

# **The Proposed Federal Impact Assessment Act (IAA):**

## **Assessment & Reform Proposals**

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Our background in environmental assessment is extensive and stretches well over 25 years each. It includes work on the original Canadian Environmental Assessment Act (CEAA) in 1992, membership on the Federal Regulatory Advisory Committee and Multi-Interest Advisory Committee on EA as well as employment as a policy analyst for the Canadian Environmental Assessment Agency (Doelle). We have both worked on drafting and reforming provincial assessment processes. We have also offered advice to proponents, panel members, and intervenors involved in environmental assessments and Dr. Doelle served as a panel member on the Joint Federal-Provincial Review Panel for the Lower Churchill Hydro-electric project in Labrador, and on the strategic assessments on tidal energy and aquaculture in Nova Scotia. In our role as academics we have over 50 publications about environmental assessment law and policy in peer reviewed journals relating to both national and international aspects of assessment as well as 2 books and numerous book chapters. In short, environmental assessment processes in Canada (and the federal process in particular) have been a focus of our professional lives for the past 30 years.

In this submission, we offer our assessment of what we consider to be some of the key elements of the proposed new federal Impact Assessment Act (the first part of Bill C-69). Given the suggested page limit, we are not able to offer a comprehensive review of the Bill. Instead, we offer our reflections and reform proposals under three main headings, Meaningful Participation (Part 1), Follow-up (Part 2) and Regional and Strategic Assessments (Part 3). We would be happy to elaborate with more specific proposals for language to implement amendments proposed in this submission, or to follow up with reform proposals on other areas of the proposed IAA.

Before addressing the specific issues we have decided to focus on, we would like to share a few general observations. When Federal EA legislation was drafted in the 1990s, we had limited experience to draw on. As a result, it was not surprising that legislation tended to be largely enabling with broad discretion to make decisions about the key aspects of the assessment process, from the scope of the project, scope of the assessment, public engagement, process options, final project decisions to post approval decisions. In the ensuing twenty-five years we

have all (government employees, First Nations, industry, consultants, the public) gained experience and learned about environmental assessment and its implementation. There are few mysteries any more. Two learning outcomes based on this experience do, however, stand out for us.

First, we have learned that broad discretion tends to lead to bad decisions. This is the case in spite of good intentions at the time legislation is passed, and is at least partly a reflection of the fact that the purpose of assessment processes is to push decision makers to look beyond obvious short-term benefits of proposed projects to consider longer-term and less obvious impacts, benefits, risks and uncertainties. This is hard, and the more discretion that is built into the process, the greater the risk that the more obvious short-term benefits will win out over other consequences of proposed activities.

This point leads us to our first general observation about Bill C-69. Our overall reaction is that it provides the powers needed to implement a good assessment process, but that too much of that power is left to the discretion of decision makers. Unfortunately, we know from 25 years of experience with discretionary assessment legislation that this is not enough. What Bill C-69 needs is a general rethink away from designing a Bill that empowers decision makers to implement an effective, efficient and fair assessment process, and instead to properly direct and guide decision makers toward an effective, efficient and fair assessment and decision making process.

The second thing we have learned is that with experience, we can offer legislative direction to those tasked with making these key decisions in the assessment process to better guide decision making for the long-term interest of those affected. If we draw properly on the 25 years of experience, we can establish criteria to better guide the exercise of discretion, and we can implement additional safeguards, such as ensuring the discretion is exercised by a decision maker that is less likely to be influenced by short term considerations, and by building into the process opportunities for reflecting on, refining and improving the legislative direction to those tasked with making the key decisions in the process.

To achieve this, criteria for assessment and decision making that experience shows are clearly appropriate should be set out in Bill C-69 itself. Sections 22 and 63 are a step in the right direction in this regard, but they are only a starting point. Beyond these criteria that are enshrined in the Statute, there will be more detailed criteria that will require more adjustments over time. Such criteria should be set out in regulations. This guarantees that we will have the benefit of the criteria without being stuck with the detail, if it turns out they need adjustment. We need to avoid an approach that does not require these criteria to be developed (such as depending on the use of broad discretionary provisions rather than clear legislative direction to develop regulations on the many issues requiring guidance and direction), and we need to avoid leaving this guidance and direction to non-binding policies and guidance. Key steps in the process that need requirements for legislative guidance (a combination of Statutory provisions and a requirement to elaborate on them through regulations), include the following:

- Mandatory regulatory direction on when a federal project, strategic, or regional assessment is to be carried out (i.e. for developing the project list, discretion to add to the list, discretion to require assessments of projects or proposals not on the list)
- Mandatory regulatory direction on the scope of the project or proposal to be assessed
- Mandatory regulatory direction on the scope of the assessment, such as criteria for factors in section 22, particularly on need, purpose, alternatives, and cumulative effects
- Mandatory regulatory direction on the appropriate process design, including appropriate approaches to public participation in the assessment
- Mandatory regulatory direction on the application of each of the criteria in Section 63
- Mandatory regulatory direction on how to apply section 63 criteria to determine whether the project is in the public interest
- Mandatory regulatory direction on how to determine whether terms and conditions need to be adjusted as a result of monitoring and follow-up.

## **Part 1: Meaningful Participation**

### *Setting the Stage for Meaningful Participation*

Our combined experience with public participation in assessment processes is extensive and ranges from being a participant to being a panel member and everything in-between. In this part we discuss how public participation is cast in Bill C-69 and in the proposed panel review process. Meaningful public participation has been a goal of EA processes for a long time. The implementation of this goal has, however, been mixed, and the federal environmental assessment process is no exception. While jurisdictions have struggled to reform their EA processes over time to improve public participation, the role of the public in EA has evolved significantly. As the focus of EA has shifted from a technical exercise of predicting biophysical impacts of proposed undertakings to a consideration of a full range of social, economic, health and cultural impacts of proposals, the need for effective and meaningful public engagement has become more and more pressing. The Multi-Interest Advisory Committee (MIAC), established by the Canadian Environmental Assessment Agency for input into the federal law reform effort, developed the following principles for meaningful participation:

- Participation begins early in the decision process, is meaningful, and builds public confidence;
- Public input can influence or change the outcome/project being considered;
- Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
- Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
- Adequate and appropriate notice is provided;
- Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
- Participant assistance and capacity building is available for informed dialogue and discussion;

- Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
- Programs recognize the knowledge and acumen of the public; and
- Processes need to be fair and open in order for the public to be able to accept a decision.

In this regard The Expert Panel concluded, after hearing from hundreds of Canadians, that significant improvements are needed to achieve the goal of meaningful public participation in EA:

*Current practices in Canada situate public participation in federal EA in the “Inform” and “Consult” categories. Current engagement practices, while varied, lean toward information dissemination rather than mutual learning and inclusive dialogue, and information gathering rather than clear integration of this information into project design or approval requirements.<sup>11</sup>*

### **Key Changes in Bill C-69**

Much of the attention in relation participation and Bill C-69 has been on the fact that it removes the “standing clause” in CEAA 2012, thereby restoring the right of any interested member of the public to participate in the assessment process. This change has also captured the attention of Senators. We agree that this is a critical and important change as it recognizes that thousands of projects had been successfully approved each year between 1992 and 2012 under both NEB and CEAA processes without such standing rules, and that when introduced such rules forced the public to find ways to have their views heard through protests, the courts and other action outside the assessment process. Removing the clause also recognizes that most provinces and territories have very successfully approved thousands of projects through their environmental assessment processes while practicing open standing. In Manitoba for example, participants can still register to participate in an assessment hearing on the day of the hearing.

Of course, there are many other provisions in the Bill dealing with public participation, from the purpose section to notice requirements, opportunities for public input in the various phases of the process, access to information and participant funding.

The purpose section dealing with public participation is similar to CEAA 2012. Section 6 1(h) proposes a purpose of the Act will be to ensure “opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment”.

The process for project assessments can be broken into its key phases, the planning phase, the Agency assessment phase, and the Panel Review phase, the decision-making phase, and the follow-up phase, each with **specific timeline requirements** except for monitoring and follow-up, which happens after the project is approved. The planning phase will be carried out for all projects assessed. The Agency process and Panel review process are alternative options for the actual assessment phase of the process. This is then followed by the decision making and follow-up phases. Each phase (except for follow-up) includes legislative timelines (180 days for the planning phase, 300 days for the Agency assessment process, and 600 days for the Panel

Review), notice requirements and a legislative opportunity for public participation. There is limited detail in the Bill on how to ensure that the public participation will be meaningful.

Overall, beyond provisions for notice, access to information, and funding, there is little direction on how meaningful public participation is to be achieved. There is also no legislative requirement for public participation in follow-up and monitoring. Follow-up is, however mentioned in the funding provisions. Under section 75(1), funding can be provided for the implementation of follow-up programs.

## **Law Reform Recommendations**

The main changes to public participation under Bill C-69 are the elimination of the “standing” test and the opportunity for public participation in the new planning phase of the EA process. Of course, the challenge of ensuring meaningful public participation in the federal assessment process predate the introduction of CEAA 2012, and are therefore not addressed by undoing the constraints imposed in that Act. We have identified the following additional changes that we feel are needed to provide a proper legislative framework for meaningful public participation.

### **Recommendation 1**

Section 2 of the proposed IA should be amended to include the following definition of meaningful public participation. The term “meaningful public participation” should then be used throughout the Act in place of “public participation”.

*Meaningful public participation establishes the needs, values, and concerns of the public, provides a genuine opportunity to influence decisions, and uses multiple and customized methods of engagement that promote and sustain fair and open two-way dialogue.*

### **Recommendation 2**

Many of the critical decision about the assessment will be made during the planning phase of the assessment, including whether a full assessment will be required, what the scope of the assessment will be, what information will be gathered to inform the assessment, and what process option will be selected for the assessment.

Meaningful public engagement will be critical to the credibility and effectiveness of this phase, and for the assessment as a whole. To ensure an appropriate legislative framework for meaningful public participation in the planning phase, we recommend the following:

- *A legislative requirement to initiate the planning phase by establishing a multi interest planning committee (MIPC), to include representatives of all interested jurisdictions, affected indigenous communities, local communities, and organizations that represent key stakeholders and public interests. The selection and precise role of non-government members, including the proponent and members of the public, should be set out in regulations. We feel this is the best way to effectively and efficiently engage the range of interests in the early planning phase. It will coordinate input in this phase, ensure there*

*are meaningful opportunities for input (not rely on default mechanisms of notice and 30 day opportunity to comment) and will enhance the steps of the process that follow.*

- *Replace the 180 day timeline with a project specific timeline to be set based on advice from the MIPC. The 180 days can serve as the default, but the process will apply to a wide range of projects, and it is unthinkable that the timeline will be appropriate for the range of projects it will apply to. When timelines are inappropriate, public participation suffers greatly.*
- *The MIPC should have responsibility to advise the Agency on all aspects of the planning phase, including scope, terms of reference for the impact statement, process options, and the design of appropriate public engagement program.*

### **Recommendation 3**

With respect to the Agency led assessment process, our main concern is with the 300 day time limit. This requirement may be quite adequate for some assessments, but will not be adequate for more complex project assessments, and will in those situations serve to undermine meaningful public participation. The solution we offer is to set 300 days as a default, but to allow the appropriate timeline to be set by the Agency, on advice from the MIPC, at the conclusion of the planning phase of the assessment. The remaining issues on how to ensure meaningful public participation in an Agency lead assessment should be addressed through regulations (see Recommendation 6 below).

### **Recommendation 4**

With respect to follow-up, the Act should offer a legislative right to meaningful public participation. It should also clarify that all results of follow-up (not just summaries), including monitoring data and reported information, is public information, and that all data will be made publicly available promptly and permanently. Similarly, all information used during the course of an assessment must be made publicly available promptly and permanently. This is critical to ensure transparency and accountability for the implementation of the results of the assessments, for adaptive management, and for the efficiency and effectiveness of future assessments.

### **Recommendation 5**

No amount of voluntary guidance on its own is going to ensure that meaningful participation is achieved. The CEA Agency in fact has some very good guidance material already available on meaningful participation, but it is simply routinely not followed. We therefore recommend that clear direction on meaningful public participation be given in regulations. To facilitate this, the regulation making power in section 112 should be amended to provide for regulations dealing with the following subject matters:

- *Details on how to ensure meaningful public participation in each of the key phases of the impact assessment process, including the planning phase, the Agency assessment phase, the panel review phase, the decision-making phase, and the follow up phase.*

- *The key purposes of participation in the early planning phase (e.g., participation in the development of the final project plan to be submitted, the development of guidelines and the establishment of a public participation plan).*
- *Meaningful public participation in each of the key phases (planning, assessment, decision making and follow-up) of regional and strategic assessments.*
- *Meaningful public participation that is culturally appropriate and appropriate to the circumstances, such as the right to cross examine expert witnesses, while allowing for information processes to learn about the values, priorities, and aspirations of affected communities.*
- *The design and implementation of the participant funding program.*
- *The manner in which information relevant to the assessment, and all follow-up data and information will be made permanently publicly accessible.*

## **Recommendation 6**

These suggested reforms should apply to all tiers of IA, including strategic, regional and project IA, and to all associated stages from discussion of the need for and alternatives to the undertaking, through to the monitoring, follow-up and decommissioning stages. Meaningful participation needs to be operational at all tiers of assessment and in the ongoing review of the IA law, regulations and policies. A key element of effective implementation and continuous improvement will be a regular review of the new legislative provisions and the establishment of effective mechanisms for encouraging public involvement in this review.

### ***The Review Panel Processes***

Environmental assessments in Canada have gone through many changes over the past 40 years. The federal process has evolved from the 1973 EARP process to the 1984 EARP Guidelines Order, the 1992, 2003, 2010, and 2012 versions of CEAA, and now the proposed IAA under Bill C-69. Through these various transitions, there have been changes to the triggering mechanism, the process options, scope and decision making (among others). A constant throughout has been that Review Panels have served as the high-water mark of assessments under the federal process. Of course, Review Panels have not been immune to change during this 40-year evolution of federal EA, and they have been affected by other changes to federal EA. This Part considers the changes proposed in Bill C-69 in the broader context of the transition that Review Panels have undergone prior to its introduction. The following are particularly noteworthy in this regard:

- There has been a concerning trend to reduce the Panel's role in determining the scope of assessments, with the Minister gradually taking over the role of making scope determinations (in the form of the Terms of Reference for the Panel and the EIS Guidelines issued to the proponent). Both are now finalized before Panels are appointed.
- There has been a concerning trend toward imposing legislated timelines on Review Panel processes.
- There has been a concerning trend away from asking Panels to offer overall recommendations and conclusions about a proposed project.

- There has been a concerning trend toward fewer Review Panels under the federal EA process, using substitution and other process options to reduce the number of Review Panels carried out.
- There has been an encouraging trend toward Joint Review Panels that include other interested jurisdictions as well as regulators.

### **Key Changes in Bill C-69**

The timeline for the Review Panel process has been reduced from 2 years to 600 days. CEAA 2012 provides that any time spent by the proponent providing information requested by the Panel does not count toward the 2-year time limit. There is no equivalent provision in the proposed IAA. Instead, the Bill proposes giving discretion to the Minister to suspend the 600-day time period until the proponent has provided information required under regulations. This changes the suspension of time from an automatic suspension under CEAA 2012 to a suspension at the discretion of the Minister.

There is no legislative clarity on the role of the Review Panel in scoping and information gathering phases of the process. This is not new. However, there are reasons to highlight this aspect of Bill C-69. First, while the role of the Panel in these critical elements of the process were not set out in previous legislation, the practice has changed significantly over the past 25 years, resulting in a gradually reduced role of the Panel in scoping in particular. Furthermore, with the introduction of the planning phase in the Bill, and the proposed timing of the appointment of the Panel (i.e. after direction on what information is required has been issued to the proponent), it seems that the role of the Review Panel in scoping (and perhaps even information gathering) could be further eroded under the IAA.

Another key change in Bill C-69 is the approach to key 'energy regulators', such as the National Energy Board (to be changed to the Canadian Energy Regulator, or CER), the Canada Nuclear Safety Commission (CNSC), and the two offshore petroleum boards (CNSOPB, CNLOPB). Under CEAA 2012, the NEB and the CNSC were given control over any environmental assessments required of designated projects. Under Bill C-69, all assessments involving designated projects regulated by one of these energy regulators would have to be assessed by way of a Review Panel. There would be no opportunity for substitution or an assessment by the Agency. A project would either be assessed by way of a Review Panel, or not assessed at all. Under section 39, these Review Panels involving energy regulators would have to be 'federal only' Review Panels, eliminating the option of Joint Review Panels with other interested jurisdictions.

The Bill proposes that the Review Panel process for projects regulated by one of the energy regulators would have its own unique rules. At least one out of three panel members would have to be appointed from a roster established by the CER and the CNSC, and at least two out of five for the offshore petroleum boards (without having a majority on the panel). In addition, the Panels would be tasked with carrying out both their assessment responsibilities under the IAA and their regulatory duties with respect to the proposed project under their home statute. Essentially, the end result is still a combination of the regulatory process and the assessment



process (as was the case under CEAA 2012), but under the IAA rather than under the energy regulators' home statutes.

The role of the Panel in the decision-making process is changing under the proposed IAA. Under the various versions of CEAA, the role of the Panel had gradually shifted from making significance findings and overall project recommendations to frequently only being asked to make 'significance' findings. Under the proposed IAA, there will no longer be a 'significance' finding. Rather, the project decision will be made by the Minister or Cabinet based on whether the project is in the 'public interest'. That decision, in turn, is to be informed by factors set out in section 63 of the IAA. The Bill does not provide for any formal link between the report of the Panel (or the agency assessment in case of an agency led assessment) and the 'public interest' determination.

Finally, the decision to refer a project to a Review Panel is guided by section 36 of the IAA. The decision is to be based on the public interest, to be determined by the Minister based on direct or indirect effects on areas of federal jurisdiction, public concern, and opportunities for cooperation with another jurisdiction.

## **Recommendations for Amendments**

Recommendations for law reform are offered below, grouped into four categories: i. the connection between the planning phase and the work of Review Panels, with a focus on scoping and information gathering; ii. the role of Review Panels in project decision-making; iii. recommendations for the Review Panel process involving projects regulated by energy regulators; and, iv. miscellaneous recommendations dealing with timelines, secretariat and powers of Review Panels.

### **1. Panel Role in Planning, Scoping and Information Gathering**

Panels should be appointed earlier than currently anticipated under Bill C-69. Ideally, Panels would be appointed during the planning phase, at least for projects for which it is clear that a Review Panel is the appropriate assessment process. At the latest, Panels should be appointed at the conclusion of the planning phase, while the proponent starts to gather the information it is required to provide under section 19. The Panel should have a legislative right to conduct scoping hearings, and to have input into the scope of the assessment and into the information needed to complete its assessment. This can be done without any delay to the overall timelines if Panels are appointed early and scoping sessions are held in parallel with the proponent's information gathering efforts. This would mean, however, that decisions made during the planning phase about the scope of the assessment, the information needed for the assessment and who is required to provide the information cannot be final decisions about the scope of the assessment by a Review Panel or the information required. They have to remain open to input from the Panel during its scoping and assessment processes. In short, the direction to the proponent on information to be provided under section 19 cannot amount to a final scope determination, and Panels should be struck and be interacting with the public, proponent and IA Agency well before the 600 day clock starts to ensure time efficiency.

Bill C-69 should be amended to offer more clarity, through a specific regulation making responsibility under section 112, not only on what the proponent is required to do at the end of the planning phase, but also on what everyone else is expected to do to prepare for the assessment phase while the proponent provides the information required under section 19. What are the responsibilities of the Agency, federal regulators and federal authorities? What contributions will other jurisdictions make to the process in case of Joint Review Panels? What needs to be done during this period to ensure the public is adequately prepared for the assessment phase? The lack of clarity on these responsibilities has hampered the federal assessment process in the past. The broader sustainability focus, the addition of the planning phase, and the introduction of timelines for the assessment phase all make it more imperative than ever to be clear about the allocation of responsibility to ensure the appropriate information is gathered, and that effective steps are taken to engage the public and to ensure interested members of the public are able to engage effectively once the assessment process is initiated.

## **2. The Panel's Role in Project Decision-Making**

There has been much debate over the best way to make project decisions at the end of the project assessment process. Some, such as the Expert Panel, have suggested that project decisions should be taken out of the hands of elected officials and instead be made by Panels or an independent commission. It is not our intention here to weigh in on this debate. Rather, we offer suggestions on how to improve the political decision-making process as envisaged in Bill C-69, and, in particular, how can we take advantage of the unique contribution Panels can make to good project decisions by the Minister or Cabinet.

Our basic proposition is that Panels will spend two years or more immersed with the assessment of the full range of predicted impacts and benefits, with the risks and uncertainties associated with proposed projects, and with alternatives and alternative means of carrying out the project. There will be no one else involved in the process, and certainly not the Minister or Cabinet, who will have the unique combination of having carried out a detailed analysis of the proposed project's impacts and benefits and the big picture perspective on its contribution to the public interest. This is particularly true now that the scope has been broadened to include all benefits and impacts of a proposed project. In light of this, it is a missed opportunity not to clearly require the Panel (under section 51) to apply the criteria in section 63 and make recommendations to the Minister and Cabinet about each of the criteria (in accordance with guidance to be set out in regulations), and to reach its own conclusion on whether and under what conditions the project is likely to be in the public interest.

The Minister or Cabinet can, of course, reach different conclusions, either because they disagree with the analysis of the Panel, or because Nation to Nation negotiations carried on outside the assessment process warrant a different conclusion. In light of this, we recommend a provision that would require the Minister to give written reasons for deciding not to follow a recommendation of the Panel (recommendations which should be required by the Act to be based on factors in section 22 and criteria set out in section 63). This would create transparency and accountability for the final project decision, while leaving ultimate accountability in the hands of elected officials and allowing the results of Nation to Nation negotiations to feed into the final

project decision. There was a similar provision in the form of section 38(2) the original version of CEAA 1992, but it was later repealed. CEAA 1992 used the following wording:

38 (2) A responsible authority referred to in (1) shall, in accordance with any regulations made for that purpose, advise the public of:

...

(c) the extent to which the recommendations set out in any report submitted by a mediator or a review panel have been adopted and the reasons for not having adopted any of those recommendations.

Without a clear role in applying the section 63 criteria and in reaching a ‘public interest’ conclusion, Review Panels are at risk of becoming little more than facilitators of hearings and note takers. It is important to consider, in particular, the impact of eliminating the ‘significance’ test, whether the project is likely to cause significant adverse environmental effects, from the federal assessment process. The responsibility to make ‘significance’ findings has been at the heart of the responsibility of Review Panels under CEAA. If this responsibility is not replaced with a clear role in informing the application of section 63 criteria and the “public interest” determination, the role and value of Review Panels will be drastically diminished under the proposed IAA.

### **3. Role of Energy Regulators in the Review Panel Process**

Regulators have important expertise to bring to the Review Panel process. At the same time, it is clear that the central role some regulators have played in EA’s under CEAA 2012 has undermined the public credibility of the federal EA process. More fundamentally, the merging of EA and regulatory processes ignores their fundamental differences, and the sequential nature of planning and regulating. The work of assessing and approving a project must occur separate from and before the regulatory processes. This was the case under the original CEAA, but was changed under CEAA 2012 for projects regulated by the CNSC and NEB. This clearly did not work. Bill C-69 is an improvement over CEAA 2012, in that it has the potential to ensure proper assessment approval before regulatory considerations and may focus the role of energy regulators in the assessment process to its appropriate role as a source of technical expertise about the proposed project. It does not, however, as currently drafted, adequately protect the integrity and independence of the assessment process. The IAA needs to limit the role of energy regulators to ensure the assessment process will take an impartial independent look at the proposed project, and fairly and impartially considers issues such as need and alternatives. To achieve this goal, we recommend the following:

- The number of panel members to be appointed from a roster of an energy regulator (CER, CNSC, CNSOPB, CNLOPB) should be limited to one, rather than a minimum of one or two, as proposed in Bill C-69.
- Panel members appointed from the CNSOPB and the CNLOPB rosters should not be eligible to serve as Panel chairs, as this would risk having energy regulators in control of the assessment process, rather than their intended focus on having them contribute their technical expertise.

- Regulatory decisions should be made by energy regulators following the assessment decision, not in parallel. The Panel hearings should, of course, inform the regulatory process, but not in a manner that risks undermining the planning nature of an assessment process, such as the consideration of alternatives and alternative means.
- Contrary to section 39, Joint Review Panels for assessments involving energy regulators should be encouraged, not prohibited.

#### **4. Other Recommendations to Improve the Review Panel Process**

In addition to the three broad areas of reform covered above, there are a number of specific issues related to Review Panels that warrant attention. Some deal with the timelines for Review Panels. Others are more technical in nature, but are equally important to the effectiveness of the Review Panel process:

- Appropriate timelines for Review Panels should be determined at the conclusion of the planning phase in consultation with the Panel. The 600-day period should serve as a default, not as a rigid legislative timeline. This will allow for timelines to be set that are appropriate for the circumstances of a particular assessment, offering appropriate balance between reasonable predictability and effectiveness of the assessment process. Alternatively, we suggest returning to the approach in CEAA 2012 of suspending time automatically, perhaps with the ability to pass a regulation to clarify how the suspension of time is to work.
- Panels, not the Minister, should have discretion to suspend time while the proponent is responding to the Panels' information requests. This is critical because practice has demonstrated that it is difficult for Panels to have access to Ministers in a timely manner during the course of an assessment.
- Panels should have direct control over budgets for hiring experts and for pursuing alternative dispute resolution options in appropriate circumstances. Experience has shown that delays in federal decision-making during the Panel process (such as Ministerial or Agency approval) hamper the ability of Panels to retain experts and to pursue mediation or other forms of ADR to resolve disputes that arise during the course of an assessment. This problem has been exacerbated through rigid legislated timelines under CEAA 2012. An important part of the solution to this problem is to give Panels the authority to directly retain experts and mediators or facilitators, and to ensure they have direct budgetary control.
- To be effective, Panels need to have access to competent analysts with respect to the broad range of subject matters covered under sections 22 and 63 of the IAA. Our sense is that this has generally been the case in the past, however, the broader scope of the IAA will make this much more challenging.
- The Agency should have clear legislative responsibility to serve as Panel secretariat, resolving any doubt that the secretariat will be provided by the Agency, and not by regulators.
- The Act should be clear that even for Joint Review Panels, and Panels involving energy regulators, Panels need to include and should focus on panel members with local expertise, relevant local and traditional knowledge, and project specific expertise.

- The Act should be clear that project descriptions prepared during the planning phase will be tested and may be altered during the Review Panel process.
- The Act should provide for a panel procedures regulation to further clarify the process and to help fully implement these recommendations.

## **Part 2: Post-Assessment Approval (Follow-up) Processes**

A historically neglected but critical part of any assessment process is what happens after project approval to ensure the project is implemented in the manner envisaged during the assessment, to ensure adjustments are made to regulatory requirements in case predictions about project impacts turn out to be inaccurate, and to ensure we learn from past assessments to improve future assessments. These elements are sometimes collectively referred to as follow-up. It is important to note, however, that this term is also used in a more narrow sense to refer only to post-approval monitoring and reporting.

The post-approval process is conceived here as a process that would include the collection and reporting of information, but would also include evaluation, public reporting, and appropriate responses for the approved project and for future assessments. All too often in assessment processes, critical elements of follow-up are either neglected altogether or are left to project regulators or proponents without formal accountability and without ongoing coordination or transparency. This is not surprising given that historically participants have tended to consider the assessment process to be completed once the project decision is made. However, the cost of not paying adequate attention to this part of the process has been high, as the Mount Polly mine disaster underscores.

Key for an effective follow-up program is that it has to track whether predictions made during the assessment turn out to have been accurate, whether mitigation and enhancement measures are as effective as predicted, and whether terms and conditions are complied with and prove to be adequate. Effective follow-up requires the results of this analysis to feed into adaptive regulatory approaches for approved projects, and learning processes for future assessments. The following are key elements of an appropriate legislative approach to follow-up:

- Clear and adequate monitoring and reporting requirements for project proponents.
- A clear plan for engaging affected communities and the interested public in the design and implementation of follow up programs.
- Appropriate public registry requirements with respect to follow-up.
- Appropriate enforcement provisions to ensure compliance with terms & conditions of approval.
- Mechanisms to ensure appropriate learning and clear responsibility to implement lessons learned through adaptive management of approved projects.
- Mechanisms to ensure implementation of lessons learned for future assessments.
- Mechanism to ensure effective cooperation on follow-up with federal regulators, and a clear allocation of responsibilities and accountability.
- Cooperation with other jurisdictions involved in the life cycle of approved projects without delegating federal responsibilities, including clarity on accountability among

jurisdictions where federal approval is based on expectation that other jurisdiction will take measures to ensure impacts are mitigated and expected benefits are realized.

### **What Bill C-69 Says About Follow-up**

A follow-up program is defined under section 2 of Bill C-69 to mean a program for verifying the accuracy of the impact assessment of a designated project and for determining the effectiveness of any mitigation measures. Follow-up programs are included in participant funding programs under section 75, and are mandatory for all assessments of designated projects. The Bill includes the power under section 112 to make regulations respecting the procedures, requirements and time periods relating to designing a follow-up program.

Section 64 provides for conditions with respect to adverse effects within federal jurisdiction. Such conditions include the implementation of follow-up, and where these are set out in a section 65 decision statement, proponents are required to comply with the conditions imposed. Under section 68, the Minister may amend a decision statement, including by adding, removing or amending a condition.

Sections 120 to 128 provide for the designation of enforcement officers and establish broad powers of inspection to verify compliance and prevent non-compliance. This would include the ability to verify compliance with any of the terms and conditions imposed under section 64, including the requirements of the follow-up program.

The internet site to be established under section 105 would have to include a description or summary of the results of the follow-up program that is implemented with respect to a designated project. Project files under section 106 would have to be kept until the follow-up program is completed. The project files must include any records relating to the design and implementation of follow-up.

### **Law Reform Recommendations**

The proposed elements of follow-up and compliance under Bill C-69 offer some of the key components of an effective approach, and include notable steps forward from CEAA 2012. In particular, it is commendable that follow-up programs would be mandatory for all approved projects, that the level of transparency with respect to the results of follow-up monitoring would improve somewhat under the Bill, and that there is a link between the terms and conditions of approval and the enforcement provisions. The Bill also includes a clear legislative power to amend the terms and conditions of approval, a power that could be exercised in response to monitoring results that demonstrate that predictions made about impacts, or about the effectiveness of mitigation measures, were wrong.

However, past experience suggests that the improvements proposed in the Bill still fall far short of what is needed to ensure appropriate actions are actually taken after assessed projects are approved and implemented. Among the key missing pieces in the Bill are the following:

- Clear responsibility to amend terms of approval in the event predictions about impacts or mitigation turn out to be wrong. The Bill should include legislated criteria for when and how the power to amend the terms and conditions for approval is to be exercised. Decades of experience with EA shows that in the absence of clear responsibility and criteria, the mere power to act on the results of follow-up will not be enough.
- While there is an obligation to publish results of follow-up in some form, there is not enough clarity in the Bill that all data collected on the actual impacts of an approved project will be publicly accessible. The Bill should clarify that all data collected is public, and that all data and all documents prepared will be permanently publicly accessible.
- There is no clarity on how inter-jurisdictional cooperation will be achieved in a way that will ensure clear accountability for implementing the follow-up program, sharing the results, and ensuring appropriate action in response. The Bill should include requirements for the Agency to negotiate implementation agreements with any jurisdiction that takes on follow-up responsibilities, with the goal of ensuring full transparency and accountability.
- Federal authorities should have clear legislative responsibility to carry out their regulatory or other duty, power or function with respect to approved projects in such a manner as to ensure the effective implementation of the follow-up programs, full transparency of the results through a central federal registry, and appropriate action in response.
- There should be clear legislative provisions that require the active engagement of affected Indigenous and local communities in the implementation of follow-up programs, including monitoring programs for any impacts of particular concern to an affected community, regardless of which authority oversees the implementation of the follow-up program.
- There should be a clear legislative responsibility for the Agency to track compliance with monitoring and reporting obligations regardless of the lead authority, to report annually on resulting conclusions about compliance and the lessons learned about predictions made during the assessment, and about the resulting actions in terms of adaptive management of the approved project.
- There should be a clear legislative accountability for the Agency to ensure that any lessons learned about the accuracy of predictions made and about the effectiveness of mitigation measures are reflected in any future assessment where those lessons may be relevant. Reviewing and comparing the analysis carried out during the assessment against actual impacts tracked during the follow-up stage and sharing the results of this analysis with the public and in future assessments will be a critical part of this responsibility.

### **Part 3: Regional and Strategic Assessments**

There has been broad agreement among academics, practitioners and stakeholders involved in impact assessment in Canada that regional and strategic assessments offer opportunities to improve the efficiency, effectiveness and fairness of assessment processes and resulting decision making. Among the key benefits are the ability to address broader policy issues, to consider the interaction among a range of past, current and possible future activities, to improve the consideration of alternatives and cumulative effects, to streamline assessments at the project level, and to attract better projects as a result of improved clarity on what types of projects are

desired. In spite of its tremendous promise, and endorsement by industry, environmental and indigenous interests alike, implementation in Canada has been slow, and so far, largely ad hoc.

### **What Bill C-69 Says About Regional and Strategic Assessment**

Sections 92 to 103 of Bill C-69 set out the basic legislative framework for strategic and regional assessments. The process is to be carried out either by the Agency, or under the direction of a committee to be established by the Minister, likely contemplated primarily in case of a cooperative assessment involving other jurisdictions. Such opportunities to cooperate with other jurisdictions are clearly provided for, particularly in the case of regional assessments beyond federal land. The terms of reference for a regional or strategic assessment have to be approved by the Minister.

Regional assessments are contemplated in the Bill for undertakings both on federal lands and beyond federal lands. The broad scope of regional assessments beyond federal lands seems appropriate. For strategic assessment, both existing and proposed policies, plans and programs are suggested in the Bill, with a required focus on the relevance of the policy plan or program for project impact assessment, rather than a broader assessment of the policy, plan or program. The resulting scope for strategic assessments would be quite narrow.

Section 97 provides an opportunity for any person to request that a regional or strategic assessment be carried out. The Minister has to respond to the request within timelines to be set in regulations, with written reasons for the decision. Otherwise, there is no mechanism provided for triggering a regional or strategic assessment, no criteria, and no list of undertakings to be assessed.

The public is to have an opportunity to participate in any assessment carried out, and to have access to relevant information. This is in line with the purpose section, which provides for meaningful public participation in regional and strategic assessments. The participant funding program established under section 75 makes reference to regional and strategic assessments, suggesting that there will be participant funding for any assessments carried out.

No further details are provided in Bill C-69 on the process or the outcome of a regional assessment. The assessment report is to be filed with the Minister, but there is no provision for a response or decision-making, and no guidance on how the results of a regional or strategic assessment are to be used in future project decisions. There are, however, a number of provisions that generally provide for the consideration of the results of regional and strategic assessment. They include the Ministers decision to designate a project for assessment under section 9, the Agency's decision to require an assessment of a designated project under section 16, and the factors to be considered in a project assessment under section 22. It would appear that the Cabinet Directive on strategic effects assessment will stay in place, but no reference is made to it in the Bill.

### **Law Reform Recommendations**

#### ***Regional Assessments***



The proposed approach to federal regional assessments is clearly a step forward from CEAA 2012, but overly cautious in the manner in which it introduces regional assessments to the federal assessment process. This is unfortunate, as a number of regions of the country (such as the Ring of Fire in Ontario or the Bay of Fundy in Nova Scotia) are in desperate need of regional assessments with full consideration of a range of future development scenarios, alternatives, and a full range of economic, social, environmental, health and cultural considerations.

While there are clearly limits on federal decision-making authority beyond federal lands, it is not clear that the drafters of Bill C-69 have fully appreciated the value of regional assessments to inform federal project assessments. In short, in order for federal decision-makers to be able to make sound decisions at the project level about a project's contribution to sustainability (a key element in the proposed new 'public interest' test for project decisions), the results of a comprehensive regional assessment that is based on a reasonable range of future development scenarios, are invaluable. In fact, making good decisions under section 63 of the proposed IAA may prove to be challenging in the absence of strong regional assessments completed before project decisions are made.

For those concerned about jurisdictional constraints on federal regional assessments beyond federal land, the issue is not whether the federal government has jurisdiction over all the information needed for a thorough regional assessment; rather, the issue is whether this information will be helpful for project decisions that are within federal jurisdiction. We fully recognize (as does Bill C-69) that there will be situations where the end result of a project assessment is that there are no or minimal impacts on areas of federal areas of jurisdiction, resulting in no federal decision-making authority. However, this can only be determined once the regional and project level information gathering processes are complete, not when decisions are made about the value of a regional assessment. A regional assessment can in fact be very helpful in clarifying federal jurisdiction over particular projects.

With these observations, we offer the following recommendations:

1. The Act should include a definition of regional assessment to clearly define it and distinguish it from a strategic assessment. A regional assessment should be defined as an assessment whose primary defining features are its regional scope and its focus on understanding the interactions between all past, present and future human activities and the natural world within a given study area leading to specific conclusions about the optimal combination and scale of human activities to be encouraged and permitted in the region.
2. The Act should ensure that there are better incentives for provinces and other affected jurisdictions (such as municipalities and Indigenous communities) to carry out cooperative regional assessments with the federal government. Funding, a commitment to collaborating in creating a common 'sustainability' based foundation for future project decision-making, and a commitment to proceed with a federal assessment in the absence of interest from other jurisdictions, appear to be obvious motivations.
3. The process to be followed (including a planning phase and an assessment phase similar to project assessments), the decisions to be made at the conclusion of the regional assessment, and how the results of the regional assessment are to be used at the project

level should be more clearly set out. As a minimum, the new Act should set out clear requirements to develop regulations to address these issues.

4. A roster of regional assessments to be carried out would also be helpful, as would a commitment to initiate a minimum number of regional assessments in any given year.

### *Strategic Assessments*

The proposed approach to strategic assessments could be significantly enhanced, as it misses the opportunity to ensure strategic assessments are used effectively to make project assessments more efficient, effective and fair by resolving high level policy issues before specific projects are proposed and assessed (or in parallel with project assessments where necessary). The planning phase for project assessments in particular provides opportunities for sequential or parallel project and strategic assessments. Bill C-69 contemplates a planning phase before the proponent prepares its impact statement. The proponent has up to three years following the planning phase to complete the statement. This time period between planning and assessment provides an opportunity to address policy issues identified during the course of the planning phase by initiating a strategic assessment.

It is clear that Bill C-69 intends strategic assessment to be used to link existing and proposed federal policies, plans and programs to project assessments, to help those engaged in project assessments understand the implications of existing and proposed federal policies, plans and programs for the projects being assessed. An example specifically addressed is the need for a strategic assessment of implications for meeting Canada's climate commitments, to determine how existing and emerging federal climate policies, plans and programs should factor into the assessment of projects and into project decisions.

While the proposed application of strategic assessments to existing and proposed policies, plans and programs is helpful, it is only one part of the overall value and importance of strategic assessments. Equally important is its potential for filling policy gaps, particularly gaps identified during the course of project assessments. Examples include outdated policies, lack of federal policies on important issues, challenges associated with new industries that have not previously been considered, and new scientific developments that make existing policy frameworks unworkable at the project level. Strategic assessment can also play an important role in updating regional assessments in light of new developments.

In short, there will be issues that arise at the project assessment level that cannot be resolved between the proponent and interested members of the public, because their implications go beyond the scope of a particular project assessment. This will be particularly relevant in cases of emerging or changing industries and with any significant shift in our understanding of the sustainability implications of established industries. The proponent or interested members of the public should be able to initiate a parallel process to address such broader issues in an equally open forum with similar objectives of resolving the issues in such a way as to maximize net contribution to sustainability. The Expert Panel recognized this when it indicated that participants noted that:

*This lack of clarity in broad policy objectives leads to an increase in uncertainty, delay in the conduct of project EA and its outcomes, and a more adversarial process. Participants suggested that strategic as well as regional IA be conducted to better understand impacts of climate change in a region and to support the implementation of policies in project EA.*

If policy issues are raised during the planning phase of a project assessment, the proponent and public should have a formal opportunity under the legislation to alert the Agency, who would then be responsible for deciding whether to initiate a parallel strategic assessment process to move forward on the policy issues raised. The process for providing this direction could include the following steps:

1. The Agency would obtain and report on policy issues raised based on consultations within government, including the review of existing related policy and Ministerial/Cabinet advice. A determination would then be made whether a policy review through a strategic assessment is warranted.
2. In circumstances involving a significant policy gap, the Agency would recommend that the gap be filled by way of an open, consultative, public strategic impact assessment (sometimes referred to as the "policy off-ramp").

In most cases, work on the proposed project assessment would continue with the scoping and information gathering phases, but no project decision would be made until the policy gap was filled and policy direction provided. In some cases, a precautionary approach to the project decision would still enable the project assessment to be completed and a project decision to be made without having to wait for the completion of the strategic assessment.

With these points in mind, we offer the following recommendations:

1. The Act should include a definition of strategic assessment to clearly define and distinguish it from a regional assessment. What distinguishes a strategic assessment from a regional assessment is its focus on a particular set of human activities, either a particular policy, plan or program, a particular issue, or a particular industry or sector of the economy. A regional assessment, in contrast, would include all human activities within a given study area.
2. The Act should ensure that there are clear requirements to carry out strategic assessments of key existing and proposed federal policies, plans and programs, and not just those relevant to conducting project assessments. The process to be followed (including a planning phase and an assessment phase similar to project assessments), the decisions to be made at the conclusion of the strategic assessment (with respect to the policy, plan and program itself), and how the results of the strategic assessment are to be used at the project level should also be more clearly set out. As a minimum, the new Act should require the development of regulations to address these issues.
3. To implement a 'policy off-ramp', the Bill should include a clear articulation of:
  - o The opportunity to initiate the policy off-ramp;
  - o The building of policy considerations into the assessment process – in other words that the proponent, the Agency and interested parties should strive to identify any

- potential policy gaps or questions about how to apply existing policy to the proposed project during the planning phase;
- The criteria to be applied to determine whether a strategic assessment is warranted (e.g., implication of the policy gap on sustainability pillars in relation to a project; implications of not filling the gap; potential undermining of existing policy objectives; etc.)
  - The criteria to be applied to determine what happens to the project assessment and the project decision pending the conclusion of the strategic assessment (e.g., avoiding undue delay – reasonableness; potential to synchronize the project assessment or decision process with policy development; magnitude of the policy gap in relation to a project; and
  - The role of government departments who will be responsible for implementing the results of the strategic assessment.

## **Conclusion**

While we do not have the space here to review all aspects of Bill C-69, we would like to emphasize in conclusion that the impact assessment processes proposed is an important step forward in the evolution of impact assessment in Canada. Provisions related to early planning and broadening the scope of assessment beyond biophysical considerations are two critical new elements in this evolution that we have not had space to review here. And while we may feel these and other changes proposed in Bill C-69 are modest in the big scheme of impact assessment they do move us forward and the Bill is a significant improvement over CEEA 2012, which we agree, needs to be replaced. We would also like to underscore that the suggestions we have made here are in the context of the IAA applying to only a relatively small number of projects a year – that these will be large, complex projects of national interest that will demand robust assessment, wide participation and very careful attention by decision makers, attention that will be closely watched by the public.

As we conclude, we would like to return to the issue we started with, the issue of discretion. In addition to legislative criteria to better guide and constrain the exercise of discretion, there is another important tool to consider for the better exercise of discretion, an opportunity to appeal decisions to a specialized tribunal set up to develop the special expertise needed to assess whether discretion is being exercised in the interest of maximizing the effectiveness, efficiency and fairness of the assessment process. We are not suggesting an opportunity to appeal the final project decision, and are not suggesting an appeal to a court, but we are suggesting that key process decisions discussed above should be appealable to a specialized tribunal set up to further guide and refine the exercise of discretion in the interest of continuous improvement of the assessment process.