Canadian Environmental Law Association
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Briefing Note on Canada's *Impact Assessment Act*:
The #BetterRules are Neither Better nor Rules

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On February 8, 2018, the federal government tabled Bill C-69, which proposes to repeal the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*), and replace it with the *Impact Assessment Act* (*IAA*).[1]

If enacted, this omnibus legislation also repeals the *National Energy Board Act*, establishes the *Canadian Energy Regulator Act*, and amends the *Navigation Protection Act* and numerous other federal laws.

On the day that Bill C-69 was introduced, federal Ministers fanned out across Canada to hold press conferences praising the new legislation, and they extensively used social media to claim that it represented #BetterRules.

However, a close reading of the *IAA* reveals that in many key aspects, the *IAA* is not demonstrably "better" than *CEAA 2012*. To the contrary, the *IAA* replicates many of the same significant flaws and weaknesses found within the widely discredited *CEAA 2012*, as described below.

Similarly, the *IAA* does not establish a concise rules-based regime that provides clarity, consistency, and accountability during the information-gathering and decision-making process established under the Act. Instead, the key stages of the proposed impact assessment process are subject to considerable (if not excessive) discretion enjoyed by various decision-makers under the *IAA*.

At the most fundamental level, for example, it currently remains unclear which projects will actually be subject to the *IAA*. In particular, no draft regulations have been released in conjunction with Bill C-69 to identify the physical works or activities that will trigger the application of the *IAA*.

The Canadian Environmental Law Association (CELA) recognizes that as the *IAA* is being debated in Parliament, the federal government is concurrently seeking public input on the forthcoming designated projects regulation.[2] However, the *IAA* itself contains no benchmarks or criteria to provide direction on the type, scale, or potential effects of projects that should be designated under the new law.

[1] http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading.
[2] https://www.impactassessmentregulations.ca/.

In this regard, it must be recalled that the same general discretion existed under *CEAA 2012*, but it resulted in an inadequate regulatory list that omitted a number of environmental significant activities (e.g. refurbishment/life extension of nuclear power plants). Regrettably, there appear to be no statutory provisions in the *IAA* that will prevent a recurrence of this problem.

Like *CEAA 2012*, the *IAA* also allows the Minister of the Environment and Climate Change to issue orders designating non-listed projects under the Act (section 9). However, this discretion can only be exercised by the Minister if, "in his or her opinion," the proposed activity "warrants" designation due to its "adverse effects," or due to "public concerns" about such effects. CELA draws no comfort from this ambiguous provision, and we are not confident that it will be used in a timely manner to designate many (or any) smaller projects that are not prescribed by the regulatory list of major projects subject to the *IAA*.

Other examples of broad discretionary powers under the *IAA* (many of which resemble existing *CEAA 2012* provisions) include, but are not necessarily limited to:

- Discretion of the new Impact Assessment Agency of Canada to determine that an impact assessment is not required for a designated project (section 16);
- Discretion of the Minister to direct the Agency not to conduct an impact assessment of a designated project (section 17);
- Discretion of the Agency or Minister to determine the scope of the factors to be considered during the impact assessment process (subsection 22(2));
- Discretion of the Agency to use available information for an impact assessment, or to require the proponent to collect additional information or conduct studies (section 26);
- Discretion of the Minister or Cabinet to extend or suspend time limits for impact assessments (subsections 28(5) to 28(9));
- Discretion of the Agency to delegate any part of the impact assessment to other jurisdictions (section 29);
- Discretion of the Minister to substitute "equivalent" provincial processes for the federal impact assessment process where "appropriate" (section 31);
- Discretion of the Minister to require additional information after completion of the substituted process (section 35);
- Discretion of the Minister to refer an impact assessment to a review panel if it is in the "public interest" to do so (section 36);
- Discretion of the Minister to establish, decrease or increase time limits for review panels (section 37);
- Discretion of the Agency to require additional information needed by review panels (section 38);
- Discretion of the Minister to establish a joint review panel with another jurisdiction (section 39);
- Discretion of the Minister to terminate a review panel (section 58);
- Discretion of the Minister to add or remove conditions in an *IAA* decision statement, or to revoke or amend an *IAA* decision statement (sections 68 and 71 to 72);

- Discretion of the Minister to establish "regional assessments" on federal lands or other lands (sections 92 to 93);
- Discretion of the Minister to establish "strategic assessments" of federal plans, policies or programs, or any "issues," that are "relevant" to impact assessments (section 95);
- Discretion of the Minister to determine whether parts of the impact assessment record should be disclosed to the public (subsection 107(1));
- Discretion of the Minister to establish guidelines, codes of practice, research or advisory bodies (section 114);
- Discretion of the Minister and Cabinet to exempt designated projects (section 115);
- Discretion of the Minister to delegate his/her "powers, duties and functions" to the Agency (section 154);
- Discretion of the Minister to set the terms of reference of review panels, and to appoint review panel members, for projects requiring licences under the *Nuclear Safety and Control Act* (section 44); and
- Discretion of the Minister to designate conditions in an *IAA* decision statement as part of a licence issued under the *Nuclear Safety and Control Act* (subsection 67(1)).

On these latter points, CELA notes that the federal government's own Expert Panel[3] had correctly recommended that, for various reasons, regulatory officials should not conduct impact assessments under the new law.

Unfortunately, not only does the *IAA* inexplicably disregard this key recommendation, but it also contains no safeguards that would prevent the Minister from stacking review panels with a majority of members from the Canadian Nuclear Safety Commission when a designated nuclear project is being assessed.

Moreover, the Expert Panel also recommended that the new assessment authority should be established as a specialized quasi-judicial commission that makes the ultimate evidence-based decision on whether a project should be approved or rejected under the new law.

Again, the *IAA* does not implement this sound recommendation, and instead proposes to still have the approval decision made by the Minister or Cabinet with no right of appeal. Thus, the *IAA* continues the heavily criticized political decision-making model found under *CEAA 2012*.

In addition, the political approval decision under the *IAA* is to be based on a "public interest" test consisting of various considerations, including whether the project makes a "contribution to sustainability" (sections 60 to 63).

Nevertheless, there are no detailed criteria built into the *IAA* to explain what these broad considerations mean in practice, or how trade-offs should be made between these considerations where they may conflict or militate towards different outcomes. It is conceivable that the federal government may intend to address these interpretive matters in policy documents or guidelines; however, as a matter of law, guidance materials are not generally binding or legally enforceable.

[3] https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html.

Alarmingly, the regulation-making authority under the *IAA* (section 109) does not expressly empower the Cabinet to promulgate standards that expand upon the elements of the statutory public interest test, or that stipulate how they should be construed and applied by decision-makers. This omission strikes CELA as a major oversight in the *IAA*.

In light of these and other serious concerns,[4] it appears to CELA that the new *IAA* provisions have largely been superimposed upon the flimsy foundation of *CEAA 2012*.

CELA therefore concludes that the *IAA*, as currently drafted, does not fulfill the federal government's commitment[5] to restore public trust, and to ensure credible, participatory and science-based decision-making, in the impact assessment process.

In reaching this conclusion, CELA anticipates that the political rationale for conferring wide-ranging discretion upon decision-makers under the *IAA* is to create maximum flexibility for the federal government within the impact assessment process.

In our experience, however, this discretion-laden approach will likely undermine the robustness, certainty and predictability needed within the national impact assessment regime. Accordingly, CELA maintains that further and better legal accountability mechanisms must be incorporated into the *IAA* in order to help structure the exercise of statutory powers of decision under the Act.

At the same time, CELA acknowledges that in several instances under the *IAA*, discretionary Ministerial or Cabinet determinations are to be accompanied by public notice and the release of reasons for decision. These are important procedural provisions, but CELA maintains that "ballot box" accountability (e.g. voting out the governing party during the next election) for contentious decisions under the *IAA* is not an adequate substitute for transparent rules requiring rigorous evidence-based decision-making under the Act.

For the foregoing reasons, CELA calls upon Parliament to look beyond the erroneous #BetterRules hashtag, and to instead carefully scrutinize and substantially revise the *IAA* as it proceeds through the legislative process.

It is expected that after receiving Second Reading, the *IAA* will be referred to public hearings to be held by the Standing Committee on Environment and Sustainable Development. CELA will be requesting to appear as a witness before the Standing Committee in order to outline a number of substantive amendments that are necessary to transform the *IAA* into an effective, efficient and equitable impact assessment statute. CELA will therefore be releasing a detailed critique of the *IAA* shortly.

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[4] http://www.cela.ca/newsevents/media-release/impact-assessment-act-some-forward-progress.
[5] http://www.cela.ca/blog/2017-09-07/federal-ea-reform-perils-overpromising-and-underdelivering.