



Brief of Quebec Center for Environmental Law on Bill C-69

Submitted to the attention of the Energy, the Environment and Natural Resources Senate committee
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CQDE's priority is to see Bill C-69 passed without any amendment that would undermine the delicate balance achieved between different interests through extensive prior consultations, and specifically without weakening of environmental protections, public participation or recognition of indigenous rights.

We submit that the amendments proposed in this brief do not undermine the balance achieved, but help ensure the restoration of public trust in federal decisions by ensuring the independence of the process leading to the report on which the decisions will be based.

Ensuring the Independence of Assessments Processes

This brief should be read in conjunction with the table of detailed amendments.

Introduction

A key unresolved issue in Bill C-69 is the lack of assurance that assessment processes are shielded from political or other undesirable influence. Processes to ensure the integrity and independence of assessments would better ensure the credibility of the reports on which decisions by elected representatives will be made.

The Expert Panel for the Review of EA Processes recommended creating an independent, decision-making institution, emphasizing that “The capacity to act quasi-judicially is not intended to transform the nature of IAs or panel reviews; rather, it is intended to provide the IA authority with appropriate independence and powers to address the full range of disputes that require resolution in IA – from facilitation and mediation to informal and formal hearings.”¹ Even if government in Bill C-69 did not

¹ Expert Panel Report, *Building Common Ground*, p. 62, online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>>

opt for the quasi-judicial decision-making model and favoured the idea that ultimate decisions are to be made by elected representatives that are democratically accountable, it doesn't lessen the necessity for independence of the recommending body if the process aims at being credible and securing public confidence. For the process and ultimate decision to be robust and regain public trust, the process leading to the report and recommendations to the decision-maker must be independent and above reproach. Indeed, in Quebec's assessment scheme which closely resembles the structure contemplated by Bill C-69, the independence of the assessment and recommendation body seems to be a key ingredient of credibility of the resulting reports which lead to better informed and relatively well accepted ultimate decisions by elected representatives.

The experience of at least one Canadian jurisdiction is that an assessment institution can maintain credibility for decades due in part to its independence from political and economic power.² Seeking to infuse assessment processes with independence from any special interest which may seek to bias the outcome in its favour is key to the success of the Bill as currently intended and a key aspect that has been overlooked since the expert panel report in 2017. Such amendments are entirely within the jurisdiction of Parliament.³

Primer on Independence in Canadian Administrative Law

The lack of independence of federal administrative tribunals and agencies has been decried by the Canadian Bar Association ("CBA") for over a quarter of a century⁴ and remains today an unsettled aspect of Canadian law⁵. Even back in 1990 before the first environmental assessment law was passed, environmental assessment was an area of focus of the CBA Task Force on independence.

² The independence of the BAPE is in part derived from its powers and immunities equivalent to those of public inquiry commissions under the Quebec *Act respecting public inquiry commissions* C-37 except imprisonment. *Environment Quality Act*, Q-2, s. 6.5. Beyond this, its independence is also inferred from its practice. For example, André Breton, former Minister of the Environment in Quebec, had to appear before a Parliamentary commission whose mandate was to investigate a visit he made to the offices of the BAPE. See online: <<https://www.lapresse.ca/actualites/politique/politique-quebecoise/201304/17/01-4641915-visite-au-bape-breton-devra-sexpliquer-en-commission-parlementaire.php>>

³ *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (CanLII), <<http://canlii.ca/t/hw0hz>>, retrieved on 2019-01-10 at para 54. "Parliamentary sovereignty is a foundational principle of the Westminster model of government, and it is based on a recognition that the legislature's power to make laws exists without any legal limits or constraints. In its traditional form, parliamentary sovereignty means that the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and that there is no matter in respect of which it may not make laws." [reference omitted]

⁴ Ratushny, Edward. 1990. Canadian Bar Association Task Force Report, *The Independence of Federal Administrative Tribunals and Agencies in Canada*, Ottawa ("CBA Task Force Report"): Canadian Bar Association; Letter from the Office of the President of the Canadian Bar Association to the Right Honourable Justin Trudeau P.C., M.P. concerning Governor in Council appointments dated April 27th, 2016 available online: <<http://www.cba.org/CMSPages/GetFile.aspx?guid=fc1c51bd-c407-405d-893f-d80a2cb66a09>>

⁵ Lorne Sossin "The puzzle of independence and parliamentary democracy" at 169 in Susan Rose-Ackerman, Peter L. Lindseth, Blake Emerson *Comparative Administrative Law: Second Edition* edited by, (2017) text available as individual pdf online : <https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_sossin_puzzle.pdf>. See also David Jones & Anne de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 94-95 as cited in Chaplin, "Travelling in Constitutional Circles: The Paradox of Tribunal Independence" (2016) 36 National Journal of Constitutional Law 73 available online: <<https://ssrn.com/abstract=296259>>1 at p. 5 "Unfortunately, there is no legal or constitutional rule for determining which executive or administrative functions should be externalized to independent agencies. From time to time, the political government of the day reconsiders how independent particular agencies should be. Thus, legislation may provide for appeals to the cabinet from decisions of an independent administrative agency, permit the cabinet to give policy directives to one of the agencies or require ministerial approval prior to the conducting of certain activities by the agency. Or, new legislation may be enacted to reorganize the administrative structure to move a particular function into one of the departments of state, or out to a totally semi-independent agency."

The report mentions the problem of long complicated assessment hearings leading to recommendations that are then completely ignored by the decision-maker, resulting in a violation of the integrity of the process and the principle that the judge who decides is the one who heard the case.⁶ The precursors to the Agency and the new energy regulator were the spectrum of organizations requiring independence according to the CBA Taskforce report⁷.

In practice, independence, where it exists, is often a matter of institutional culture that go beyond statutory texts which often lack in details in this regard. The corollary weakness is that “Independence, it turns out, works remarkably well in Canada as long as supported by Government and remarkably poorly when that Government support erodes”.⁸ Enshrining necessary best practices concerning independence in law is critical to ensure its survival under future governments who may want to undermine it when recommendations or reports do not favor powerful industries or its own agenda. Since amending laws involves the public processes of Parliament, it makes it more difficult to change subsequently than independence that exists solely as a matter of institutional culture or the good will of the Prince. This is especially so since the courts have tended to leave the requirements of independence to the intent of the legislature.⁹

Since *Canadian Pacific Ltd. v. Matsqui Indian Band*, the three components of “judicial independence – security of tenure, financial security and administrative independence – have been applicable to administrative tribunals, but on a sliding scale or “spectrum”. The criteria are the same as those that apply to judges but the extent to which they are expected to be fulfilled with respect to tribunal members varies depending on factors having to do with the nature of the tribunal, its procedures and the issues with which it deals.”¹⁰

Administrative law experts criticize the fact that the jurisprudential test for independence is based on the comparison with judicial processes in a way that unduly restricts its application by excluding certain administrative tribunals – or individual public servants – which cannot be said to be separate from the executive.¹¹ Instead, an approach that focuses on the goal of public confidence in executive decision-making involves “the question “independence from whom and why?” The analysis would be one that is based in the operational context of each tribunal with the goal of achieving fairness

⁶ CBA Task Force report p. 5 & pp. 160-161.

⁷ CBA Task Force report p. 295. The “Bureau fédéral des évaluations environnementales” and “Office national de l’énergie” were both in the list of administrative tribunals and agencies for which the report suggested measures of independence.

⁸ Lorne Sossin “The puzzle of independence and parliamentary democracy” at 1666 in *Comparative Administrative Law: Second Edition* edited by Susan Rose-Ackerman, Peter L. Lindseth, Blake Emerson, (2017) text available as individual pdf online: <https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_sossin_puzzle.pdf>.

⁹ Chaplin p. 6

¹⁰ Chaplin p. 3, commenting on *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

¹¹ The rules of natural justice and procedural fairness, including the rules about bias, are about determining how decision-makers act or can reasonably be expected to act. Over time they have become applicable to all government decision-makers (adjudicative tribunals, regulatory agencies, individually empowered officers and ministers of the Crown), to different degrees, regardless of their status or where they are located in government machinery. Experts suggest the quasi-judicial / administrative distinction should cease to apply to the independence test as it as ceased to apply to other domains of administrative law. As it stands, the independence test based on courts is not applicable to all government actors, but should be. Chaplin at p. 19. As currently formulated, the test for tribunal independence cannot be applied to all government actors. “Maintaining a test for independence derived from the exercise of separating the judiciary from the executive branch thus perpetuates the administrative/quasi-judicial distinction that has been abandoned in all other areas of administrative law.” Chapin at p. 21

and neutrality as concerns the parties who actually appear before the body.”¹² The former Vice-president of the Bureau d’audiences publiques en environnement (“BAPE”), commented with respect to Bill C-69:

It is not enough that the chairperson of a review panel and its members be independent from the project proponent. They must also be sheltered from all possibility of collusion, complicity, professional or cultural partiality, and partisan politics.

It’s not an indictment of a given government to recognize that they have positions on major projects and that ministers publicly promote projects while hearings are ongoing. But there must be a counterweight to this freedom of government to legitimately support a project. And this counterweight is neutrality, independence, and the rigour of the environmental assessment process and review panels that must be above all suspicion.¹³

“Thus the question at issue under this rubric should always be whether the decision-maker is so dependent on – and therefore partial to – the interests of one of the parties before the body that it is, in effect, making a decision in its own cause.”¹⁴ Problems arise when tenure, remuneration and administration are controlled on an unregulated discretionary basis by a party, including the fact that a member could not be attributed further cases.¹⁵ The IAA as it stands provides no safeguards against these perils, and the Keen incident described below is a stark reminder that agency heads risk termination when taking decisions (or issuing reports) according to their legislated mandate that displease the government of the time if the law allows it easily. Since the government can be seen as both a party to the case and ultimate decision maker and is also appointing the person who will prosecute the case, it allows for the possibility of a full orchestration of the process to favor a specific result. This situation should be avoided if public trust is to be restored through enacting a series of safeguards to ensure assessments are undertaken free from influence.

This brief and attached table of detailed amendments suggest best existing practices to ensure the future independence of assessments to be conducted under Bill C 69 as informed by a contextual analysis. The priority recommendations herein and attached, although most often based in legislative precedents in the federal apparatus, may depart from current federal assessment practice, that is entirely the point. The focus is on the Agency created under the IAA, because CERA already has relatively stronger safeguards of independence as compared to the existing NEB Act and more than the IAA which has none, but the lessons could be applicable to the regulator created under CERA.

Contextual note on legislative process to date regarding independence in Bill C-69

¹² Chaplin p. 3

¹³ Louis-Gilles Francoeur National Observer, 6 June 2018, online : <<https://www.nationalobserver.com/2018/06/06/analysis/political-appointments-undermine-environmental-assessment-process>>

¹⁴ Chaplin p. 32

¹⁵ Chaplin p. 31 commenting on the Matsqui decision.

C-69 provides that impact assessment of a designated project can be carried out by the Impact Assessment Agency of Canada (IAA ss. 24-30) (the ‘Agency’) or, if the minister deems it to be in the public interest, by a review panel (IAA ss. 36-69).

Over the month of May 2018, 1989 Canadians sent letters to 3 ministers responsible for C-69, requesting among other demands that :

In order to restore confidence, review panels for projects must be genuinely independent of industry and government. Only independent panel members, with sufficient powers of inquiry and appointed as part of an independent, transparent and non-partisan process, should carry out assessments of projects in Canada across all industries.

Currently, the Bill does not provide any mechanism to ensure the integrity and independence of Agency and panel members from government, proponents or other interests. Experts made general recommendations regarding review panel appointments to the House of Commons Standing Committee that reviewed the Bill, but no amendments were proposed. The issue was raised by some members during Third Reading in the House of Commons,¹⁶ and received media attention.¹⁷ The issue of the appointment and security of tenure of the President of the Agency has not been raised at all so far.

Appointment mechanisms currently provided for by Bill C-69

1. President of the Agency

In Bill C-69, the President of the Agency occupies the rank of deputy minister and is appointed at the pleasure of the Governor in Council (IAA s. 160(1)). He or she may exercise the powers that the Act confers to the minister.

The Canadian Energy Regulator’s Chief Executive Officer is also appointed at pleasure, but by recommendation of the Minister of Natural Resources (CERA s. 8) with consultation from directors, while its appointed commissioners are to serve six-year terms during good behaviour (CERA ss. 21(1) & 28).

Problem: In order to regain public trust, it is proposed that the President should have a well-established autonomy and independence from government and the projects it often supports. The President of the Agency (and ideally the CEO of the Canadian Energy Regulator) should undergo the most rigorous nomination process available for federal officials. As it stands, the President of

¹⁶ Member Barsalou at minute 12:02; Member Boulerville at minute 13:21, online:

<[http://parl.vu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20180605/-1/29463?useragent=Mozilla/5.0%20\(Macintosh;%20Intel%20Mac%20OS%20X%2010_10_2\)%20AppleWebKit/537.36%20\(KHTML,%20like%20Gecko\)%20Chrome/66.0.3359.181%20Safari/537.36](http://parl.vu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20180605/-1/29463?useragent=Mozilla/5.0%20(Macintosh;%20Intel%20Mac%20OS%20X%2010_10_2)%20AppleWebKit/537.36%20(KHTML,%20like%20Gecko)%20Chrome/66.0.3359.181%20Safari/537.36)>

¹⁷ Louis-Gilles Francoeur (former VP of the BAPE) drafted an opinion letter in *Le Devoir*, “L’évaluation environnementale à la merci des nominations politiques”, 30 May 2018, online: <<https://www.ledevoir.com/opinion/idees/529108/l-evaluation-environnementale-a-la-merci-des-nominations-politiques>> also published in English in the *National Observer*, 6 June 2018, online <<https://www.nationalobserver.com/2018/06/06/analysis/political-appointments-undermine-environmental-assessment-process>>

the Agency is appointed in a less independent manner than the CEO of the Energy Regulator and has less security of tenure than CER commissioners.

The CBA Taskforce report specifically recommended that Presidents of organizations be appointed after consultation of all opposition parties in the House of Commons, which would encourage government to appoint the most qualified persons but would also warrant greater respect for the office holder and the independence of the organization.¹⁸

Appointments at pleasure can be terminated with a lower level of procedural fairness than appointments during good behaviour and the executive retains greater discretion to terminate employment.¹⁹ Indeed, the dismissal of Ms Keen, the then President of the CNSC, days before she was to testify before Parliament after ordering the closure of the Chalk River facility for health concerns was confirmed by the federal court since the Presidency was held at pleasure, rather than during good behaviour.

At pleasure appointments would likely not be considered sufficient to ensure independence in other common law jurisdictions.²⁰ The CBA Taskforce report was categorical appointments at pleasure are entirely incompatible with the principle of independence and no member of organizations should be appointed at pleasure.²¹

Proposed Solution: It would seem appropriate for the President of the Agency to be appointed in the most rigorous process available in the federal government²² and during good behavior.²³

2. Review Panels

Under Bill C-69, the Minister (of Environment and Climate Change) must establish 2 types of rosters of persons who may be appointed as review panel members (IAA s.50):

¹⁸ CBA Task Force report p. 80 (FR version). Some go as far as recommending that appointments of Presidents be subjected to a parliamentary confirmation process at p. 83 (check section 110 of the House of Commons Regulation)

¹⁹ *Keen v. Canada* (Attorney General) [2009] F.C. 353 para 49; With respect to “at pleasure” appointments, procedural fairness is needed merely to “ensure that public power is not exercised capriciously”.

²⁰ Lorne Sossin, p. 42 (of the pdf).

²¹ CBA Task Force report p. 97-8.

²² The most rigorous appointment process is that of the Auditor General as provided for under the *Auditor General Act*, R.S.C., 1985, c. A-17, ss. 3(1) and 3(1.1.)). There is no statutory definition of officers of parliament in Canada but “key features of the position include: independence from the government of the day, a means of appointment, a mandate and term in office that is defined by statute, and a reporting obligation to one or both houses of Parliament”. “The impact and role of officers of Parliament: Canada's conflict of interest and ethics commissioner” by Gwyneth Bergman, Emmett Macfarlane (2018) *Canadian Public Administration* v61 n1 (March 2018): 5-25 at p. 6. Note that, in my opinion, such an appointment mechanism would not transform the Agency President into an Officer of Parliament since his reporting function would remain to the Minister and not to the House of Commons. See Auditor General Act, R.S.C., 1985, c. A-17, s. 7.

²³ The revocation by Parliament provided for the positions of the Auditor General and for current NEB members (NEB Act s.3(2)) is not proposed. Such a procedure only makes it hard to remove “bad apples” whilst not ensuring that they are avoided in the first place through rigorous appointments. It would seem a better balance is achieved through emphasizing that appointments be as rigorous as possible, but termination by the executive should be possible for bad behaviour.

- A general roster including people who can a) review projects on their own (IAA s. 41) and on joint panels with other jurisdictions or energy regulators;
- Rosters of members of energy regulators and offshore boards appointed on the recommendation of their regulators and in consultation with the minister of Natural Resources (IAA s. 50 (b), (c) (d)).

For federal-only assessments contemplated by the general framework of the IAA, the Minister appoints the members of impact assessment review panels (including the chair), and sets out the panels' terms of reference. With regard to jointly established review panels with another jurisdiction, the Minister names the chairperson or the co-chairperson and at least one other member of the review panel (IAA s. 42(c)). When it comes to projects assessed jointly with regulatory bodies, the Minister appoints the chairperson and at least two other members of the panel (four in the case of offshore petroleum boards) (IAA 44(1), 46.1(1), 47(1)).

The Act requires all panel members to be unbiased and free from any conflict of interest relative to the designated project, and have knowledge or experience relevant to the designated project's anticipated effects or knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment (IAA ss 41(1), 42(d), 44(2), 47(2) and 46.1(2)).

Problem: The Bill, in leaving the construction of the roster of eligible panel members and appointments to specific panels in the Minister's hands, does not ensure any independence for review panels. The current scheme presents an inherent institutional bias: the assessment by the review panel (or the Agency) leading to a report could be akin to playing a prosecutorial / inquisitorial role whereas the Minister or Cabinet who make the ultimate decision on projects would be the equivalent to being the final judge. The judge should in no way appoint the prosecutor.²⁴

Further, panel members from the general rosters have no specified tenure in the Act, which does not create permanent positions, as is the case for commissioners of the Regulator created by CERA. The general members of IAA review panels are therefore likely to have less experience with procedures as well as public participation and in a weaker position than members from regulators. The latter would be likely to exert more influence, because they have more experience and could be inclined to favour projects the regulation of which their respective regulators depend for future institutional relevance and on a personal level, their future employment given their expertise in the regulated industry.

Proposed Solutions: The proposed solution has three components.

First, review panel members who are not from regulators or boards should have some form of tenure security or permanent employment. The Act would ideally create permanent member positions from the general roster, which would ensure review panels are comprised of at least one member cognizant of the procedure and with 'expertise' in the generalist approach necessary for

²⁴ *MacBain v. Canada (Canadian Human Rights Commission)* [1985] Federal Court of Appeal F.C.J. No. 907; [1985] 1 F.C. 856 at paras 15-18, online : <<https://www.canlii.org/en/ca/fca/doc/1985/1985canlii3160/1985canlii3160.html?resultIndex=1>>. Commission, which was the body responsible for referring the complaint against Mr. MacBain to the Tribunal (characterized by the court as being the "prosecutor"), to also appoint the Tribunal and select its members. This combination of functions produced an "appearance of unfairness", as was conceded by counsel for the Attorney General. The court held that this adjudicative structure contained "an inherent bias".

multi-criteria sustainability assessments. This is how BAPE commissions in Quebec are normally composed of a permanent commissioner and a temporary one chosen for the specific project.

Second, preparing the lists of eligible persons to the panel rosters should be in the hands of an independent committee, such as the technical advisory committee established by the Agency (IAA s.157).

Third, the appointment to specific project review panels should in no way be in the hands of the Minister who will often be the final decision-maker. The President of the Agency (once appointed in a more independent manner as described above) would appoint members from the rosters to particular review panels.

Nature of review panel and adequate powers of inquiry

Problem: Bill C-69 does not attribute a specific institutional nature to review panels and their process. Further, the wording of s.53 IAA concerning enforcement powers is insufficient to enable parts of the Act such as non-disclosure orders or to ensure the proper incentives for witnesses and third parties to respect review panel orders in a way that is necessary to ensure robust enquiries.

Solution: Review panels should have inquisitorial powers and independence similar to public inquiry commissions and equivalent to BAPE commissions.

Indeed, another aspect of the Quebec model which would seem favourable in terms of inspiring amendments to Bill C 69 have to do with the conceptualization of the process as public inquiries where adequate powers must be provided to review panels. Indeed, the assessments conducted by the BAPE assume a role akin to a commission of inquiry with which they share powers and immunities, where the commissioners play active inquisitorial-type roles in seeking to make projections and recommendations regarding a project's future impacts. The inquisitorial model of public inquiries originated in the civil law tradition²⁵ but has since spread to Canada and has been used in federal administrative processes.²⁶ Inquisitorial processes are especially appropriate for situations where there is an imbalance of power and legal representation between interested parties (such as between proponent and members of the public in impact assessments) as well as when the ultimate goal is to pursue the truth in the public interest rather than settle a dispute between parties. Inquisitorial processes reserve a more active role for the 'judge' than in adversarial proceedings. In inquisitorial processes, the 'judge' is above the interested parties, represents the public interest as a whole and is charged with directing an inquiry to unearth the truth. Interested parties are not directly obligated to ensure the full deployment of evidence into their pretensions.²⁷ Indeed, if a BAPE commissioner believes one of the public's question into a project's impact to be relevant, he will pick

²⁵ Laverne Jacobs, "The Dynamics of Independence, Impartiality, and Bias in the Canadian Administrative State" in Colleen Flood & Lorne Sossin, *Administrative Law in Context*, 3rd ed. 2018 253 at p. 289; See also Roderick Macdonald, "An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commission) in Canada" (2011) at p. 6, online: <https://www.mcgill.ca/roled/files/roled/roled_commissioninquiries_en-roderick_macdonald.pdf>.

²⁶Laverne Jacobs et al. "The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives Research Workshop Report" 24 C.J.A.L.P. 261 available online: <<http://ssrn.com/abstract=2117826>>.

²⁷ See the difference between adversarial / accusatory and inquisitory procedure: online (French only): <<http://www.vie-publique.fr/decouverte-institutions/justice/approfondissements/procedure-accusatoire-procedure-inquisitoire-deux-modeles-pour-justice-penale.html>>.

it up and pursue the question as its own and direct it at the proponent or other interested parties²⁸ using its enforcement powers. The mere existence of these powers and their threat leads to good compliance from government bodies and third parties alike. Conversely, adversarial procedures can impede public participation given the discrepancy in resources of the different stakeholders (proponent vs. often unrepresented members of the public).

²⁸ Brief on Bill C-69 Presented by Louis-Gilles Francoeur, Vice President of the Quebec Bureau of Public Hearings on the Environment (BAPE) 2012-2017. He has chaired several commissions of inquiry on major projects as well as the generic survey on uranium industry issues in Quebec. Brief presented to Parliamentary committee reviewing Bill- C-69 (as translated by parliament), online: <<https://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9803813/br-external/FrancoeurLouisGilles-9809335-e.pdf>>.



Table of Detailed Amendments

This table should be read with the accompanying brief
Critical amendments are highlighted in green.

Section / Current Provision	Proposed amendment	Rationale
IAA 41 (1) If the impact assessment of a designated project is referred to a review panel, the Minister must — within 45 days after the day on which the notice referred to in subsection 19(4) with respect to the designated project is posted on the Internet site — establish the panel's terms of reference and appoint as a member one or more persons who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to the	If the impact assessment of a designated project is referred to a review panel, the Minister must — within 45 days after the day on which the notice referred to in subsection 19(4) with respect to the designated project is posted on the Internet site — establish the panel's terms of reference and the President of the Agency must appoint as a member one or more persons from a roster established under paragraph 50(a)i) who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to the	<p>The Minister should not be appointing the specific members to the review panels of projects as it will often be the ultimate decision-maker. The government is often partial to projects that are reviewed and therefore should not be involved with choosing who will be inquiring into the impacts of the projects if the review panel's report and recommendation is to have any weight and credibility.</p> <p>In Québec, the President of the BAPE, not the Minister, appoints commission members to specific mandates (Environmental Quality Act, s. 6.4)</p> <p>As drafted, s. 41 and s. 42 do not make it clear that</p>

<p>designated project’s anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment.</p>	<p>designated project’s anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment.</p> <p>Make equivalent amendments to s. 42(1), s.44(1), s.47(1) and transitional provisions for the offshore boards or amend the foregoing to include all rosters under s. 50(a).</p>	<p>appointments are restricted to people on the s.50 rosters as it is specified for regulator / offshore board appointments in s. 44 / s. 47 and transitional provisions.</p>
<p>IAA 50 The Minister must establish the following rosters: (a) a roster of persons who may be appointed as members of a review panel established under any of the following: (i) section 41, (ii) subsection 44(1), (iii) subsection 47(1), (iv) an agreement, arrangement or document referred to in section 42;</p>	<p>IAA 50 The Minister must establish the following rosters: (a) a roster of persons who, upon recommendation of the expert committee established under s. 157, may be appointed as members of a review panel established under any of the following: (i) section 41, (ii) subsection 44(1), (iii) subsection 47(1), (iv) an agreement, arrangement or document referred to in section 42;</p>	<p>Following the modernization of the Québec <i>Environmental Quality Act</i> in 2018, the list of eligible nominees is proposed by a selection committee including a representative of civil society.¹</p>
<p>NEW SECTION</p>	<p>We propose a section that would create permanent review panel member positions for those on the general rosters to ensure tenure security akin to the members that would be appointed from regulators.</p>	<p>Nothing is provided for the tenure and remuneration of review panel members from the general roster. This ad hoc mechanism means a review panel members that issues a report which displeases the government could be at risk of not getting further mandates, which is one of the factors recognized by the jurisprudence as leading to institutional bias. Further, they are likely to</p>

¹ BAPE Commissioners are appointed through a procedure which involves a selection committee with a civil society representative (*Environment Quality Act* 6.2.2.; Q - Regulation respecting the procedure for selecting persons qualified for appointment as members of the Bureau d’audiences publiques sur l’environnement Q-2, r. 35.3).

	<p>For example, CERA commissioners who will sit on joint review panels will have the following treatment: “A full-time commissioner is to be paid the remuneration that is fixed by the Governor in Council and is entitled to be paid reasonable travel and other expenses while performing their duties and functions under this Act while absent from their ordinary place of work.” (CERA s. 26(6)) They are also employed during good behavior for up to six years (s. 28(1))</p>	<p>be in a weaker position than permanent commissioners from the regulators on joint review panels which could lead them to defer to their judgements especially on procedure if they have less experience with running such process.</p> <p>We recommend a minimum of five permanent positions.</p>
<p>IAA 53(2) (2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce records and other things as is vested in a court of record.</p>	<p>Option A: (2) A review panel has the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce records and other things as public inquiries commissions created under Part 1 of the Inquiries Act, R.S.C., 1985, c. I-11 as well as the power to enforce non-disclosure orders.</p> <p>Option B: (2) A review panel has the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce records and other things and enforce non-disclosure orders as is vested in a superior court of record except the power to order imprisonment.</p>	<p>Amendment seeks to guarantee at least the same enforcement powers as those provided to BAPE inquiry commissions (BAPE commissions have all the powers of public inquiry commissions (which are the same as a Superior Court judge) except imprisonment (<i>Environment Quality Act</i>, Q-2, s.6.5; <i>Act respecting public inquiry commissions</i> c. 37, s. 7).</p> <p>At common law, only superior courts of records have the “jurisdiction to punish all types of contempt of Court whether committed in the face of the Court or out of Court. On the other hand, the power of an inferior Court to fine and imprison for contempt is confined to contempt of Court when committed in the face of the Court.” (<i>R. v. Dunning</i> Ontario Court of Appeal, (1979) 50 CCC (2d) 296 at 300. See also <i>C.B.C. v. Quebec Police Comm.</i>, [1979] 2 SCR 618</p> <p>Option A: Preferable since it has the advantage of making a closer link with public inquiries which would make the jurisprudence and administrative law doctrine</p>

		<p>to better understand the nature of review panels and their necessary independence.</p> <p>Since it is unclear whether “any court of record in civil cases” in the <i>Inquiries Act</i>, R.S.C., 1985, c. I-11, s. 5 refers to superior court of records’ including their power to sanction ex facie contempt, the amendment specifically adds a power to enforce non disclosure orders covered in ss. 56(4)&(5).²</p> <p>Option B: More closely mirrors the powers of the CERA commissioners. Note that joint review panels with CERA commissioners will benefit from their powers (IAA s. 48), why should review panels into other types of projects have more limited powers?</p>
IAA 53(6) Any summons issued or order made by a review panel under subsection (1) must, for the purposes of enforcement, be made a summons or order of the Federal Court by following the usual practice and procedure.	Any summons issued or order made by a review panel under subsection (1) must, are for the purposes of enforcement, be made a considered summons or order of the Federal Court by following the usual practice and procedure.	Amendment seeks to match the meaning of the French version of the section. If review panels have to petition the federal court to make their summons and orders enforceable, the delays and additional procedures may nullify the enforcement powers granted and impede the work of review panels especially given mandatory timelines.
IAA 153 (2) The Minister is responsible for the Agency.	The Minister is responsible for the Agency but must not give directions to the President of the Agency, its employees or review panel members with respect to any particular project report, decision, order or recommendation of the Agency or review panel except as otherwise	<p>The Minister’s role should be limited to issuing the general mandate and taking the final decision as provided in the Act when it comes to particular projects under review.</p> <p>Court cases involving species at risk highlighted how higher-level bureaucrats and political personnel under the last government acted to amend recommendations</p>

² According to Emeritus Professor Garant, this is equivalent to the powers of superior court judges in Québec since the superior court is a court of record (Garant, *Droit administratif* (1996) 4th ed., vol.1 p. 596).

	provided in this Act.	from experts before they reached the ministerial decision-making stage. The federal court struck down the Environment Minister's refusal to recommend an emergency degree for the Western Chorus frog in 2015 on this basis. Mirrors language in CERA ss. 17(1) and. 23(1)
IAA 157 (2) The Agency may appoint any person with relevant knowledge or experience as a member of the expert committee. The membership of the committee must include at least one Indigenous person.	The Agency may appoint any person with relevant knowledge or experience as a member of the expert committee. The membership of the committee must include at least one Indigenous person. Each member shall exercise his or her discretion in an independent manner.	To mirror the best practice of the expert committee established under the <i>Species at Risk Act</i> s. 16(6) The independence of this committee is particularly important given that it would be responsible for populating the roster.
IAA 160 (1) The Governor in Council appoints an officer to be the President of the Agency, to hold office during pleasure, who is, for the purposes of this Act, a deputy of the Minister.	<u>Replace existing section 160(1) with:</u> <u>A. Preferable option</u> The Governor in Council shall, by commission under the Great Seal, appoint an officer to be the President of the Agency after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons. The President holds office during good behaviour for a term of 10 years with no possibility of renewal but may be removed for cause by the Governor in Council.	Option A / Preferable: Appointment process inspired by <i>Auditor General Act</i> , R.S.C., 1985, c. A-17, ss. 3(1) and 3(1.1.) appointment except for the confirmation process by Parliament upon removal and in accordance with CBA Task Force recommendation at pp. 60 & 103. In the modernization of the Quebec EQA, some had proposed that the President of the BAPE be appointed through the same process that other important office holders (e.g. appointment by two thirds of the members of the Quebec National Assembly (http://www.assnat.qc.ca/fr/abc-assemblee/assemblee-nationale/personnes-designees-assemblee.html .) The compromise position adopted is that the President is nominated amongst people selected to become BAPE commissioners through the committee selection process.

	<p>The President has the rank and the powers of a deputy head of a department.</p> <p>B. Compromise option: The Governor in Council shall appoint an officer to be the President of the Agency after consultation with the leader of every recognized party in the House of Commons.</p> <p>The President holds office during good behaviour for a term of 5 years but may be removed for cause by the Governor in Council.</p> <p>The President has the rank and the powers of a deputy head of a department.</p>	<p>Issue of “deputy head”: The English versions of IAA s. 160(!) IAA and CERA s. 23(2) use different terminology for what is expressed in the French versions of both provisions as “administrateur général de ministère.”³</p> <p>The CERA terminology (deputy head of a department) is preferable to the IAA version (deputy of the Minister) in that it more closely mirrors the FR version (deputy minister translates to “sous ministre” which is present in neither acts in French) and properly addresses rank and powers.</p>
<p>160(2) The President is the Agency’s chief executive officer, and may exercise all of the Minister’s powers under this Act as authorized by the Minister.</p>	<p>160(2) The President is the Agency’s chief executive officer, and may exercise all of the Minister’s powers under this Act as authorized by the Minister. The President must not however give directions with respect to any particular project report, decision, order or recommendation of the Agency or review panel except as otherwise provided in this Act.</p>	<p>Attempt to mirror CERA 23(1).</p>

³ The terms and their implications in English and French are explained in the *Guide fédéral de jurilinguistique législative française*, a collection of articles dealing exclusively with issues in the drafting of French legislative texts. The very nature of the work causes it to be available in French only, online: <<https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/juril/no97.html>>.

