

The Trend Towards Increasing Federal Regulation: Canada's New Federal Environmental Regulations & Approval Processes

Presented By

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March 28, 2018

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Presentation Overview

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2. Federal Oversight & the Mining Industry
3. New Legislation – Bills C-68 & C-69
4. Impact Assessment Agency
5. Impact Assessment Process
6. Fisheries & Waterways
7. Risks & Benefits

Canada's Division of Power

Constitution Act, 1867, section 91

○ Federal Jurisdiction

- Trade and Commerce
- Treaties with foreign nations
- Aboriginal lands and affairs
- National works and undertakings
 - International and interprovincial movement of resources
 - Nuclear
- Cross-border environmental assessment

Canada's Division of Power

Constitution Act, 1867, sections 92, 92A

○ Provincial Jurisdiction

- Property and civil rights within the province
- Matters of a local or private nature
- Local works and undertakings
- Non-renewable resources within the province
 - Intra-provincial movement of energy resources
 - Local energy markets
- Ownership of Crown corporations

Mining & Federal Oversight

- Mining projects are currently subject to extensive federal oversight including through the *Canadian Environmental Assessment Act 2012*, the *Fisheries Act* and *Navigation Protection Act*
- Mining projects make up the bulk of projects currently subject to federal environmental assessment
- Under the current CEAA, new mining projects are considered “physical activities”

Mining & Federal Oversight

- Under the current CEAA, new mining projects undergo an environmental assessment process, which includes:
 - a screening or study and preparation of a screening or study report
 - an assessment by a review panel
 - the design and implementation of a follow-up program
- The regulatory reforms of 2012 did not reduce the level of federal oversight of mining projects
- Mining projects, which fall under provincial jurisdiction, also undergo comprehensive provincial assessment and permitting processes

New Federal Legislation

- Bill C-69
 - *Impact Assessment Act*
 - *Canadian Energy Regulator Act*
 - *Navigable Waters*

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

Impact Assessment Act

- On February 6 and 8, 2018, the Canadian government introduced Bills C-68 and C-69
- Introduce several major changes to Canada's federal regime for the assessment of federally regulated projects and regulation of waterways
- The Bills repeal and replace the *Canadian Environmental Assessment Act, 2012*, while making several significant changes to the *Fisheries Act* and the *Navigation Protection Act*

Impact Assessment Act – Mining Specific

- The proposed legislation empowers the Minister to designate an activity as a “designated physical activity” if in her opinion the carrying out of that physical activity may cause:
 - adverse effects within federal jurisdiction or adverse direct or incidental effects
 - public concerns related to those effects warrant the designation
- Under the new IAA, new mining projects undergo:
 - a planning phase, where public participation and engagement are part of the planning phase
 - the impact assessment phase where the project is reviewed by the agency or a panel, as the case may be
 - a decision statement by the agency or panel

Timeframes

- The government is seeking public input (before April 15, 2018) to develop two regulations
- Indigenous consultation will take place on the regulations in the spring of 2018
- The government notes that it expects the regulations to be finalized in early 2019, with legislation in advance of that
- The new regulations have not been released for the new regime, but expect that mining projects will be included
- Entire new regime to be in effect by the spring of 2019

Impact Assessment Agency

- The new *Impact Assessment Act* (IAA) will replace the existing *Canadian Environmental Assessment Act, 2012* (CEAA)
- Result is a new regime for the assessment of impacts caused by certain federally regulated projects
- IAA names the Impact Assessment Agency of Canada (the Agency) as the authority responsible for conducting impact assessments
- The Agency steps into the role of the existing Canadian Environmental Assessment Agency and assumes the expanded responsibility for “impact” assessments – previously referred to as environmental assessments – for all designated projects

Impact Assessment Agency

- IAA only requires federal impact assessments for certain designated projects
- Not yet known whether the list of designated projects will be the same or similar to the current list under the CEAA regulations, the government intends to maintain a list of projects to which the IAA will apply
- The Government of Canada has initiated consultations on which projects should be designated projects
- Among others, the government's consultation documents suggest that certain types of mines could be added to the current project list

Impact Assessment Process

The IAA establishes a new project assessment process that, although it resembles the existing environmental review regime to some extent, is a unique process that has never before been tested in Canada

From the perspective of project proponents, some of the most important elements of the process are:

- There will be an early engagement process before the formal Agency review process commences. This step is likely to add to overall project approval timelines
- The IAA establishes specific legislated timelines for the major steps of the review process. However, those timelines:
 - (i) do not include the early engagement process
 - (ii) can be paused by the Minister for prescribed reasons (to be determined)
 - (iii) can be extended indefinitely by Cabinet at the Minister's request

Impact Assessment Process

- In making a public interest decision under the Act, the Minister will be required to consider certain specified factors, including “alternatives to” a project and “the intersection of sex and gender with other identity factors”
- IAA does not include a standing test for participation in panel reviews, thereby allowing for the participation of any organization or individual
- Review panels will have the authority to separate organizations and individuals into different groups with different opportunities to participate
- A review panel’s report will not make a recommendation. Rather, it is only required to set out the effects that are likely to be caused by the project and to indicate the extent to which they are adverse

Considerations and Factors

- Additional factors to consider in assessment report;
 - impact on any Indigenous group and any adverse impact on the rights of indigenous peoples of Canada affirmed by section 35 of the *Constitution Act*
 - traditional knowledge of the Indigenous peoples of Canada with respect to the project
 - the extent to which the designated project contributes to sustainability
 - the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and commitments in respect of climate change

Considerations and Factors

- Additional factors to consider in assessment report:
 - considerations related to Indigenous cultures raised with respect to the project
 - community knowledge provided with respect to the project
 - comments from a jurisdiction received in the course of consultations
 - any assessment of the effects conducted on behalf of an Indigenous governing body
 - climate change

Impacts To Present Projects

- Transition provisions for the IAA will require many environmental assessments that are currently underway under CEAA to shift to the new regime
- The specific implications will depend on when the new IAA comes into effect (which is expected in 2019) and how far along a particular project is in the CEAA process

Fisheries Act

- the resurrection of the “HADD” – harmful alteration, disruption or destruction of fish habitat – threshold for requiring federal authorization of in-stream works
- Authorization would also be required for any activities that may cause the death of fish
- Bill C-68 proposes changes that would allow for certain classes of works, undertakings or activities to proceed without federal authorization, provided that they comply with codes of practice that are established under the revised Act

- The Bill would add distinct federal approval requirements for designated works, undertakings or activities that are “part of a designated project” or that take place in a designated “ecologically significant area.”
- Bill C-68 also proposes changes that expressly require the responsible Minister to consider adverse effects on Indigenous peoples and traditional knowledge when making decisions under the Act

Navigable Waterways

- Bill C-69 will amend the *Navigation Protection Act* and rename it the *Canadian Navigable Waters Act*
- The *Canadian Navigable Waters Act* would maintain the schedule of navigable waters previously found in the *Navigation Protection Act*, which means that not all bodies of water are automatically navigable waters
- The *Canadian Navigable Waters Act* would also include a process for works in navigable waters not listed in the schedule

Risk Factors With New Legislation

- Potential delay on a project as timelines are not clear
- Uncertainty with respect to application – no standing test under either IAA or CERA
- All manner of social and environmental issues are expected to be addressed, even when they are beyond the ability of any single project proponent to mitigate.
- Pose investment risks due to process impeding progress of a project

Benefits?

- Arguably clearer approval timeframes – if implemented
- The IAA is intended to streamline and shorten the regulatory processes
 - For example, it would shorten the overall time limits for completing the review panel's assessment and report phase from two years to 600 days for panel reviews, and from one year to 300 days for the assessment and report phase for Agency reviews, subject to certain powers of the Minister and Cabinet to adjust the applicable timelines
- Cooperation with other jurisdictions and better coordination within the federal government

Questions

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Thank You