



Supporting Inclusive Resource Development (SIRD)
East Africa
TRAINING PROGRAM: MODULE 4
JUNE 2019



THE CANADIAN
BAR ASSOCIATION



Global Affairs
Canada Affaires mondiales
Canada



INTERNATIONAL BEST PRACTICE IN ENVIRONMENTAL IMPACT ASSESSMENT

**John P. Andrews
Oil & Gas Lawyer**

**Formerly of the Canada-Newfoundland and Labrador Offshore Petroleum
Board**



An Effective Environmental Regulatory Regime

- An effective environmental regulatory regime assumes a willing and effective government ready and able to implement policies and programs designed to protect the environment
- An effective environmental regulatory regime involves
 - comprehensive measures which are designed to prevent or control activities resulting in adverse environmental effects, including prohibition, licensing, and incentives (e.g. grants, taxation, emissions trading systems)
 - consistent, principled, and transparent enforcement through expert, well-funded and trained regulatory agencies
 - a system of review of the environmental impacts of development proposals, that gives a voice to potentially affected parties
 - information and education to foster a culture of environmental protection



The Political Dimension of Environmental Protection

- There is a political tension between protection of the environment and facilitation of business by reducing regulatory “burden”
- In 2012 Canada made significant changes to its federal environmental legislation
- Canada reduced environmental regulation, protection and environmental assessment for pipeline approvals, fisheries, navigable waters and species at risk
- These changes also affected measures for climate change regulation and commitments under the Kyoto Protocol.
- Following the 2015 election, the Canadian government committed to review those changes, measures and commitments.



The Development of Bill C-69

- In 2016, the Canadian Government:
 - Took interim steps to modify the application of CEAA 2012, in particular with reference to pipeline approvals ([Interim Principles for EA](#))
 - Established an Environmental Assessment Review Expert Panel to receive submissions and consider changes to the environmental assessment regime
- In 2018, it introduced [Bill C-69](#), which has now been passed by the House of Commons and awaits approval by the Senate before becoming law
- The Government sought input on Bill C-69 (see submissions by the [Mining Association of Canada](#) and the [Canadian Bar Association](#)) as it went through the Parliamentary process and responded with [amendments](#)
- Government is consulting the public on the Regulations Designating Physical Activities (also known as the Project List) and the Information Requirements and Time Management Regulations ([Impact Assessment Regulation Consultation](#) – note proposals for nuclear, mining, oil and gas)



Environmental Assessment in Canada – Public Scrutiny

- Environmental assessment (EA) legislation
 - a regulator of government activity
 - will also regulate private activity e.g. where there is a government component such as grant of an approval or provision of finance
 - requires an assessment of the environmental impacts of a plan or project to be prepared and made available for public comment and perhaps legal challenge
- In Canada, federal and provincial government have constitutional jurisdiction over the environment and each has statutes requiring EA
- Federal and provincial EA processes are different. A project may require one or both, in which case they will be assessed together (Joint Review) while respecting separate jurisdiction/process/approval
- Provincial EA statutes often require EA of municipal activity although some minor activities are dealt with under subsidiary streamlined regimes



Environmental Assessment in Canada – Federal EA

- In 2012, the Canadian Government replaced the *Canadian Environmental Assessment Act* (CEAA) with *CEAA 2012* under which
 - federal EA changed from trigger-based system (government plans, approvals, finance etc.) to a narrower system applicable only to a list designated projects
 - focused on significant adverse environmental effects of those projects.
 - “environmental effects” had a variable meaning ranging from effects only on fish, aquatic species and migratory birds to an extended meaning for impacts on Indigenous peoples
 - Participation in public hearings was limited to “interested parties”: persons who, in the opinion of the responsible authority or the review panel are directly affected by the carrying out of the project; or have relevant information or expertise
- In 2016, the Canadian government tabled Bill C-69; the *Impact Assessment Act*, to replace the *Canadian Environmental Assessment Act, 2012*



Federal EA in Canada

The Impact Assessment Act

Part 1 of Bill C-69 enacts the *Impact Assessment Act* and repeals *CEAA, 2012*. Changes include:

- Increased public participation in project reviews, including a new early engagement phase
- Recognition of Indigenous rights and work in partnership with Indigenous Peoples.
- Transparency:
 - Decisions to be based on science and Indigenous traditional Knowledge
 - information taken into account in an impact assessment, and the reasons for decisions, to be made available to the public through a registry that is accessible via the Internet;



Federal EA in Canada

The Impact Assessment Act (continued)

- Environmental impacts to be assessed
 - expanded to include health, social, economic and impacts on Indigenous Peoples with a view to preventing certain adverse effects and fostering sustainability.
 - Cumulative effects of existing or future activities in a specific region may be assessed
 - Reviews will include gender-based analysis
- One project, one review: the Impact Assessment Agency of Canada (currently the Canadian Environmental Assessment Agency) will lead all federal reviews of major projects
- Making decisions timely: reduced and managed timelines for project review, with fewer stops of the legislated clock



Federal EA in Canada

The Impact Assessment Act (continued)

Designated projects for review

- List of designated project to include projects that pose major risks to the environment
- Designated projects likely to cause certain environmental, health, social or economic effects may not be carried out, unless determined to be in the public interest
- Minister may (and in some cases must) refer an impact assessment of a designated project to a review panel
- Minister may set conditions, including with respect to mitigation measures, that must be implemented by the proponent of a designated project
- Planning phase is required for impact assessment of a designated project, which includes requirements to cooperate with and consult certain persons and entities and requirements for public participation



Federal EA in Canada

The Impact Assessment Act (continued)

- Cooperation with certain jurisdictions, including Indigenous governing bodies, through the delegation of any part of an impact assessment, the joint establishment of a review panel or the substitution of another process for the impact assessment
- Government is consulting the public on the Regulations Designating Physical Activities (also known as the Project List) and the Information Requirements and Time Management Regulations until May 31, 2019



Other Legislation under Bills C-68 and C-69

- Bill C-69 Part 2 replaces the *National Energy Board Act* with the *Canadian Energy Regulator Act*,
 - which establishes the Canadian Energy Regulator and sets out its composition, mandate and powers
 - The role of the Regulator is to regulate the exploitation, development and transportation of energy within Parliament's jurisdiction
- Bill C-69 Part 3 renames the *Navigation Protection Act* as the *Canadian Navigable Waters Act* and amends it to protect the right of Canadians and Indigenous Peoples to travel on navigable waters in Canada
- [Bill-68](#) (also waiting to be passed by the Senate) amends the *Fisheries Act*: to restore lost protections to all fish and fish habitats – not just those affected by major projects



The Duty on Government to Consult Indigenous Peoples

- Section 35 of *The Constitution Act, 1982* guarantees existing aboriginal and treaty rights of the aboriginal (Indigenous) peoples of Canada
- The “honour of the Crown” requires governments (federal, provincial, municipal) to consult and accommodate Indigenous peoples on conduct that has or may impact their constitutionally protected rights
- The duty is triggered by contemplated Crown conduct e.g. issue of a permit
 - The reduction in 2012 of required federal approvals reduced instances where the duty is triggered
 - The new Projects list under the *Impact Assessment Act* may reverse this
- Governments may delegate procedural aspects to industry (e.g. by incorporation into EA or other regulatory processes)
- The *Impact Assessment Act* endeavours to integrate Indigenous consultation into the EA process



The Duty on Government to Consult Indigenous Peoples

- Where the duty arises, the Crown will be required to: carry out a fair and reasonable process for consultations; and demonstrate reasonable efforts to respond and/accommodate any issues
- The extent or depth of consultation and accommodation required, is proportional to the strength of the claim to a particular right and the severity of the potential adverse effects
- Canada has announced that it will fully implement United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - Main themes:
 - the right to self-determination
 - the right to be recognized as distinct peoples;
 - the right to free, prior and informed consent; and
 - the right to be free of discrimination
- Bill C-69 reiterates Canada's commitment to UNDRIP



Gender and the Environment in Canada

- Gender relations, determined by social, economic and political structures, result in inequality that leads to increased vulnerability for women to environmental hazards
- Indigenous women are at the intersection of three segments of Canadian society (children and expectant mothers, Indigenous peoples, the poor and homeless) acknowledged to be vulnerable to environmental hazards
 - women and Indigenous peoples form a disproportionately large share of the poor
 - many Indigenous communities are remote with a cold climate, aging infrastructure, and rely on diesel electricity generation and space heating
 - those communities face increased challenges posed by climate change



Gender and Constitutional Protection In Canada

- Part I of *The Constitution Act, 1982* contains the *Canadian Charter of Rights and Freedoms* (Charter)
- Section 15 of the Charter - Equality Rights - guarantees “equality before and under law and equal protection and benefit of law without discrimination
- Canadian courts have held that an otherwise uniformly applicable law which has a disproportionately negative effect will be in violation of section 15
- Section 35(4) of *the Constitution Act, 1982* provides that “aboriginal and treaty rights are guaranteed equally to male and female persons”



Gender and the Environment in Canada – Duty to Consult

- A paper by the Atlantic Regional Research Centre of the Urban Aboriginal Knowledge Centre: *Gendering The Duty To Consult How Section 35 and the Duty to Consult Are Failing Aboriginal Women 2017*, argues that
 - Aboriginal rights jurisprudence is failing Aboriginal women
 - the focus of the duty to consult on land and resources related to land, and on representation structures created by the Indian Act, has a discriminatory effect on Aboriginal women and girls
 - the duty to consult should be extended to specifically cover the constitutional rights and socio-legal interests of Aboriginal women



Key points

- Balance between environmental protection and regulatory burden
- Elements of an effective environmental regulatory regime include: political will; measures to prevent or mitigate adverse environmental effects; consistent, principled, and transparent enforcement; a system of review with public participation; information and education
- Role of public consultation in the development of environmental regulation
- Interrelationship of environmental protection and Indigenous rights
- Disproportionate effect of adverse environmental impacts on women and children, especially Indigenous women and children
- Role and limitations of the Constitution and the courts in the development of Indigenous rights and the protection of women and children





THANK YOU