Bill 69 and the Impact Assessment Act: public trust regained or more of the same

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The Government of Canada's promise to review the 2012 changes to various federal environmental laws has now come to fruition (see our summary of the 2012 changes here and here). This review included looking at the *Fisheries Act*, the *Canadian Environmental Assessment Act, 2012*, the *National Energy Board Act*, and the *Navigation Protection Act*.

Some significant amendments to the *Fisheries Act* are brought in with Bill C-68 (ELC comments here). Bill C-69 repeals and replaces both the *Canadian Environmental Assessment Act, 2012* (now, the *Impact Assessment Act*) and the *National Energy Board Act* (now, the *Canadian Energy Regulator Act*). As well, some amendments are made to the *Navigation Protection Act* which becomes the *Navigable Waters Protection Act* (retaking its maiden name).

In this blog post, the ELC provides a summary assessment of the proposed *Impact Assessment Act* (the IAA). While the IAA broadens the considerations for impact assessment and expands public participation, it fails to deliver on assuring accountability to science, regional and strategic assessment and independent decision-making.

The *Act* does include a variety of hooks that you might hang your hat on to pursue better impact assessment (IA) process. This should lead to better decisions, and, hopefully, better environmental outcomes. These hooks include:

1. A statute purpose and direction to administer the Act in a fashion that fosters sustainability and applies the precautionary principles (s.6);
2. A broadening of public participation (relative to CEAA 2012);
3. A broadening of factors to be considered, including contributions to sustainability and the effect of a project on the commitments in respect of climate change (s.22);
4. Prescribed factors to be considered in determining the public interest (s.63);
5. The creation of advisory bodies (including a Minister's Advisory Council (s.117), an indigenous advisory council (s.158), and an IA expert committee (s.157);
6. The maintenance of publicly available project files for tracking of follow-up (s.106);

Time will tell if these hooks are effectively used.

More fundamentally though, the Act fails to ensure a clear notion of accountability to science and the IA process. First, lets reflect that restored "public trust" and making "environmental assessment credible again" were central points of the government's platform. The narrative of "restoring public trust" has accompanied the introduction of Bill 69.

How do you ensure public trust in a process? It would seem that “public trust” is best served by depoliticizing decisions and ensuring accountability to the IA process, to scientific knowledge and to ensuring conditions related to mitigation and follow-up programs are effective and enforced.

However, the IAA, in its proposed form, relies on the Minister and Cabinet to make the ultimate determination of whether a project is in the “public interest” (with the IA provided by the Agency). While determination of the “public interest” must consider factors set out in s.63, that decision will remain clearly political and largely unreviewable. The phrase “public interest”, like the often trotted out term “balance”, is essentially what you make of it, unless there is a prescriptive and testable definition of how the public interest can be ascertained (which there is not in the IAA). This could have been overcome by placing decision making power in an independent regulatory tribunal (such as the Agency) to conduct and assess the IA and make the relevant decisions.

Further, the IAA fails to adequately deal with issues around the scientific integrity of the IA process. A report card produced by the Yellowstone to Yukon Conservation Initiative (Y2Y) highlights these issues (see it here).

The use of a “designated projects” list also continues CEAA 2012’s approach to determining if an IA might be required. Until regulations are put in place, what activities or projects will be listed is uncertain. Our concern with a list approach (and the Agency’s discretion to screen projects) is that environmentally significant activities may evade federal IA and there is no readily apparent method to capture and assess cumulative environmental effects.

Finally, while there are some provisions that ensure a level of continuity between the assessment decisions and the conditions that attach to authorizations and follow-up, the Bill is largely quiet on the evaluation of follow-up programs. This reflects a missed opportunity to construct a system for ongoing assessment and learning related to mitigation measures and follow-up programs: measures and programs on which almost all decisions rely.

So, while there are a few hooks to hang your hat on, it appears the “public trust” hat may still be lost up in the attic, hidden under a pile of politicized decision-making, excessive discretion, and a lack of clear commitments to solid science and follow-up.

It is anticipated that Bill 69 will undergo second reading (imminently) and would subsequently be sent to committee, giving the government an opportunity to make changes to the Bill.

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