

## Bill C-69

Good from afar, but far from good?

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## 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

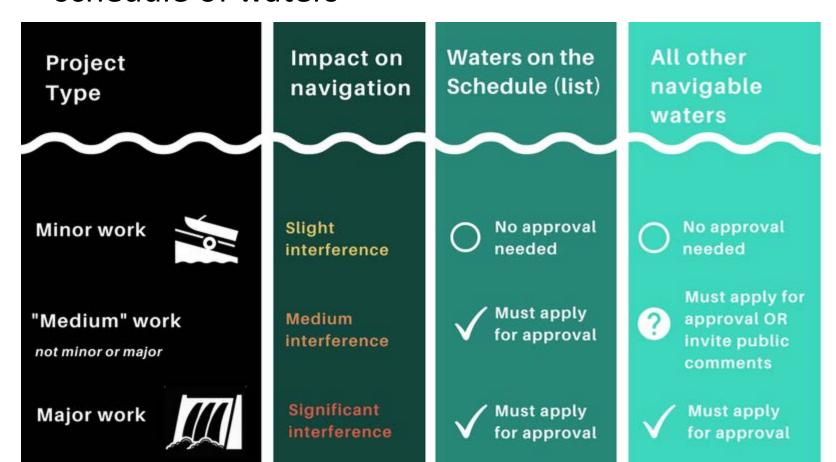
## C-69 — Canadian Energy Regulator Act



- 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

## <u>C-69 — Canadian Navigable</u> Waters Act

 Only restores partial protections & retains schedule of waters



# 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





### **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

#### 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



#### 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

#### 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



#### "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

#### 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



#### "One project, one review"

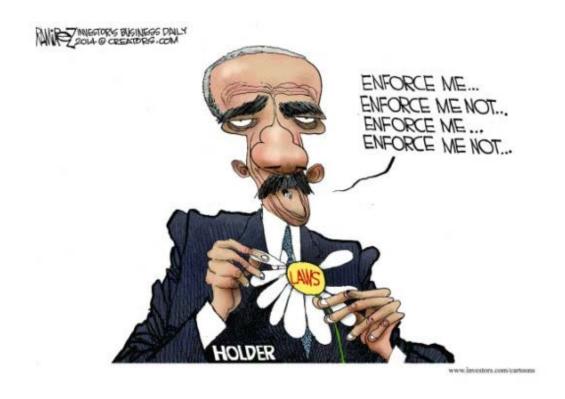
- Nice perambulatory acknowledgement of cooperation
- Agency is responsible for all assessments (NEB and CNSC members now appointed to Agency-led review panels)
- Purpose: promote cooperation w/ provincial & Indigenous jurisdictions
- BUT:
  - main focus of C-69 appears to be substitution
  - no requirement 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



#### 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 IAA in a nutshell



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



## Thank you

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

https://www.wcel.org/publication/questions-and-answers-about-canadasproposed-new-impact-assessment-act

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