHAT IS IMPORTANT?

Canada and BC have an undeniable comparative advantage in the basics, and with almost 40% of the world's population living in China and India — most of whom aspire to our standard of living — we are well-positioned to supply them and others with high-quality, responsibly managed products, including agri-food, energy and other industrial raw materials. But it seems that some people in Canada are intent on closing rather than opening doors to growing offshore markets for our natural resources and industrial products.

The proposed changes to Canada's assessment process, as articulated in Bill C-69, signal a pendulum swing that in our judgement is guaranteed to discourage future investment and development in Canada's natural resource, infrastructure and manufacturing industries. The legislation promises to complicate, rather than simplify, the decision-making process by increasing the number of parties who have a "voice," adding many more "must-consider factors/criteria" for regulators to incorporate into their work, and lengthening the time lines for review.

BILL C-69 - THE ISSUES

WHETHER TO VERSUS HOW TO

Bill C-69 fundamentally changes what should be a planning process into a permitting venture with the inclusion of long list of compliance and enforcement rules. The potential for duplication, overlap, and conflict with post-assessment permitting requirements is great. Assessment is and should remain primarily an information-gathering and planning tool, as confirmed by the courts over time. The exact details of "how to," along with compliance and enforcement matters, belong in permitting — impact assessment should provide the broad stroke "how to."

EARLY PLANNING

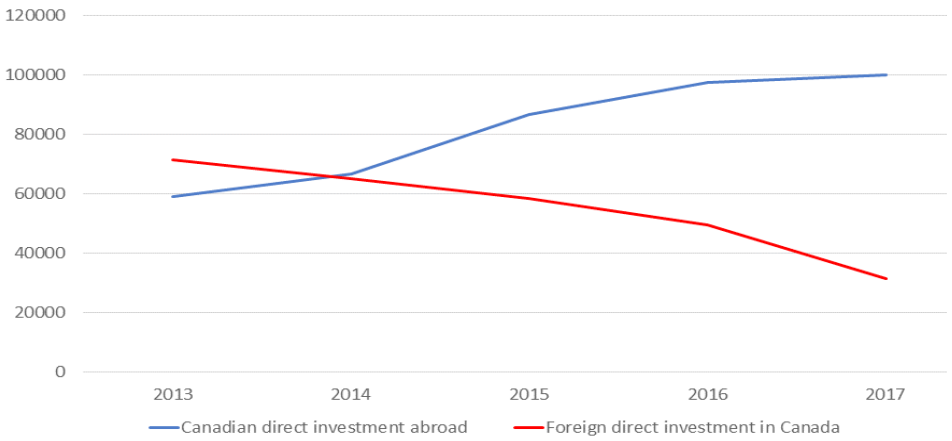
A planning phase is intended to reduce conflict and shorten the overall review by providing opportunities for early discussion among stakeholders, leading to an "early decision" about project acceptability. This is a sound idea, in concept. However, details to enable substantive decisions depend on data. That means proponents must correctly anticipate all or substantially all of the data and

analysis needed before the planning phase finishes, including content from baseline environmental studies and analysis of current issues. In our view, this is impossible given that much of the needed information is not available until much later in the assessment of a project's feasibility. Extensions and suspensions of timelines are likely, as is the morphing of the planning phase into the actual assessment phase. As a result, while early planning is an interesting idea, we are sceptical about its ultimate ability to deliver faster results, greater certainty for proponents or more effective assessments.

TIMELINES

Time-limited reviews are critical for achieving a measure of certainty. The proposed timelines in Bill C-69 for reviews led by the new Impact Assessment Agency will increase by 40% compared to current CEAA 2012 timelines. If a project is panel-reviewed — henceforth this is a requirement for all energy projects — timelines expand by 20%. This does not include all the pre-application work that goes into the proof-of-concept stage of project planning, rounding up investors willing to risk their money and reputation, and follow-on permitting requirements for a project that manages to gain approval under the impact assessment process. In the extreme, it is conceivable that complicated projects could take up to a decade and hundreds of millions of dollars from start to finish, before the proponent can look forward to generating a dollar of revenue. Faced with this, we believe many potential investors will look askance at Canada and choose to pursue opportunities elsewhere. Recent Statistics Canada data on direct investment flows suggests this is already happening, as Canada increasingly acquires a reputation as a place where large-scale projects go to die.

FIGURE 1: **FOREIGN DIRECT INVESTMENT IN CANADA AND CANADIAN DIRECT INVESTMENT ABROAD (MILLIONS $)**



Source: Statistics Canada

PUBLIC PARTICIPATION AND FUNDING

From its humble beginnings where it was mainly a technical review by government agencies and a handful of experts, Bill C 69 transforms impact assessment into a broad-based stakeholder engagement exercise where everyone is free to offer comments. Project proponents support reasonable participant assistance directed at promoting constructive, interest-based dialogue. However, with its expansive approach to public participation, Bill C-69 increases complexity and costs for proponents and public-sector agencies alike. For the most controversial projects, the government's proposed changes to CEAA 2012 will ensure that EA reviews come to resemble "figurative shouting matches about whose values should prevail."[2] Bill C-69 embodies a conception of stakeholder engagement and consultation that could lead to a de facto public referendum on every major project.

WHAT'S IN AND WHAT'S OUT

Canadian policymakers have determined that legitimate business ventures are those included in the federal and provincial reviewable projects regulations that are part of the formal EA regimes. Government and the public second guessing of the legitimacy of a proponent's proposal before due process is complete undermines both the credibility of the list and the certainty of the assessment process. Regular reviews of the list, using a structured evaluation process, can assure calibration with the realities of the economy and the types of acceptable industrial activities as they evolve over time.

INDIGENOUS PARTICIPATION

Reconciliation with Indigenous

[2] Pardy, Bruce. Federal Reforms and the Empty Shell of Environmental Assessment, 2018

people is necessary. Impact assessment is one area where more can be done to reflect Indigenous people's rights and interests in the overall regulatory framework. The Business Council's 2016 Memorandum of Understanding with the BC Assembly of First Nations and the related Champions' Table initiative are examples of steps being taken in the BC context to facilitate more direct dialogue that respects the unique governance structures and aspirations of Indigenous people. It is important to manage expectations about the assessment process being the solution to anything other than project-by-project reviews; the challenges around reconciliation are extensive and cannot be fully addressed through changes in the impact assessment regime.

FACTORS TO CONSIDER

The planned revisions to the federal government's EA regime expand the scope of future reviews by including not just environmental impacts but inter-related socio-economic, cultural, and human-health impacts, both beneficial and adverse. In evaluating proposed projects and activities that trigger an assessment, British Columbia has long incorporated an analysis of economic, social and cultural/heritage considerations, albeit mostly from a negative effects perspective. Positive impacts should also be considered when reviewing projects, but this can be difficult to do given the human propensity to value losses more than gains.[3] However, the inclusion of 20 MUST-consider factors in Bill C-69, without a clear decision-making framework (below), is likely to create rather than limit uncertainty since it is not obvious how these diverse factors, most of which are subjective, will be evaluated.

DECISION MAKING, PUBLIC INTEREST, SCIENCE AND DATA

Good decisions are facilitated by good information and a transparent process. Unfortunately, along with the factors noted above, Bill C-69 clouds and complicates rather than clarifies the EA process by including vague and undefined terms like sustainability and precautionary principle. These are "slippery and all encompassing"[4] concepts. All are problematic and will likely frustrate the process and make it harder to get to "yes" outcomes. This is a major weakness of the legislative changes to environmental assessment being advanced by the current federal government. Mitigating this somewhat is the requirement for a reason for decisions, which is intended to force articulation of how the Minister arrived at his/her final conclusions, along with the ability to amend certificates, assuming any future projects make it through the process gauntlet to the certificate stage.

SUBSTITUTION AND COOPERATION

Although maintaining the substitutability of processes, Bill C-69 leaves open the possibility that projects could be forced to complete separate federal and provincial environmental assessments, along with the possibility of additional Indigenous processes.

LAND USE PLANNING/STRATEGIC AND REGIONAL ASSESSMENT/ CUMULATIVE IMPACT ASSESSMENT

Land use plans and/or strategic and regional assessments are provided for in Bill C-69. They may be helpful in providing context for certain projects. The same is true for cumulative impact assessment, a nascent procedure with a limited track record of results. None of these tools is a panacea for the difficult trade-offs that are inherent in the assessment process. Governments must avoid viewing or treating them as pre-conditions/pre-requisites to project proposals. Expensive and time-consuming, they do not necessarily reduce conflict – and may exacerbate disagreements among stakeholders.

ALTERNATIVES TO A PROPOSED PROJECT

Requiring a proponent to assess an alternative to their proposal (i.e., a geothermal electricity generation project versus a gas generation facility, or a solar project instead of a pipeline) is patently unreasonable. As noted, the types of acceptable projects to be undertaken in Canada are determined by the project list. Neither governments nor the public should second-guess the economic and business case presented by proponents who are willing to risk capital and their reputation by choosing to submit a proposal for review. Yet Canada seems intent on doing down this unworkable path, judging from Bill C-69.

BRITISH COLUMBIA

Discouragingly, British Columbia looks to be following Canada in revamping the EA process. In the past, BC has embraced a continuous improvement model and has implemented measured, incremental, and deliberate changes

[3] Kahneman, D. & Tversky, A. Choices, Values, and Frames. American Psychologist. 39 (4): 341–350. 1984
[4] Pardy, Bruce. Federal Reforms and the Empty Shell of Environmental Assessment, 2018

to EA over the past number of years. This approach is supported by the business community. In each of our submissions on the federal impact assessment reform, the Business Council has referenced the BC process as a promising model to start with when thinking about change at the federal government level. Stakeholders in BC have gained experience in making adjustments that strike a balance among various interests. As such, the Business Council is of the view that the BC EA process does not require a major overhaul. We hope the ideas developed in the current BC legislative review are evaluated against the primary objectives of improving efficiency and reducing – not increasing – costs. We remain hopeful that rational public policy will prevail.

CONCLUSION

Impact assessment is here to stay. It will continue to evolve as it has done for the past 40 years. How people judge its effectiveness depends on what is important to them given their values and beliefs and whether or not decision-makers are successful at balancing diverse considerations.

Regrettably, the new Canadian *Impact Assessment Act* falls short of resolving many issues of concern to business and industry. Instead, it sends a(nother) signal that Canada is not open for business. Regardless of the government's initial intentions, the planned changes to Canada's impact assessment process will not restore public trust because for many, no new energy, mining, or industrial project is welcome, even though 32% of Canada's GDP depends on activity in the traded goods sectors of natural resources and manufacturing. Similarly, the contributions of natural resource goods to the BC economy cannot be understated either. They represent about 75% of BC's international merchandise exports, 12-13% of the province's GDP, and are the source of many stable well-paying jobs in the main urban centers of Metro Vancouver, southern Vancouver Island and Kelowna and many more communities throughout BC.

Time will tell if the outcomes of BC recently launched environmental assessment review create additional obstacles to investment, economic development and employment growth.

AUTHORED BY

Denise Mullen
Director, Environment and Sustainability