

Bill C-69

Good from afar, but far from good?

Anna Johnston

Staff Lawyer | West Coast Environmental Law

ajohnston@wcel.org
www.wcel.org

Federal Law Reform – Key Dates



- November 2015 mandate to:
 - Review & introduce new federal EA processes
 - Modernize the NEB
 - Restore lost protections & introduce new, modern safeguards to the *Fisheries Act & Navigation Protection Act*
- 2015 & 2016:
 - Expert Panel reviews of federal EA processes and NEB
 - House of Commons Committee reviews of *Fisheries Act & NPA*
- February 2018: Bills C-68 & C-69 tabled in House of Commons
- *Spring 2019: Acts expected to receive royal assent*

Bill C-68 – Amendments to the *Fisheries Act*



Lost protections restored:

- Prohibition against the “harmful alteration, disruption or destruction (HADD) of fish habitat”
- Protection of all fish (not just fisheries fish)
- Prohibition against causing death to fish (other than fishing)

Modernizations introduced

- Purpose and considerations for decision-making
- Regulation-making power for rebuilding fish stocks, and conservation and protection of marine biodiversity
- Prohibit fishing cetaceans to take into captivity



C-69 – Canadian Energy Regulator Act



- Replaces NEB with the new CERA
- Separates adjudicative and operational functions of regulator:
 - Establishes a CEO separate from the Chair;
 - Creates a Board of Directors to provide strategic direction to the regulator; and
 - Establishes a body of independent Commissioners responsible for project assessment and decision-making
- CER will evaluate projects not subject to Impact Assessment Act
- Legislated timelines reduced from 450 days to 300 days
- Standing test removed, so all Canadians can participate in pipeline hearings

C-69 – Canadian Navigable Waters Act

- Only restores partial protections & retains schedule of waters

Project Type	Impact on navigation	Waters on the Schedule (list)	All other navigable waters
Minor work 	Slight interference	<input type="radio"/> No approval needed	<input type="radio"/> No approval needed
"Medium" work <i>not minor or major</i>	Medium interference	<input checked="" type="checkbox"/> Must apply for approval	<input type="checkbox"/> ? Must apply for approval OR invite public comments
Major work 	Significant interference	<input checked="" type="checkbox"/> Must apply for approval	<input checked="" type="checkbox"/> Must apply for approval

Bill C-69 – *Impact Assessment Act*



- Partial sustainability approach
- Maintains project list approach
- Introduces assessment planning phase
- Moderate heightened consideration of science & Indigenous knowledge
- Eliminates participation standing test
- Heightened transparency and accountability
- “One project, one review” (can be through substitution)
- Somewhat better engagement of (limited) Indigenous jurisdictions

21 CITIES ACROSS CANADA



The Panel received over **520 WRITTEN SUBMISSIONS** including: Indigenous organizations and communities, individuals, NGOs, Provinces, Federal Departments and Agencies, Territories, municipalities, Port Authorities and land claim organizations.

1035
IN-PERSON PARTICIPANTS

(including workshops and open dialogue sessions)



397
IN-PERSON PRESENTATIONS

OVER **30%**
OF PRESENTATIONS WERE MADE BY INDIGENOUS GROUPS OR ORGANIZATIONS

EA Expert Panel Review

- Decisions based on sustainability, not justification of adverse effects
- Cooperation among jurisdictions should be primary goal
- Establish an independent impact assessment authority
- Introduce an assessment planning phase
- Ensure evidence-based impact assessment
- All assessments by assessment authority
- Focus on regional and strategic assessments
- Respect Indigenous jurisdiction, rights and governance

The IAA – Does it stack up?



Sustainability approach

- Must consider extent to which project contributes to sustainability
- Broad factors to consider, including environmental, social, economic, health, gender
- Public interest test guided by five factors (including sustainability)
- Ultimately, decision is discretionary and sustainability not guaranteed
- Must give reasons for decision, but not justification
- **Takeaway:** Shift to sustainability is positive, but discretion to make unsustainable decisions undermines the IAA's intention

The IAA

What gets assessed



- Bill C-69 retains “project list” approach
- Focus is on projects with “the most potential for adverse environmental effects”
- Minister may designate projects
- BUT designated projects do not *require* IA – Agency screens & decides whether IA is required
- Federal project trigger, but limited to federal lands, and projects outside Canada
- **Takeaway:** Act has limited application; real risk for cumulative impacts to go unaddressed and untracked

The IA

Assessment planning phase



- Purpose: Engage jurisdictions, public & stakeholders early, before assessments commence
- Process:
 - Proponent submits basic project description
 - Public and Provincial/Indigenous engagement
 - Assessment planning (scope, process, alternatives, public participation, etc)
 - Determination: Is an IA necessary?
- Minister may reject if project would cause “unacceptable effects”
- BUT Legislation does not prescribe assessment plans
- **Takeaway:** Risk that phase will merely be a screening process

The IAA



Decisions based on science and IK

- *“Whereas... impact assessments provide an effective means of **integrating** scientific information and the traditional knowledge of the Indigenous peoples of Canada...”*
- Planning phase likely to help ID necessary info and who should provide that info
- BUT:
 - “Integration” risks assimilation and subjugation
 - Proponent-led model continued, with little legislated reassurances that information will be sound
 - IAs must only “take into account” science and IK – what else can decisions consider?
- **Takeaway:** Much is left to guidance and policy

The IAA

“Meaningful” public participation



- *Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process...*
- Standing test removed
- Engagement begins earlier, in planning phase
- BUT:
 - no definition of “meaningful”
 - no requirement that participation be meaningful
- **Takeaway:** How and when the public is allowed to engage is largely left to guidance

The IAA

Transparency and accountability



- Nice perambulatory acknowledgement
- IAA continues the Agency's registry and internet site
- Minister must provide detailed reasons for decision
- BUT:
 - information required to be posted only includes summaries – public must ask for full data
 - does not need to justify public interest determination, or trade-offs
- **Takeaway:** Much is left to Ministerial and Agency discretion

The IAA

“One project, one review”



- Nice perambulatory acknowledgement of cooperation
- Agency is responsible for all assessments (NEB and CNSC members now appointed to Agency-led review panels)
- Purpose: promote cooperation w/ provincial & Indigenous jurisdictions
- BUT:
 - main focus of C-69 appears to be substitution
 - no requirement that substituted process adhere to IA Act standards, or provide access to all information
 - no requirement that collaboration be primary goal
- **Takeaway:** No assurance that collaboration will be the primary vehicle

The /AA



Indigenous governance, collaboration and rights

- Nice perambulatory language
- Purpose: promote cooperation and respect Indigenous rights
- Requires consideration of Indigenous rights at various stages
- Agency must consult with Indigenous peoples in planning phase
- BUT:
 - fails to mention UNDRIP, or “consent”
 - “Indigenous peoples” narrowly defined under Canadian law
 - no requirement that gov’t collaborate w/ Indigenous peoples
- **Takeaway:** Little assurance of real respect for Indigenous authority

The /AA in a nutshell

RAWRZ INVESTORS BUSINESS DAILY
2014 @ CREATORS.COM



For suggested amendments, see “WCELA Submission to Standing Committee”:
<https://www.wcel.org/publication/wcela-submission-committee-bill-c-69-impact-assessment-act>



WEST COAST
Environmental Law

Thank you

Q&A about Canada's Proposed New Impact Assessment Act:

<https://www.wcel.org/publication/questions-and-answers-about-canadas-proposed-new-impact-assessment-act>

Anna Johnston

Staff Counsel | West Coast Environmental Law

ajohnston@wcel.org
www.wcel.org