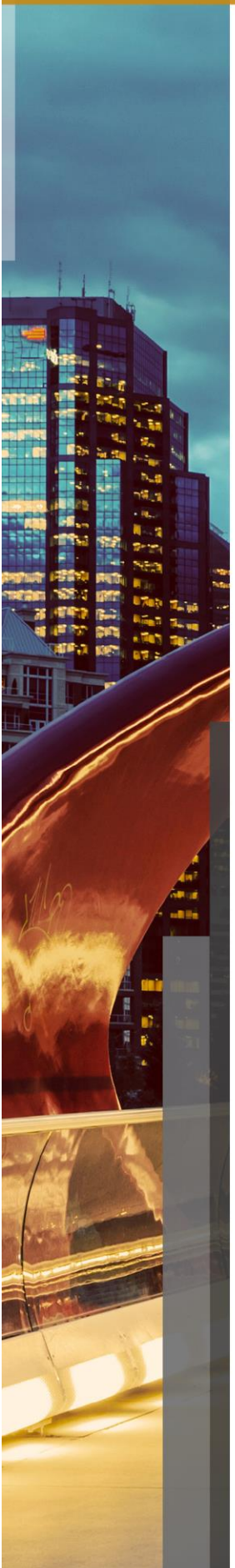

Bill C-69: Introducing the Canadian Energy Regulator and the Impact Assessment Agency

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On August 28, 2019, Bill C-69 was proclaimed into force, simultaneously enacting the *Canadian Energy Regulator Act* (**CERA**) and the *Impact Assessment Act* (**IAA**) and repealing the *National Energy Board Act* (**NEB Act**) and the *Canadian Environmental Assessment Act*, *2012* (**CEAA 2012**). Due to this legislative changeover, the National Energy Board (**NEB**) has been replaced with a new regulatory body, the Canadian Energy Regulator (**CER**); and the Canadian Environmental Assessment Agency (**CEA Agency**) has been replaced with the Impact Assessment Agency of Canada (**IA Agency**).

Bill C-69 introduces a number of important changes to the regulatory regime for major projects and environmental assessments in Canada.

An overview of the regulatory changes enacted by Bill C-69

Revised governance and adjudicative structure

Previously, the NEB administered its statutory jurisdiction as an integrated regulatory body. No longer. The CERA implements an internal reorganization, separating out the CER's administrative and adjudicative functions. Strategic administrative and policy considerations will be managed by a Board of Directors and a CEO; adjudicative functions will fall into the purview of a group of independent commissioners (the Commission).

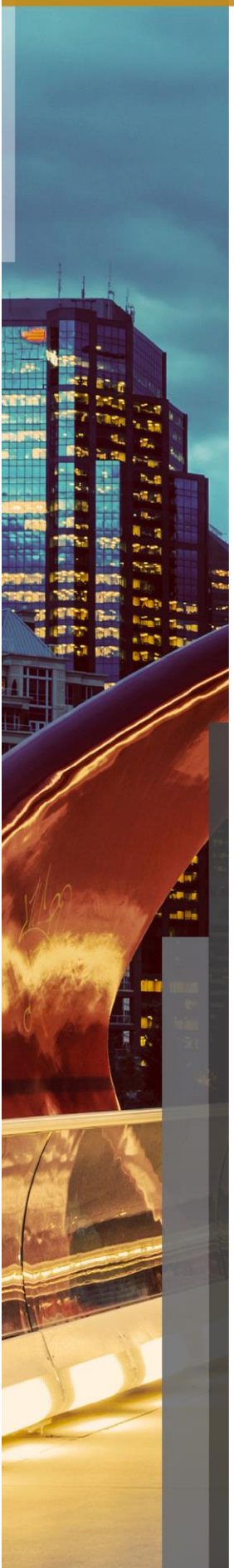
In addition to these two bodies, the CERA contemplates that the Commission and IA Agency will, on occasion, form a federal review panel to jointly conduct integrated impact assessments and reviews of certain designated projects that are subject to both the CERA and the IAA.

This change, though new in the CERA, is not unfamiliar. Prior to 2012, some project reviews were similarly conducted by federal joint review panels under the NEB Act and the *Canadian Environmental Assessment Act*, the predecessor statute to the CEAA 2012. After 2012, the NEB conducted the environmental assessments and project reviews for designated projects within its jurisdiction and the CEA Agency was responsible for those projects that the NEB did not have the jurisdiction to consider. Thus, while the decision-making apparatus set out in the CERA and the IAA represents a change from Canada's most recent approach to environmental and major project regulation, the involvement of a multi-agency review panel is, in many respects, no more than a reversion to a process similar to that followed prior to 2012.

Jurisdiction of the CER

Under the CERA, the CER has retained, to varying degrees, jurisdiction over a list of projects and associated matters similar to that previously exercised by the NEB. Offshore renewable energy projects are a new addition to this list, and likely include offshore wind and tidal facilities. In its adjudicative role, the CERA tasks the Commission with reviewing applications for the development, construction and operation of many of these projects, as well as their ongoing oversight and eventual abandonment. Notwithstanding that the CER has jurisdiction over a broad range of projects and related matters, the remainder of this article focuses primarily on projects related to the oil and gas industry, and, in particular, the more complicated circumstances that engage both the CERA and the IAA.

Regarding new oil and gas infrastructure projects, the Commission will, unless otherwise directed, assess applications within its jurisdiction, considering a range of environmental and, broadly speaking, socio-economic factors. Some of the enumerated factors that fall within this list, like



environmental impact, safety, and concern for the rights and interests of Indigenous peoples of Canada were previously considered implicitly by the NEB. Other factors are new, including the impact of a project on the intersection of sex and gender identity factors and the extent to which the project will hinder or contribute to the Government of Canada's ability to meet its environmental obligations and commitments in respect of climate change.

Designated projects and the IA Agency

The IAA applies to a broad range of projects and physical activities. In this respect, there is some crossover with the CERA. The *Physical Activities Regulations* (the **Regulations**) to the IAA designates certain projects (**designated projects**) which will require an impact assessment as part of their regulatory review. A number of pipeline and other energy-related projects are included on this list and must therefore undergo integrated impact assessments and reviews conducted by a review panel. These include:

- pipelines in national parks and protected areas;
- interprovincial or international pipelines that require more than 75km of new right of way; and
- certain offshore projects and operations related to offshore pipelines.

In addition to projects that are subject to the jurisdiction of both the CER and the IA Agency, the following energy-related projects must undergo impact assessments administered by the IA Agency:

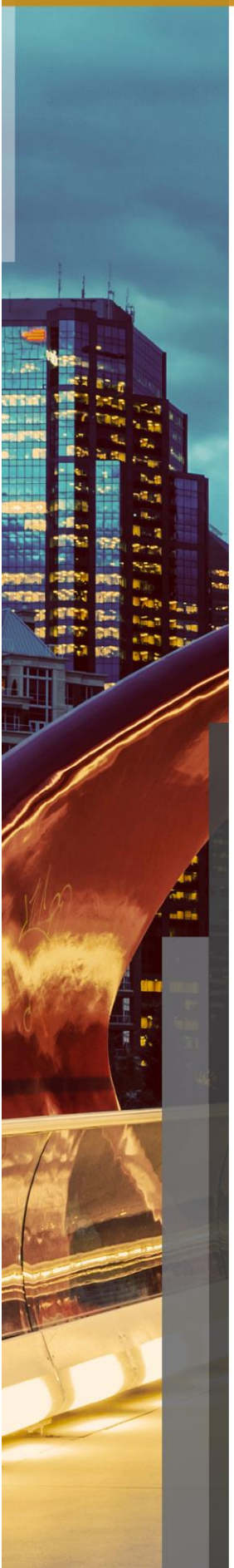
- new fossil-fuel power generating facilities that generate more than 200 MW;
- new *in situ* oil sands mines that have bitumen production capacities of 2,000 cubic metres per day and are not subject to provincial legislation limiting the amount of greenhouse gas emissions produced by oil sands sites in the province, as well as the expansion of certain existing mines; and
- certain refining, processing and storage facilities, as well as the expansion of existing designated facilities.

For both categories of designated project, proponents should be aware of the expanded criteria that will apply to any impact assessment conducted by a review panel or the IA Agency, including the newly framed public interest determination. As is the case as between the CERA and the NEB Act, the IAA has a far broader list of factors than was formerly included in the CEAA 2012, which focused primarily on environmental effects. In this regard, the explicit reference to "impact" in the title of the IAA is telling: the IAA requires a consideration of the overall societal impact that a project may have, either as a direct or consequential result of its construction and operation and including environmental, biophysical, and socio-economic factors.

New formulation of the public interest determination

Under the NEB Act, the Board had to consider various economic and market related factors in its review of pipeline applications, as well as any public interest it thought may be affected by the pipeline. The CEAA 2012 built on this inquiry, but its version of the public interest assessment provided little additional guidance, focusing primarily on concerns related to the significant adverse effects that a designated project might have on the environment.

While the residual public interest consideration that applies to the Commission's review of pipeline applications under the CERA remains open-ended, the public interest inquiry under the IAA has been



completely reformulated. For designated projects, the decision-maker will no longer have to simply determine whether any significant adverse effects identified in the environmental review can be justified in the circumstances. Under the CEAA 2012 and NEB Act, this was a discretionary decision that relied primarily on a weighing of the socio-economic and environmental benefits and burdens associated with a designated project. Departing from this approach, the IAA now requires the appropriate decision-making authority to determine whether the adverse effects identified in the impact assessment and review are in the public interest with regard to the following considerations:

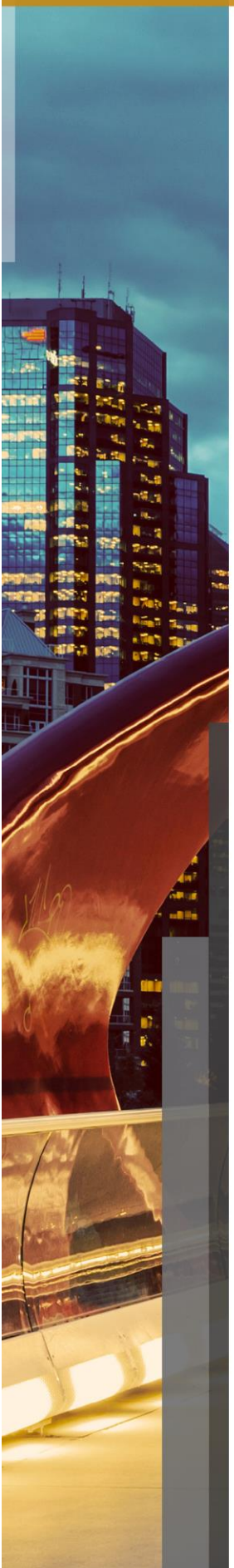
- the extent to which the designated project contributes to sustainability;
- the extent to which the identified adverse effects are significant;
- whether the implementation of mitigation measures may alleviate any concerns arising from the adverse effects of the designated project;
- the impact that the designated project may have on any Indigenous group or their constitutional rights; and
- the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

This list of factors appears to preclude the decision-maker from simply weighing the socio-economic and environmental benefits and burdens associated with a designated project. The public interest has now been defined as something different than a "net benefit" and it appears that Parliament is of the view that adverse effects are no longer justifiable if the project as a whole does not, in some manner, fit within these parameters, regardless of the net economic benefit. Complicating the analysis, however, is the fact that, while these factors are similar to those comprising the underlying impact assessment, the scope of the questions asked at the public interest stage of the inquiry does not extend to account for all of the considerations that informed the initial impact assessment. Until the IA Agency, a review panel, the federal government or a court provides further guidance, the manner in which the various assessments conducted under the CERA and IAA interact will introduce significant uncertainty into the project approval process.

The duty to consult and an increased emphasis on Indigenous interests

References to the Commission's and IA Agency's duties and responsibilities to the Indigenous peoples of Canada appear throughout CERA and the IAA. While we have not put together an exhaustive list of these changes, the following are noteworthy:

- it is now explicitly within the mandate of the Commission and the IA Agency to perform its duties and functions in a manner that "respects the Government of Canada's Commitments with respect to the rights of Indigenous peoples of Canada";
- in discharging its duties, the Commission and the IA Agency must consider any adverse effects that a project, decision, order or recommendation may have on the Indigenous peoples of Canada;
- the Commission must establish an advisory committee to improve the involvement of Indigenous peoples of Canada in energy infrastructure projects; and



- when evaluating project applications, the rights, interests and knowledge of Indigenous peoples are now an enumerated consideration for the Commission and the IA Agency.

Many of the principles underlying these express statutory requirements are constitutionalized under s. 35 of the *Constitution Act, 1982*, and, as a result, already informed the NEB's and CEA Agency's administrative practices. Some of the specific requirements, however, are new.

Public participation

The NEB's previous test for standing, which limited participants to those that were either directly affected by a project or had relevant information or expertise, no longer applies. The language of both the CERA and the IAA disclose a broad and inclusive approach to public participation, though it is only the CERA that expressly addresses standing. For pipeline applications, the CERA contemplates an open-ended public right of participation: "Any member of the public may, in a manner specified by the Commission, make representations with respect to an application for a certificate".

This change has the potential to cause significant delays to the review process; however, it may be that the Commission or review panel simply adopts a procedure similar to that previously employed by the NEB: permitting those whose interests are directly affected to directly intervene while limiting the participation of less directly affected parties to letters of comment.

Timelines for review and the "planning phase"

During the debate surrounding Bill C-69's development, the federal government frequently stated that an objective of the proposed legislative changes was to improve decision certainty and turnaround times. One mechanism that may help achieve this goal relates to designated projects under the IAA. Prior to the commencement of an impact assessment, the proponent of a designated project must conduct a planning phase in which it engages with the public and works with the IA Agency and relevant federal authorities to determine what the eventual impact assessment will consider and what information the IA Agency or review panel will require to conduct its assessment. This planning phase is set to take no more than 180 days, but may be extended.

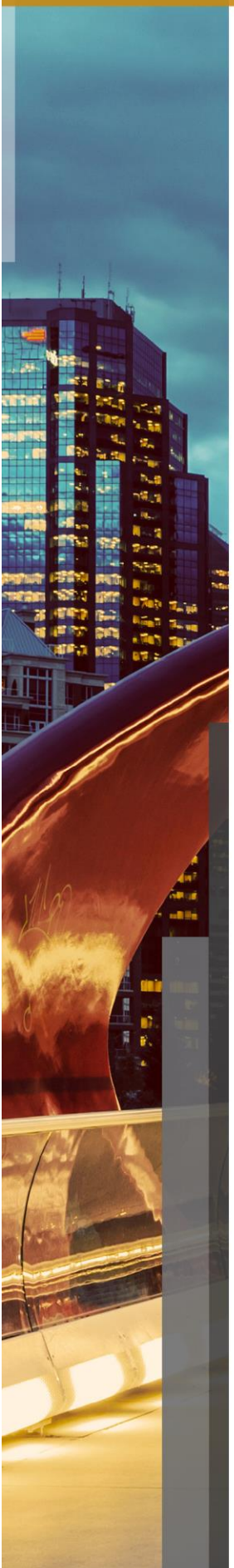
Once a review or assessment has commenced under either the CERA or IAA, there are limits on the amount of time the relevant regulatory authority will have to issue its report and recommendation to the Governor-in-Council (the **GIC**). There are similar time limits that apply to decisions that must be made by the GIC.

Consistent with the NEB Act, proponents of pipelines shorter than 40 km may apply for an exemption from the full review and certification process.

Applications for pipelines between 40 km and 75 km will also, at least procedurally, look similar to the process previously conducted under the NEB Act. Applicants will apply to the Commission, the Commission will issue a report and recommendation to the GIC within 450 days following the receipt of a complete application, and the GIC will make a final decision within 90 days of receiving the report.

New interprovincial or international pipeline projects that require 75 km or more of new right of way, however, are designated projects and will be assessed by a review panel. A review panel operating under the CERA and the IAA must issue its report within 300 days of the commencement of the impact assessment and project review, though this time limit may be set for as long as 600 days if the IA Agency believes that more time is required. Once it has received a report prepared by the review panel, the GIC must consider the report and issue a decision within 90 days.

For all other designated projects, the IA Agency (or, if necessary, a review panel) must complete its impact assessment within 300 days, at which point the Minister must either issue a decision within



30 days or refer the matter to the GIC for further consideration. As above, however, the initial 300 day limit may be extended to be as long 600 days if the impact assessment is conducted by a review panel.

Despite the assurances of the federal government, it is not obvious that the changes and timelines implemented under the new regime will actually improve decision certainty and turnaround times. Indeed, given the addition of new factors for consideration, increased opportunity for public participation, and the discretion of the Minister to extend or suspend the specified timelines, project reviews may, in fact, take longer.

For pipelines, the GIC can no longer disregard a negative recommendation

Under the CERA, the GIC no longer has the ability to exercise its discretion and approve a pipeline if the Commission (or review panel) recommends that it not approve the project. If the recommendation contained in the report is that a project not proceed, the GIC may only reject the application or ask that the recommendation be reconsidered.

Conclusion

As with any new legislative and regulatory paradigm, there will be growing pains. The changes brought in by Bill C-69 have broadened the scope of considerations the Commission and IA Agency must now review in assessing new projects, many of which are themselves amorphous and difficult to define. What is clear, however, is that the burden for new project proponents appears to be greater now than it was under the old regime. While we wait to see how the CERA and the IAA will shape regulatory processes moving forward, Alberta has vowed to challenge the constitutionality of Bill C-69, arguing that it improperly interferes with its jurisdiction to manage the development of its natural resources.

This article is intended as general information only and is not to be taken as legal advice. If you require additional information or assistance with the foregoing please get in touch with our Energy or Regulatory team.