Environmental Law Centre

Bill C-69: A Saga

By Anita Nowinka, Summer Law Student

I. INTRODUCTION

On February 8, 2018, the federal Liberal government tabled Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*.[1] Bill C-69 is the product of an election campaign promise made by the Liberal Party to attempt to restore credibility and public trust in Canada's environmental assessment regime. The 2015 Liberal platform pledged a new assessment process that would:

- Restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
- Ensure that decisions are based on science, facts, and evidence, and serve the public's interest;
- Provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
- Require project advocates to choose the best technologies available to reduce environmental impacts.[2]

The previous regime introduced by Prime Minister Harper and the Conservative government in 2012 significantly clawed back Canada's environmental assessment process. Under budget implementation legislation, the federal government replaced the original *Canadian Environmental Assessment Act, 1999* with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), which applied to fewer than 10% of previously federally regulated projects, restricted what projects were considered pursuant to a Designated Projects List, imposed legislated timelines, and introduced standing restrictions to limit public participation only to those deemed "directly affected." [3]

---

[1] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* 1st Sess, 42nd Parl, 2019, online: <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/third-reading> [Bill C-69].

[2] Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 42, online (pdf): <www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>.

[3] Anna Johnston, "Questions and Answers about Canada's Proposed New *Impact Assessment Act*" (February 2019), online (pdf): <https://www.wcel.org/sites/default/files/publications/2019-02-wcel-revisedqanda-iaaact.pdf>.

In its 360 pages, Bill C-69 replaces the *Canadian Environmental Assessment Act, 2012* with the new *Impact Assessment Act* (IAA), replaces the *National Energy Board Act* with a new *Canadian Energy Regulator Act* (CERA), and makes modest amendments to the *Navigation Protection Act*, including renaming it as the *Canadian Navigable Water Act* (CNWA). In some ways, Bill C-69 introduces worthwhile changes to the Canadian environmental assessment regime; however, its basic structure remains the same. This brief follows the series of changes made to Bill C-69 since its tabling through to its final text. Section II examines the basic framework of Bill C-69, including the major differences from the previous regime. Section III then breaks down the 188 amendments proposed by the Senate and the corresponding response from the House of Commons. Finally, Section IV concludes that despite worthwhile improvements introduced by Bill C-69, its effectiveness in striking the appropriate balance between economic development and protection of environmental and social interests remains to be seen.

II. BILL C-69: MAJOR ELEMENTS

Bill C-69 is divided into four parts. Part 1 enacts the *Impact Assessment Act* and repeals the *Canadian Environmental Assessment Act, 2012*. Part 2 enacts the *Canadian Energy Regulator Act*, which establishes the Canadian Energy Regulator and sets out its composition, mandate and powers. Part 2 also repeals the *National Energy Board Act*. Part 3 amends the *Navigation Protection Act* and Part 4 makes consequential amendments to Acts of Parliament and regulations. An outline of these main components is included in Table 1 below.

TABLE 1: BILL C-69 GENERAL BREAKDOWN[4]

PART 1: IAA (Clauses 1 – 9)	Designation of Physical Activity
	Planning Phase
	Impact Assessments • Consultation and Cooperation with Certain Jurisdictions • Factors to be Considered • Impact Assessment by Agency • Impact Assessment by Review Panel
	Participant Funding Programs
	Regional Assessments and Strategic Assessments
PART 2: CERA (Clauses 10 – 44)	Part 1: Canadian Energy Regulator
	Part 2: Safety, Security and Protection of Persons, Property and Environment
	Part 3: Pipelines
	Part 4: International and Interprovincial Power Lines
	Part 5: Offshore Renewable Energy Projects and Offshore Power Lines
	Part 6: Lands
	Part 7: Exports and Imports
	Part 8: Oil and Gas Interests, Production and Conservation
	Part 9: General
PART 3: CNWA (Clauses 45 – 76)	Amendments to the Navigation Protection Act

[4] Not exhaustive – some minor subsections of Bill C-69 are omitted.

PART 4 (Clauses 81 – 196)	Consequential and Coordinating Amendments

Considerable commentary has been dedicated to analyzing each of these parts in detail.[5] The brief summaries below serve simply to highlight the sections that have proven most contentious in the House of Commons and Senate debates.

PART 1: Impact Assessment Act

Under the new IAA, environmental assessments are now referred to as impact assessments (IA) and the Impact Assessment Agency of Canada (the Agency) replaces the Canadian Environmental Assessment Agency as the authority responsible for these assessments. The National Energy Board (now the Canadian Energy Regulator) and the Canadian Nuclear Safety Commission are no longer responsible for leading assessments for projects falling under their regulatory mandates.

The starting point for determining whether a project must undergo an impact assessment is a Designated Projects List, but the Minister of Environment can also require a project to be assessed that is not on the list. The IAA maintains CEAA 2012's original framework for conducting review either by the Agency or by Review Panel. An IA by Review Panel is required if the designated project includes physical activities that are regulated under the *Nuclear Safety and Control Act*, the *Canadian Energy Regulator Act*, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

IA will now have three phases: a new planning phase, an assessment phase, and a decision-making phase. The planning phase includes requirements to cooperate with and consult certain persons and entities. The Act also modifies requirements with respect to public participation, including the elimination of the previous "directly affected" test for standing.

Instead of considering only environmental impacts, the Act now also mandates decision-makers to consider all socio-economic factors, including environmental, health, social and economic effects as well as the effects on Indigenous peoples, when evaluating designated projects. Section 22 of the IAA includes a list of twenty factors that need to be analyzed in every impact assessment. Instead of focusing on the significance and justifiability of adverse effects, decision-makers are tasked with approving or denying projects based on whether the environmental, health, social or economic effects are in the public interest. This decision must include a consideration of the following factors: the impacts on the rights of the Indigenous peoples of Canada, the extent to which the project contributes to sustainability,

[5] See e.g. Martin Olszynski "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (15 February 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/02/Blog_MO_Bill68_Bill69.pdf>; Nigel Bankes, "Some Things have Changed but Much Remains the Same: the New Canadian Energy Regulator" (15 February 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/02/Blog_NB_Much_Remains_The_Same.pdf>; Martin Ignasiak, Sander Duncanson & Jessica Kennedy, "Changes to federal impact assessments, energy regulator and waterway regulation (Bills C-68 and C-69)" (12 February 2018), *Osler* (blog), online: <https://www.osler.com/en/resources/regulations/2018/changes-to-federal-impact-assessments-energy-regulator-and-waterway-regulation-bills-c-68-and-c-1>.

and the extent to which the effects of the project hinder or contribute to Canada's ability to meet its environmental obligations and its commitments in respect to climate change, among others.[6]

PART 2: Canada Energy Regulator Act

Much of the content under CERA is carried through as it was packaged in NEBA. The role of the Canada Energy Regulator ("the Regulator") is to regulate the exploitation, development and transportation of energy within Parliament's jurisdiction. The Act provides for the establishment of a Commission that is responsible for the adjudicative functions of the Regulator and ensures the safety and security of persons, energy facilities and abandoned facilities and the protection of property and the environment. It provides for the regulation of pipelines, international and certain interprovincial power lines, offshore renewable energy projects and power lines, access to lands, as well as the exportation of oil, gas and electricity.

Some notable changes relate to the relevant factors the Regulator must consider before issuing a certificate. For example, section 183(2) provides enhanced direction to the Regulator (and Review Panels) as to the relevant factors that the Regulator must take into account in assessing an application for project approval. These include many of the same factors that are required as part of an IA under section 22 of the IAA; however, section 183(2) of CERA fails to mention climate change commitments as a relevant consideration.

Part 5 of CERA is novel and provides the Regulator with the jurisdiction to regulate offshore renewable energy projects. Previously, the NEB had no such jurisdiction and neither did the provinces, thus creating a regulatory vacuum. CERA also improves upon the previous regime by making specific reference to the rights of Indigenous peoples in several areas, from the Preamble through to the statute's operative provisions.

PART 3: Canadian Navigable Waters Act

Beyond renaming the *Navigation Protection Act* as the *Canadian Navigable Waters Act*, the new CNWA restores a comprehensive definition of navigable water and requires that an owner apply for an approval for a major work in any navigable water. The Act also sets out the factors that the Minister must consider when deciding whether to issue an approval, including any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada.

PART 4: Consequential Amendments

Part 4 makes consequential amendments to Acts of Parliament and regulations.

III. AMENDMENTS FROM THE SENATE AND CORRESPONDING RESPONSE FROM THE HOUSE OF COMMONS

On May 30, 2019, the Senate passed a report from the Standing Senate Committee on Energy, the Environment and Natural Resources outlining 188 proposed amendments to Bill C-69. The amendments can be analyzed by grouping them according to several key themes:

[6] *Supra* note 1, s 63.

Greater independence of the Agency and reduced political discretion – ACCEPTED BY HOUSE

Some Senate amendments attempted to reduce political discretion by way of shifting control from the Minister of Environment to the Agency. The amendments empowered the Agency to set and suspend time limits,[7] appoint panel members,[8] and appoint administration/enforcement officers.[9] In the original Bill, these responsibilities rested with the Minister of Environment. In the interest of ensuring greater independence of the Agency, these amendments were accepted by the House of Commons.

The Senate also proposed, and the House accepted, to explicitly state that the Minister of the Environment may not direct the President of the Agency or its employees with respect to a report, decision, or recommendation.[10]

Reducing political discretion in the impact assessment process has the benefit of depoliticizing the process. However, analysists have highlighted that IA as a concept is inherently discretionary and political thus the exercise of discretion cannot be eliminated.[11] IA is a decision-making process – a policy decision based on government's calculation of pros and cons – meant to attribute legitimacy to the ultimate decision. In the absence of objective standards and substantive rules, discretion will always remain.

Acknowledgement of unique circumstances of Indigenous women – ACCEPTED BY HOUSE

Several amendments explicitly acknowledge the role of Indigenous women, require that their views and knowledge be brought forward, and require that the assessment identify how Indigenous women specifically will be impacted.[12] These amendments were accepted by the House of Commons.

Greater emphasis on investment and economic development – REJECTED BY HOUSE

Many amendments proposed by the Senate suggested a greater focus on certainty of investment, innovation, and economic development. These objectives surfaced at several points, including the

[7] See e.g. *supra* note 1, Clause 1, s 9(5) and (6) (Senate amendment 1(g)(iv) and (v)); Clause 1, s 36(3) and (4) (Senate amendment 1(u)(i) and (ii)); and Clause 1, s 37(1) (Senate amendment 1(v)(i) through 1(w)(iii)).
[8] See *supra* note 1, Clause 1, s 42(c) (Senate amendment 1(y)(iv)).
[9] See *supra* note 1, Clause 1, s 120(1) (Senate amendment 1(aw)(i) and (ii)).
[10] The Senate called for the addition of the following to Clause 1, s 153(2): "The Minister may not, except as provided in this Act, direct the President of the Agency or its employees, or any review panel members, with respect to a report, decision, order or recommendation to be made under this Act." (Senate amendment 1(ax)).
[11] Martin Olszynski "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (15 February 2018), *ABlawg* (blog), online: <ablawg.ca/wp-content/uploads/2018/02/Blog_MO_Bill68_Bill69.pdf>.
[12] See e.g. *supra* note 1, Clause 1, s 9(2) (Senate amendment 1(g)(ii); Clause 1, s 97(2) (Senate amendment 1(ao)(iii)).

Preamble,[13] the purposes section of the IAA,[14] and the factors to be taken into account in the assessment. Under both section 22 and section 63 of the IAA, decision-makers have to determine the extent to which the assessed project contributes to sustainability. The Senate proposed to change the focus on sustainability to "potential environmental, health, social and economic effects" and only a consideration of "any relevant policy on sustainability."[15] This was rejected by the House of Commons.

Interestingly, some analysts believe that the new IAA already attributes more weight to economic considerations than its predecessor. [16] The new IA analyzes all factors that can impact the short-term and long-term public interest. This calls for a more transparent and comprehensive examination of a project's full range of positive and adverse economic as well as social, environmental, and health effects. It brings economic impacts to the forefront, alongside all the others. In contrast, CEAA 2012 considered economic impacts mainly as part of a backend exercise that evaluated whether significant adverse effects were justified in the circumstances. Some analysts go as far as to suggest that this framework might even allow economic factors to eclipse social and environmental concerns.[17] Either way, the basic IAA framework places them all on equal footing to start, thus making the concerns raised by the Senate largely unfounded.

Decreased timelines – REJECTED BY HOUSE

An often-raised criticism of Bill C-69 is that the new regime will slow approvals for pipeline and oil and gas projects.[18] Critics raised concern about the length of time required to conduct an assessment and approve a project, citing cases such as the Northern Gateway and Trans Mountain pipeline assessments. Several of the Senate amendments sought to shorten regulatory timelines with the rationale that this would deliver faster and more certain approvals.[19] Additional wording proposed by the Senate would emphasize timeliness in all aspects of the review process.[20] These amendments were rejected by the House of Commons.

---

[13] The Senate called for the addition of the following to Clause 1, Preamble: "Whereas the Government of Canada is committed to enhancing Canada's global competitiveness by building a system that enables decisions to be made in a **predictable and timely manner**, thereby providing **certainty to investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs** in all regions of Canada;" (Senate amendment 1(a)(i), emphasis added).

[14] The Senate called for the addition of the following to Clause 1, s 6(1): "(b.1) to establish a process for conducting impact assessments that provides **certainty to investors and stakeholders, encourages innovation in the carrying out of designated projects and creates opportunities for economic development**;" (Senate amendment 1(c)(iv), emphasis added).

[15] Senate amendment 1(ag)(iii) and (iv).

[16] Robert Gibson, "Assessment of projects would improve under Bill C-69" (1 April 2019), online: *Policy Options* <policyoptions.irpp.org/magazines/april-2019/assessment-projects-improve-bill-c-69/>.

[17] *Supra* note 16.

[18] Sarah Cox, "Senate changes to environmental assessment bill are worse than harper era legislation: experts" (7 June 2019), *The Narwhal* (blog), online: <thenarwhal.ca/senate-changes-to-environmental-assessment-bill-are-worse-than-harper-era-legislation-experts/>.

[19] See e.g. Clause 1, s 9(4) (Senate amendment 1(g)(iii)). The Senate called for a restriction of the time for the Minister to respond to a request for designating a project from 90 days to 30 days.

[20] For example, the Senate called for the addition of the following to Clause 1, Preamble: "Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that

Notably, the new IAA sets timelines that are already shorter than those in CEAA 2012.[21] However, one analyst suggests that the problem with delays lies not in the length of time allocated, but rather the process itself. Both the Northern Gateway and Trans Mountain projects were given formal approvals but the delays stemmed from lengthy court challenges. The deficiency that caused significant delays was not the length of the approval process, but rather "a streamlined process that was not sufficiently consultative, comprehensive, and credible."[22] Though by no means ideal, the same analyst suggests that the inclusion of a planning phase, more flexible timelines, provisions related to strengthening strategic and regional assessments, and relaxed participation restrictions stand as improvements upon the previous CEAA 2012 regime.[23]

Greater role for municipalities and provincial jurisdiction – REJECTED BY HOUSE

Many of the Senate amendments emphasize municipalities as entities that have a role in the IA process and must be consulted at different points.[24] Provincial jurisdiction is also explicitly reinforced in multiple places.[25] One of the amendments would essentially provide provinces with a veto power by including the following provision:

> **Provincial Jurisdiction**
> **20.1** No action may be taken by the Agency or the Minister under this Act in respect of a designated project in respect of which the government of a province in which that designated project is located — in whole or in part — requests that the Agency take no further action if the request
> **(a)** sets out the provincial authority in respect of the environmental assessment of the designated project; and
> **(b)** is received by the Agency no later than 30 days after the day on which the notice referred to in subsection 18(2) is posted on the Internet site.[26]

All of these proposed changes were rejected by the House of Commons.

Downplayed climate change considerations – REJECTED BY HOUSE

Several of the Senate amendments undermined science and climate change considerations and these were rejected by the House of Commons. For example, one amendment would require that a major project's impacts on the environment and climate change be considered "on a global level."[27] Coupled

process and with the information they need in order to be able to participate in a meaningful way, **while ensuring that these processes proceed in a timely fashion**;" (Senate amendment 1(a)(iii), emphasis added).

[21] See e.g. Clause 1, s 37 which imposes a 600 day timeline under the IAA compared to a two year timeline under CEAA 2012. The Senate called for shortening this to 510 days which was rejected by the House (Senate amendment 1(v)(ii)).

[22] *Supra* note 16.

[23] *Supra* note 16.

[24] See e.g. *supra* note 1, Clause 1, s 12 (Senate amendment 1(h)(v)); Clause 1, s 14(1) (Senate amendment 1(i)(ii)); Clause 1, s 16(2)(d) (Senate amendment 1(j)(ii)).

[25] See e.g. *supra* note 1, Clause 1, s 3 (Senate amendment 1(c)(i)).

[26] Senate amendment 1(m)(i).

[27] The Senate called for the addition of the following to Clause 1, s 22(1): "The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must, subject to subsection (2), consider the

with a recommendation to return to the concept of "significance,"[28] analysts suggest that under this rubric, the impact of every project would be deemed insignificant and likely approved.[29]

Another amendment would require the Agency, when requesting information and studies from project proponents, to respect a "principle of proportionality."[30] The proportionality would be measured between the time and money required by such studies and the "nature and complexity of the project."[31] This principle has never before been used in environmental decision-making. Its inclusion would likely allow proponents to regularly resist further information requests and studies without consequence.[32]

Furthermore, the Senate recommended that the requirement to consider specific factors in the IA to be softened from "must" to "may," giving the Agency more discretion in how much weight to give each factor.[33] This weakens the obligation on the Agency to consider each factor and introduces uncertainty when it comes to assessing impacts.

Other amendments purported to exclude downstream GHG emissions from the definition of direct or incidental effects.[34] The inclusion of downstream GHG emissions in IA has been an ongoing debate, with the traditional position excluding these impacts and environmental organizations advocating to have them included.[35] Including these impacts is necessary to ensure reviewing bodies have sufficient information about climate effects to determine the extent to which a project helps or hinders Canada's ability to achieve its climate commitments. Excluding these impacts weakens the process. The House of Commons recognized this and rejected the proposed amendments.

Inclusion of a privative clause – REJECTED BY HOUSE

The Senate suggested the inclusion of a privative clause, which specified that various decisions and determinations made by the Minister and the Agency are final and conclusive. Some decisions captured under the privative clause included the decision whether to designate a project, whether an assessment is required, and whether the project is in the public interest.[36] The insertion of a privative clause would severely restrict legal challenges and limit the ability of the public to hold decision-makers accountable. These amendments were rejected by the House of Commons.

---

following factors … (a.1) the project's impact, **on a global level**, on the environment and climate change." (Senate amendment 1(n)(ii), emphasis added).

[28] See e.g. *supra* note 1, Clause 1, ss 6(b) and (d) (Senate amendments 1(c)(iii) and (c)(v) respectively); Clause 1, s 8(b) (Senate amendment 1(g)(i)).

[29] Martin Olszynski, "Propose Bill C-69 amendments undermine science" (27 May 2019), *Policy Options* (blog), online: <policyoptions.irpp.org/magazines/may-2019/proposed-bill-c-69-amendments-undermine-science/>.

[30] The Senate called for the addition of the following to Clause 1, s 18: "(1.2) The Agency must respect the **principle of proportionality** by ensuring that the time and money invested in the information and studies requested in connection with the impact assessment are commensurate with the nature and complexity of the project." (Senate amendment 1(k)(xi), emphasis added).

[31] *Ibid.*

[32] *Supra* note 29.

[33] See *supra* note 1, Clause 1, s 16(2) (Senate amendment 1(j)(i)).

[34] See *supra* note 1, Clause 1, s 2 (Senate amendment 1(b)(ii)).

[35] West Coast Environmental Law, "A Regulatory and Implementation Framework for the *Impact Assessment Act*" (14 January 2019) at 24-25, online: <www.impactassessmentregulations.ca/8869/documents/16911/download>.

[36] See e.g. *supra* note 1, Clause 1, s 74.1(1) (Senate amendment 1(ak)(i)).

Limiting what projects undergo IA – REJECTED BY HOUSE

The original Bill does not lay out exactly which projects will be subject to a federal IA. These will be included in a designated project list regulation that is current being developed. However, some Senate amendments attempted to limit certain projects by incorporating language to this effect into existing provisions. For example, project types such as oil sands, pipelines that are not offshore, wind projects, solar projects, natural gas extraction, and power generation using natural gas would be excluded.[37] As one analyst suggests, "[these] changes are … essentially putting so many holes in the ship that it won't even hold water."[38] Including these exceptions would severely limit the scope of projects regulated by the IAA.

Other amendments limited the Minister of Environment's ability to designate projects not already on the project list to those where the effects would be complex or novel or where there are "unique or exceptional circumstances."[39] The Senate also proposed to limit what can be assessed by a Review Panel (as opposed to the Agency) only to projects substantially different from any project that had previously been reviewed by a Review Panel.[40]

These amendments were all rejected by the House of Commons.

Which projects fall within the scope of the IAA's designated project list is a key indicator to the success of the Act as a whole. The federal government was accepting public input during the development of the Designated Project List regulations, which have yet to be released. Much effort has been dedicated to bolstering the protection offered by the IAA by including a robust Designated Projects List.[41] Until draft regulations are released, however, it is difficult to predict how adequately they achieve the goals of the Bill C-69.

IV. CONCLUSION

Bill C-69 is not a perfect bill, but it is generally regarded by analysts to constitute an improvement on the previous environmental decision-making regime. The basic architecture of the IAA remains largely the same as that of CEAA 2012 with a few significant changes, including a new preliminary planning phase, shorter but more flexible timelines, broader participation rights, and a broader public interest test for project approval that relies on a lengthy list of assessment factors. Under CERA, decision-makers now have expanded jurisdiction to consider offshore renewable energy projects and an expanded list of factors to consider for project approvals.

Among the 188 amendments proposed by the Senate, several key themes emerged that largely reflected industry interests. The House of Commons rejected amendments which tipped the scales too far in favour of economic development, decreased timelines for assessments, strengthened the role of municipalities and gave provinces veto power, downplayed climate considerations, and restricted the

[37] See *supra* note 1, Clause, s 4 (Senate amendment 1(c)(ii)).
[38] *Supra* note 18.
[39] See *supra* note 1, Clause 1, s 9 (Senate amendment 1(g)(ii).
[40] See *supra* note 1, Clause 1, s 43 (Senate amendment 1(z)(i)).
[41] *Supra* note 35.

intervention of the courts. The House of Commons accepted only those amendments which decreased political discretion in the decision-making process and affirmed the unique circumstances of Indigenous women.

Despite the developments introduced by Bill C-69, much is yet to be determined, including the list of projects that will be required to undergo a federal IA. The effectiveness of the new regime in fulfilling its objectives hinges significantly on how broadly or narrowly this list is scoped. Thus, it would be of interest to ELC to continue to observe the developments related to the project list regulations moving forward.