



Bennett
Jones

Proposed Changes to Federal Environmental Legislation Including the *Canadian Environmental Assessment Act*

Brad Gilmour, Partner
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Introduction

- › Evolution of Federal Environmental Assessment
- › Current Status of Proposed Regulatory Changes
- › Impact Assessment Act
 - › Significant Changes and Themes
 - › Designated Projects
 - › Impact Assessment Pathways and Timelines
 - › Factors to be Considered in Impact Assessment
 - › Decision making

Evolution of Federal Environmental Assessment

- › Environmental Assessment and Review Process Guideline Order (“EARPGO”)
 - › *Friends of the Oldman River v. Canada (Minister of Transport)* [1992] 1 SCR 3, 1992
 - › Parliament has power to provide for EIA in areas of federal jurisdiction – navigation, fisheries, federal public lands and Indian reserves, international and inter-provincial transportation and communication



Evolution of Federal Environmental Assessment

- › CEAA, 1992
 - › Extensive litigation – what is a “project”? Scope of the project? Scope of the factors?
 - › Typically triggered when federal permits listed in the *Law List Regulation* were required (e.g., s. 35(2) of *Fisheries Act*, s. 5 NWPA, s. 52 NEBA)
 - › Undefined timelines/overlap and duplication
- › CEAA, 2012
 - › Project list
 - › Defined time lines
 - › Less litigation



Current Status

- › Federal government committed to review of environmental and regulatory processes in 2015 Speech from the Throne
- › Consultation and expert panel review of *CEAA* completed in 2016/17
- › Result:
 - › **Bill C-68**: *An Act to amend the Fisheries Act and other Acts in consequence*
 - › **Bill C-69**: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*



Current Status

- › Current *CEAA 2012* will continue to apply until amendments pass through Parliament
- › Intended implementation in spring/summer 2019
- › Both bills have passed 2nd reading
 - › C-69 is under review by the Standing Committee on Environment and Sustainable Development; anticipated to continue into May.
 - › C-68 is scheduled to be reviewed by the Committee April 24-26
- › Public consultation on contents of *Impact Assessment Act* regulations is currently underway; deadline has been extended to June 1, 2018.

Proposed changes to the *CEAA*

- › Notable changes and themes:
 - › *CEAA 2012* replaced by the *Impact Assessment Act*
 - › Canadian Environmental Assessment Agency replaced by Impact Assessment Agency
 - › Transition to broader impact assessment
 - › Emphasis on consultation with Indigenous groups and the public
 - › Expanded list of factors to be considered in assessment
 - › Broader definition of the public interest in decision making

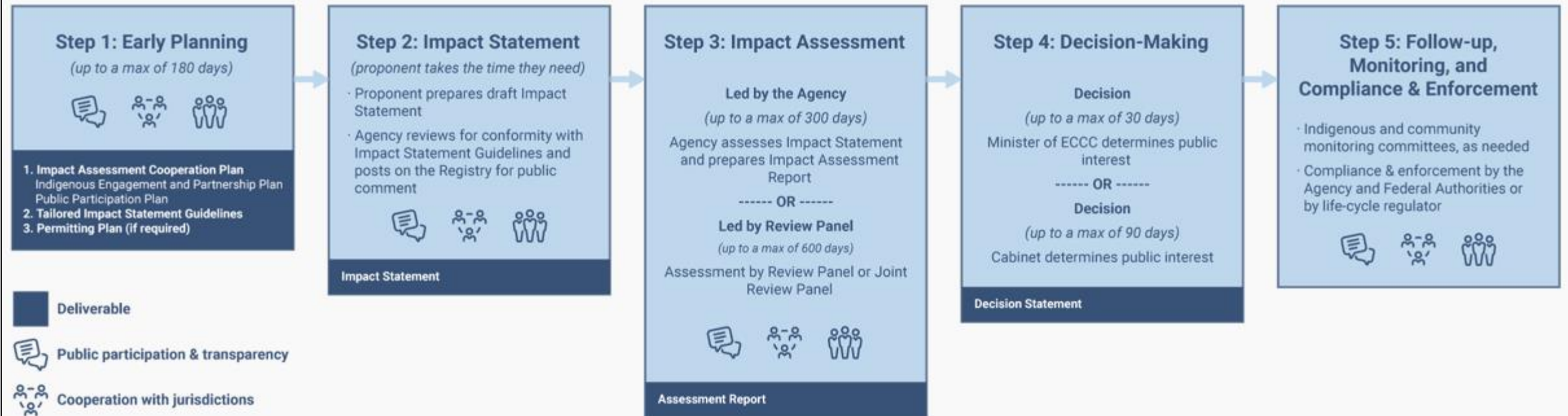


Proposed changes to the *CEAA*

- › Continuity with CEAA 2012:
 - › Designated project approach
 - › Legislated timelines (with significant discretion to extend)
 - › Decisions remain with Minister or Governor in Council (Cabinet)

Proposed Process and Timeline for Designated Projects

Figure one: The proposed new system at a glance



*Regional and strategic assessments would be proactively conducted outside of individual project reviews. This will help inform project assessments, manage cumulative impacts, and support decision-making.

Source: Government of Canada, Review of Environmental and Regulatory Processes

<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>

Designated Projects

Designated Projects

- › Projects designated by regulation are subject to assessment under the *Impact Assessment Act* (s 7)
- › The contents of the designated project regulation or “list” are currently unknown
 - › Public consultation on contents ongoing until April 15, 2018
 - › Similar to CEAA 2012 structure: list-based on project type and size
- › Minister may also designate a project upon request or of his/her own initiative (s 9)



Planning Stage

- › Proponent submits project description to Agency
- › Agency consults with other jurisdictions to plan single assessment process that meets requirements of all jurisdictions (s 12)
- › Agency required to provide public with opportunity to comment on preparation of a potential impact assessment (s 11)
- › Based on information collected, Agency determines whether an impact assessment of the designated project is required (s 16)
 - › Required to consider the possibility that project would caused adverse effects within federal jurisdiction; adverse impacts on the rights of Indigenous peoples; public comments; any other factors the Agency considers relevant.



Planning Stage

- › Timeline from proponent's submission of project description to end of planning stage: 180 days (s 18)
 - › Minister may extend by up to 90 days
 - › Governor in Council may further extend at their discretion
- › Planning Stage Outcomes:
 - › Project does not require impact assessment
 - OR
 - › Agency issues **Notice of Commencement** to proponent
 - › Notice of commencement outlines information or studies that the Agency considers necessary for it to conduct the impact assessment.



Types of Impact Assessments

- › **Agency Impact Assessment (ss 25-29)**
 - › Default assessment path for designated projects found to require impact assessment
- › **Review Panel Impact Assessment (ss 36-38):**
 - › Minister may refer impact assessment to a review panel if he/she is of the opinion that it is in the public interest (based on extent of adverse effects, public concern, and opportunity to cooperate with other jurisdictions)
 - › Automatic referral to review panel if designated project includes physical activities regulated by the *Nuclear Safety and Control Act* or the *Canada Energy Regulator Act* (s 43)
 - › Minister must refer within 45 days of the notice of commencement being issued
- › **Joint Review Panel Impact Assessment (ss 39-55):**
 - › Formed upon the Minister entering into an agreement or arrangement with any jurisdiction that has powers or functions in relation to the environmental effects of the project
 - › Minister must refer within 45 days of notice of commencement



Types of Impact Assessments

Assessment by Substituted Process

- › Minister may approve the substitution of another jurisdiction's process where that jurisdiction has the powers, duties and functions in relation to an assessment (ss 31-35)
 - › Substitution may occur upon request of the jurisdiction and within 180 days of the notice of commencement
- › Substitutional process must:
 - › Ensure all factors that must be considered under *IAA* (s 22) are addressed
 - › Ensure consultation with Indigenous groups that may be affected
 - › Ensure public consultation and comment on draft report



Preparation of Impact Statement

- › Proponent prepares Impact Statement based on guidance in Notice of Commencement document (s 18)
 - › Must include information and studies that the Agency considers necessary for it to conduct the impact assessment
- › Proponent must complete Impact Statement within 3 years of the Notice of Commencement being issued (s 19)
 - › Upon request by the proponent, the Agency may extend the time limit by any period necessary to complete the Impact statement

Impact Assessment by Agency or Panel

- › Impact assessment conducted by the Agency, the Review Panel or the Joint Review Panel
 - › All must ensure public participation and present draft report for public comment
 - › Agency review period: maximum 300 days
 - › Review Panel or Joint Review Panel: maximum 600 days
- › Agency or Panel prepares report for Minister and Governor in Council
 - › Sets out likely effects caused by carrying out project
 - › Identifies adverse effects in federal jurisdiction AND those adverse direct or incidental effects, and their extent
- › Impact Assessment Act outlines factors which must be taken into account in all impact assessments



Factors to be Considered in Impact Assessment

Impact Assessment must consider:

- › **(a)** the effects of the designated project, including
 - › **(i)** the effects of malfunctions or accidents that may occur in connection with the designated project,
 - › **(ii)** any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
 - › **(iii)** the result of any interaction between those effects;
- › **(b)** mitigation measures that are technically feasible and that would mitigate any adverse effects of the designated project;
- › **(c)** the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada ...;
- › **(d)** the purpose of and need for the designated project;
- › **(e)** alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
- › **(f)** any alternatives to the designated project;
- › **(g)** traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project;
- › **(h)** the extent to which the designated project contributes to sustainability;

...



Factors to be Considered in Impact Assessment

- › **(i)** the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- › **(j)** any change to the designated project that may be caused by the environment;
- › **(k)** the requirements of the follow-up program in respect of the designated project;
- › **(l)** considerations related to Indigenous cultures raised with respect to the designated project;
- › **(m)** community knowledge provided with respect to the designated project;
- › **(n)** comments received from the public;
- › **(o)** comments from a jurisdiction that are received in the course of consultations conducted under section 21;
- › **(p)** any relevant assessment referred to in section 92, 93 or 95 [regional and strategic assessments];
- › **(q)** any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;
- › **(r)** any study or plan that is conducted or prepared by a jurisdiction, that is in respect of a region related to the designated project and that has been provided with respect to the project;
- › **(s)** the intersection of sex and gender with other identity factors; and
- › **(t)** any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account.



Decision Making

- › Agency Impact Assessments (s 60)
 - › Agency submits final report to Minister
 - › Minister may make determination or refer the question of public interest to the Governor in Council
- › Review Panel and Joint Review Panel Assessments:
 - › Final report submitted to Minister (ss 55 or 59), who must refer decision to Governor in Council (s 61)
 - › Governor in Council determines whether the project is in the public interest (s 62)



Decision Making

- › Minister or Governor in Council must determine whether the adverse effects within the federal jurisdiction indicated in the report are in the **public interest** (s 63)
- › IAA defines “public interest” as:
 - › **(a)** the extent to which the designated project contributes to sustainability;
 - › **(b)** the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
 - › **(c)** the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
 - › **(d)** the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
 - › **(e)** the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.



Decision Making

- › Minister may impose any conditions (s 64)
 - › In relation to adverse effects within federal jurisdiction
 - › In relation to adverse direct or incidental effect “directly linked or necessarily incidental” to federal exercise of power or federal funding
- › Minister must issue decision statement within 30 days of the Impact Assessment being posted online (s 65)
 - › Minister must provide detailed reasons for decision
- › Minister must establish period within which the proponent must substantially begin to carry out the project (s 70)
 - › Period may be extended at his/her discretion



Summary

- › Assessments extended beyond “environmental effects” to “impacts”
- › Project list concept maintained
- › Mandatory timeline concept maintained (although process under IAA is longer)
- › Greater number of factors to be assessed
- › Broader Indigenous group participation and consideration
- › Climate change a key element
- › Larger fines and penalties
- › Poorly drafted transition provisions



> Questions?



Bennett Jones



Bennett
Jones

Thank you



Brad Gilmour
Partner

(403) 298-3382
gilmourb@bennettjones.com