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Government of Canada enacts changes to environmental assessment processes

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On June 21, 2019, the federal government of Canada (Canada) passed Bill C-69, new legislation that will materially reform the federal environmental assessment regime in Canada. The reforms will see the National Energy Board (NEB) replaced by the Canadian Energy Regulator (CER) and the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) replaced by a new *Impact Assessment Act* (IAA). See our initial review of the proposed reforms.

Bill C-69 was subject to a review by the Standing Senate Committee on Energy, the Environment and Natural Resources. On June 5, 2019, after hearing from interested parties across the country, including members of Osler's Regulatory, Environment, Aboriginal and Land Group, the full Senate passed a suite of close to 190 amendments to Bill C-69. Canada agreed to accept roughly half of these, but largely rejected the proposed amendments put forward by Conservative senators as well as several amendments proposed by independent (formerly Liberal) senators that would have improved the Bill. Although the final amended version of Bill C-69 can be considered an improvement over the original draft, the new legislation introduces considerable uncertainty into the federal environmental assessment processes, and key issues that plagued Bill C-69 from the outset remain.

Bill C-69, as amended, introduces considerable uncertainty into the review process

Bill C-69 will exacerbate the ongoing issues of regulatory uncertainty and protracted timelines that currently exist under CEAA 2012, which are seriously impairing Canada's ability to attract investment. Environmental assessments under the IAA will continue to take longer than necessary and will provide Canada with the opportunity to repeatedly "stop the clock," thereby raising the spectre of indefinite delays. In addition, Bill C-69 allows for a degree of public participation that will not serve to provide the Impact Assessment Agency of Canada (Agency) or CER with the best available, relevant evidence. Rather, all interested persons, many of whom may have no connection to the project being reviewed, will be allowed to opine on and object to the project on unrelated grounds that may be completely outside the proponent's control. Overall, the process has become increasingly politicized and represents a shift away from decision-making by expert quasi-judicial bodies. Further, while Bill C-69 attempts to address perceived public concerns with the current regulatory regime, in our view it will likely serve to make the process less efficient and will not improve the environmental outcomes of the regulatory process.

Summary of noteworthy amendments proposed by the Senate and passed by the House

The following summarizes some of the noteworthy amendments to the original version of Bill C-69 that were included in the final version of the Bill that was passed into law, including some of the few amendments that improve the Bill relative to its earlier version:

- In many places, ministerial discretion has been replaced with discretion of the new Agency (which will replace the Canadian Environmental Assessment Agency). These changes are in response to concerns that the federal Minister of Environment and Climate Change had too much power under the IAA to interfere with impact assessments but replacing ministerial discretion with the Agency's discretion simply creates new concerns. For example, the Agency now has the ability to suspend time limits established under the IAA that are intended to make the Agency more efficient. In our view, allowing the Agency to suspend time limits if it fails to carry out its functions within the legislated time period undermines the purpose of the time limits in the first place.
- The Agency will now be determining the scope of the factors to be considered in an environmental assessment in the notice of commencement, which is issued at the outset of the process. This should provide the proponent with a degree of certainty about the scope of the assessment prior to carrying out its assessment studies, thereby allowing the proponent to appropriately focus its studies on the relevant issues for the project.
- When considering regional and strategic assessments, the IAA now expressly allows the Agency or review panel to consider the weight to be given to that assessment, including the relevance of the assessment to the project and the strength of evidence behind it. This amendment reduces the risk that regional or strategic assessments would be finalized and the Agency and review panels would then treat those assessments as binding, regardless of the strength of evidence behind them.
- The "significance" threshold has been reinserted into the IAA as the key threshold for measuring adverse effects in assessment reports. In our view, this threshold helps to provide focus for the assessment and distinguish between material and immaterial impacts. The test for project approval, however, is still the "public interest," including consideration of the project's "contribution to sustainability," consistent with the first version of Bill C-69.
- The Agency is now tasked with reviewing reports issued by review panels and submitting recommendations to the Minister regarding the conditions that should be imposed on the project. This is problematic for three reasons. First, it is not clear why the Agency is being asked to perform this function, and it will likely result in unnecessary duplication of efforts and costs. Second, there is no time limit for the Agency's recommendations and the ultimate decision by the Governor in Council will not be made until 90 days have passed after the Agency's recommendations have been received. The Agency's role in this process

will therefore likely result in delays. Third, and perhaps most importantly, the Agency will not necessarily attend the review panel hearings but will be essentially second-guessing the review panel without the benefit of hearing the evidence. This creates concerns regarding procedural fairness if the Agency is recommending conditions on a project that the proponent has not had an opportunity to review and respond to.

The Project List and transitional provisions create uncertainty

Bill C-69 will come into force on a date to be proclaimed by the government, which is currently unknown. Before the Bill comes into force, however, the key regulation under the IAA (the regulations designating physical activities, or "Project List," which sets out the types of projects that will be subject to the IAA) will likely need to be finalized. Canada has released a Consultation Paper On Approach to Revising The Project List to seek public comment on revising the current Project List.

Notably for industry, once Bill C-69 comes into effect, not all projects currently being assessed under the existing CEAA 2012 will be grandfathered by this new legislation. For example, environmental assessments that are currently being conducted by the NEB or the Canadian Nuclear Safety Commission, and for which the Agency considers that the proponent has not collected the information or undertaken the studies required, may be transitioned to the new process once the IAA comes into force. As such, the transitional provisions of the IAA create considerable uncertainty for ongoing projects.

The ultimate impact of Bill C-69 on environmental assessments in Canada will be influenced by the details contained in the regulations once passed, who gets appointed to lead the Agency and serve as CER commissioners, and how those individuals implement the new legislation. Until the details of the new regime are well understood and have been tested through actual project assessments and litigation, we expect regulatory uncertainty will continue to be a major barrier to investment in Canada.