



Que sera, CERA – The Canadian Energy Regulator Act (CERA)

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On February 8, 2018, following two expert panel reports and two parliamentary committees, the Federal Government introduced new legislation ([Bill C-69](#)) that, if passed, will bring an end to the National Energy Board's (NEB) 60 years of energy infrastructure regulation and see it replaced by a new federal Canadian Energy Regulator (CER) to be located in Calgary. Additionally, the Canadian Environmental Assessment Agency will become the Impact Assessment Agency of Canada (IAAC) and will lead all federal reviews of major federal energy infrastructure projects. By introducing the *Canadian Energy Regulator Act* and the *Impact Assessment Act* and repealing the *National Energy Board Act* and *Canadian Environmental Assessment Act*, Bill C-69 also addresses consequential amendments across other federal legislation.

The elimination of the NEB and the creation of the CER and IAAC are being done under the Federal Government's rubrics of:^[1]

- modern and effective governance – through changes in regulatory governance;
- enhanced certainty and timelier decisions - through process integration and efficiencies;
- more inclusive public engagement – through the elimination of the current NEB test for standing, expanded participant funding and engagement outside the hearing process;
- greater Indigenous participation – through recognition and consideration of Indigenous rights and knowledge, capacity funding, and aiming to secure free, prior and informed consent; and
- strengthened safety and environmental protection – through updating the powers of inspection officers.

Bill C-69 is proposing sweeping changes to the regulatory landscape for federal energy infrastructure. This blog highlights just some of the more significant changes that will occur if Bill C-69 is enacted.

Changes for Project Proponents

As proposed, the CER's structure has separated administrative and adjudicative functions. Administrative functions will be overseen by a Board of Directors and a Chief Executive Officer, while the adjudicative function will be conducted by a newly created Commission. In addition to the CER having largely the same jurisdiction over federal energy infrastructure as the NEB has had historically, the CER will also have an expanded jurisdiction in respect of offshore renewable energy projects and offshore power lines.

One of the most significant proposed changes is that Bill C-69 codifies the factors to be considered in both pipeline applications and impact assessments before the CER and IAAC. In addition to including the factors that have been developed through previous NEB decisions, Bill C-69 expands these historical factors and introduces new factors, including:

- interests and concerns of the Indigenous peoples of Canada, and the rights of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- impacts to Canada's ability to meet its climate change obligations;
- effects that are direct as well as effects that may be incidental; and
- considerations of impacts on gender, sex and identity issues.

The current ability for a federal infrastructure project to undergo an impact assessment by substituting a provincial process or other authorized process has been limited under Bill C-69. The changes require any substituted provincial impact assessment process to address not only regional impacts, but also to address the opinions of relevant federal authorities and Indigenous peoples and to describe adverse effects in the federal context.

Bill C-69 proposes to reduce and standardize time limits for federal review of new projects. For the IAAC, the timelines for review of a project's impact assessment has been shortened to:

- 300 days for a proponent to submit the final impact assessment report;
- 45 days for the IAAC to refer to a review panel; and
- 600 days for the review panel to provide its impact assessment report.

For the CER, new review and approval timelines, commencing on receipt of a complete application, include:

- 450 days for a pipeline certificate application;
- 300 days for a pipeline shorter than 40 km in length;
- 300 days for a power line;
- 300 days for an offshore renewable energy project or offshore power line; and
- 180 days for the exportation of oil or gas.

While Bill C-69 proposes a number of consequential changes across a variety of federal legislation, the changes to the *Navigation Protection Act* (NPA) are significant. An amended NPA will increase the enforcement powers and will ostensibly expand the application of the NPA by broadening the definition of "navigable water". The new definition will include waters which are used, or have a reasonable likelihood of being used, by vessels as a means of transport or travel for: commercial purposes, recreational purposes or for Indigenous peoples of Canada, and where there is public access, two or more riparian owners, or where the Crown is the only riparian owner.

In respect of projects currently before the NEB, if Bill C-69 passes, project proponents can expect that applications pending before the NEB will be taken up before the CER and continued in accordance with the *National Energy Board Act*.

Changes for Stakeholders (Indigenous peoples, landowners and the public)

Bill C-69 proposes broad changes to the manner in which Indigenous peoples, landowners and the Canadian public can participate in hearings before the CER or IAAC through amendments to participant funding programs and to the standard required for participation in public hearings. Notably, the existing standard for participating in NEB hearings requires a person to establish that they are directly affected by the outcome of the application, or that they have relevant information or expertise. Bill C-69 proposes to significantly relax this standard, allowing any member of the public to, in a manner specified by the Commission, make representations with respect to an application.

In addition to requiring that at least one full-time member of the Commission be an Indigenous person, Bill C-69 requires the Commission to consider any adverse effects that a decision may have on the rights of the Indigenous peoples of Canada under the *Constitution Act, 1982*. The obligation to consider these effects appears to be independent of any participation by an Indigenous group in a Commission hearing.

Changes for NEB Regulated Entities and Infrastructure

Bill C-69 does not propose significant changes to the day-to-day regulation of entities and facilities by the NEB. The regulation of traffic, tolls and tariffs, the import and export of electricity, oil and gas, as well as the construction, operation and abandonment of interprovincial and international powerlines are left largely undisturbed by Bill C-69. Similarly, Bill C-69 will enshrine the current set aside and collection mechanism for pipeline abandonment funding that was created and implemented by the NEB. However, this new regime establishes an “orphan pipeline” funding mechanism which allows the CER to fund abandonment and clean-up of pipelines where the holder cannot be located or no longer exists. Surpluses and shortfalls from such set-aside mechanisms will go to the account of general revenue of the Federal Government.

For compliance and enforcement related matters, the inspection and investigative powers of the CER are proposed to be similar to those of the NEB; however Bill C-69 introduces broadened inspection powers coupled with a very prescriptive enforcement and penalty regime that includes a wide range of strict and absolute liability offences for regulated entities. This includes changes previously introduced, pursuant to the *Pipeline Safety Act*, providing for both vicarious and absolute liability for pipeline operators in respect of unintended pipeline releases and with it, the introduction of express liability limits of at least \$1 billion and the need for pipeline operators to maintain the financial resources necessary to pay the liability limit. In this regard, a pooled fund mechanism is directed at allowing pipeline operators to jointly pool financial resources in order to meet the financial resource requirements.

Conclusion

Bill C-69 proposes sweeping changes to the regulatory landscape for federal energy infrastructure that are intended to bring about enhanced certainty for project proponents, the Canadian public and the Indigenous peoples of Canada. However, if it is passed, it will take time for the certainty it is aiming to bring to occur. After all, the only certain thing about change is that it brings uncertainty.

[\[1\] Canadian Energy Regulator Handbook.](#)

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