This is not Nation to Nation Decision Making: Unilateral Decision Making and the Notable Omissions of Bill C69

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Road Map

First Principles

- **Purpose of Impact Assessment**
- **Omissions matter**
- **Some key elements from *Building Common Ground* relating to Indigenous people**

Positive Changes

- **Four positive changes of Bill C-69 for Indigenous people**

1) more opportunities for cooperation and collaboration
2) recognized role for traditional knowledge
3) the best interests test and Indigenous people and rights
4) advisory group regarding the interests and concerns of Indigenous people

Core Omissions

1) unilateral decision making and the omission of UNDRIP
2) silence on Indigenous Laws and Protocols

A Persistent Lack of Clarity on Consultation

Vulnerable watersheds and regional cumulative effects assessment

First Principles – Good planning and reconciliation

Impact assessment (IA) aims to identify and **address potential issues and concerns early** in the design of projects, plans and policies. In so doing, it can contribute to the creation of **positive relationships** among various interest groups, including reconciliation between Indigenous Peoples and non-Indigenous peoples. IA also aims to contribute to the **protection** of the bio-physical environment and the **long-term well-being** of Canadians by **gathering proper information to inform decision-making**.

Expert Panel Report, *Building Common Ground: A New Vision for Impact Assessment in Canad*a, 2017 (emphasis added)

<u>The Unfilled Promise of Regional Assessments</u>

. . . regional and strategic assessments offer opportunities to improve the efficiency, effectiveness and fairness of assessment processes and resulting decision making. Among the key benefits are the ability to **address broader policy issue**s, to consider the interaction among a range of past, current and possible future activities, to improve the **consideration of alternatives** and cumulative effects, to **streamline assessments** at the project level, and to **attract better projects** as a result of improved clarity on what types of projects are desired. In spite of its tremendous promise, and endorsement by industry, environmental and indigenous interests alike, implementation in Canada has been slow, and so far, largely ad hoc.

Meinhard Doelle, *The Proposed New Federal Impact Assessment Act (IAA): Assessment & Reform Proposals*, Schulich School of Law, Dalhousie University, 2018 (emphasis added)

A Critical Distinction – What the legislation says versus what the government says

Third, my approach to this legislation – and the basis for one of my main criticisms of it – is to consider what ***it actually says and requires***, not what the current government says it will do with it as a matter of policy. In my view, environmental laws should be written with a view towards potential future governments that may be hostile to environmental concerns. . . . On this score, much of the legislation introduced last week is wholly inadequate.

Olszynski, In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69, University of Calgary Faculty of Law, 2018 (emphasis in original)

Building Common Ground necessitates honouring the values of Free, Prior and Informed Consent

UNDRIP is clear that all decision-making processes that impact the rights of Indigenous Peoples must be in accordance with the distinctive governance institutions, laws and customs of the relevant Indigenous Peoples.

Expert Panel Report Building Common Ground: A New Vision for Impact Assessment in Canada, 2017 (See also United Nations Declaration on the rights of Indigenous Peoples, Articles 10, 11, 19, 28, and 29)

In May 2016, the Minister of Indigenous and Northern Affairs announced Canada is now a full supporter, without qualification, of the declaration.

https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958

Participants expressed the view that free, prior and informed consent (FPIC) is not necessarily a veto but a process of mutual respect, trust and collaborative decision-making grounded in the recognition of Indigenous Peoples as equal partners.

Expert Panel Report Building Common Ground: A New Vision for Impact Assessment in Canada, 2017

Building Common Ground requires building support for Indigenous Laws into governance and process

Reconciliation requires settlers to acknowledge that their laws and systems are not neutral. Existing federal “environmental assessments” are based on Western worldviews and laws, which are foreign to Indigenous people

Written submissions of the Assembly of Manitoba Chiefs submitted to the Expert Panel for the Review of the Environmental Assessment Processes, December 23, 2016

Recognition of and support for Indigenous laws and inherent jurisdiction should be built into governance and processes. . . . Indigenous Peoples should have the ability to adapt the process to reflect their own traditions, customs, law and aspirations.

Expert Panel Report Building Common Ground: A New Vision for Impact Assessment in Canada, 2017

The Great Binding Law originates from the worldviews and cultural contexts of Indigenous Nations. It is a way of life and encompasses many laws. It guides us in ways of achieving good relationships with all our relations. It teaches us that everything is related and one cannot think about the impacts of decisions on humans without considering the impacts and needs of all living beings.

Written submissions of the Assembly of Manitoba Chiefs submitted to the Expert Panel for the Review of the Environmental Assessment Processes, December 23, 2016

Positive Elements of Bill C-69 for Indigenous People

6 (1) The purposes of this Act are

(e) to promote cooperation and coordinated action between federal and provincial governments, and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;

(f) to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;

(g) to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982, in the course of impact assessments and decision-making under this Act;

(j) to ensure that an impact assessment takes into account scientific information, traditional knowledge of the Indigenous peoples of Canada and community knowledge;

Cooperation and Substitution as they relate to Indigenous People

Agency must offer to consult and cooperate with certain jurisdictions including Indigenous Governing Body as defined in 1 f) 1 g)

Bill C69, Part 1 Impact Assessment Act, s. 21

Appropriate substitute for Canada IA may be a process for impact assessment conducted by a Indigenous Governing Body as defined in 1 f) 1 g)

Bill C69,. Part 1 Impact Assessment Act, s. 31

Perhaps the most *potentially* significant development in terms of Indigenous engagement and consideration in the proposed federal assessment regime comes through the *Act's* expanded basis for recognition of – and cooperation with – Indigenous groups.

Wright, *The Fog Persists*, University of Calgary, 2018

Traditional Knowledge

Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and the traditional knowledge of the Indigenous peoples of Canada into decision-making processes related to designated-projects; (preamble)

Bill C69, Part 1 Impact Assessment Act, preamble

<u>Impact Assessment must take into account</u>

traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project

Bill C69, Part 1 Impact Assessment Act, s 22(1)(g)

considerations related to Indigenous cultures raised with respect to the designated project;

Bill C69, Part 1 Impact Assessment Act, s 22(1)l

<u>But what about scoping power?</u>

the scope of the factors to be taken into account determined by Agency or Minster

Bill C69, Part 1 Impact Assessment Act, s 22(2)

The Best Interest Analysis must consider impacts on Indigenous People and Rights

Best Interest Analysis of G in C must expressly consider:

the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982

Bill C69, Part 1 Impact Assessment Act, s 63 (d)

Advisory Committee – Interests and Concerns of Indigenous People

Advisory committee — interests and concerns of Indigenous peoples

Bill C69, Part 1 Impact Assessment Act, s 158. See also Expert Committee must include at least one Indigenous person, s. 157

Decision making is ultimately unilateral

After taking into account the report with respect to the impact assessment of a designated project that the Minister receives under section 55 or that is submitted to the Minister under section 59, the Minister must refer to the Governor in Council the matter of determining whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63, in the public interest.

Bill C69, *Part 1 Impact Assessment Act*, s 61

[T]he architecture of the proposed *Act* leaves in place decision-making that is ultimately unilateral in nature, albeit with enhanced requirements for collaboration with Indigenous groups en route to that final decision.

Wright, *The Fog Persists*, 2018

No Reference to UNDRIP

What perhaps stands out in the proposed *Act* more starkly than anything else is that there is **no mention at all** of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). In fact, there is no mention of it anywhere at all in Bill C-69.

Wright, The Fog Persists, 2018 (emphasis added)

Perhaps the most significant aspect, however, is what has been omitted: none of the proposed acts reference the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or the concept of “free, prior and informed consent” (fpic). The **lack of any reference to UNDRIP or fpic is surprising** given that it was a major policy commitment of the federal government and a significant component of the expert panel’s report on revisions to federal impact assessment

Millen,Carpenter and Adkins, Implementing UNDRIP? Federal Government Releases Draft Environmental, Legislation http://www.blakesbusinessclass.com/implementing-undrip-federal-government-releases-draft-environmental-legislation/, 2018 (emphasis added)

How can unilateral decision making be reconciled with UNDRIP?

One has to wonder whether omitting UNDRIP in the Bill is the government quietly taking the position that FPIC cannot be squared with keeping ultimate decision-making authority as a unilateral decision to be made by the Crown. If so, this is a major problem for meaningfully – let alone collaboratively – pursuing the overarching objective of reconciliation.

Wright, The Fog Persists, 2018

[A]ll the enhanced measures and consideration of Indigenous peoples still boil down to essentially procedural rights (notwithstanding potential accommodation and associated mitigation measures) that lead to Indigenous rights, interests and concerns being placed within the broader public interest determination to be made by Minister or Cabinet (even if Indigenous rights constitute a “special public interest that supersedes other concerns”, as so characterized in *Clyde River*, at para 40).

Wright, The Fog Persists, 2018

Can Canada identify a single reference to Indigenous Law Protocols in Bill C69

Ongoing Uncertainty regarding the Duty to Consult

Contrary to the Expert Panel's recommendation that the impact assessment authority be clearly designated an agent of the Crown that is accountable for the duty to consult and accommodate (Expert Panel report at p 31), **the *Act* perpetuates a fog** that has lingered around this question for some time now. If anything, it would seem that by leaving ultimate decision-making authority with the Minister or Cabinet, the *Act* makes it such that it is virtually impossible for the Agency or review panel process to completely fulfill the duty or assess whether the duty has been fulfilled.

Wright, *The Fog Persists*, 2018 (emphasis added)

Unrealized Potential of RCEA

Minister may establish committee to conduct regional assessment when entirely on federal lands or by agreement other regions

Bill C69, *Part 1 Impact Assessment Act*, s 92 and 93

A Desperate Need for Regional Assessments

[A] number of regions of the country (such as the Ring of Fire in Ontario or the Bay of Fundy in Nova Scotia) are in desperate need of regional assessments with full consideration of a range of future development scenarios, alternatives, and a full range of economic, social, environmental, health and cultural considerations.

In short, in order for federal decision-makers to be able to make sound decisions at the project level about a project's contribution to sustainability (a key element in the proposed new 'public interest' test for project decisions), the results of a comprehensive regional assessment that is based on a reasonable range of future development scenarios, are invaluable. In fact, making good decisions under section 63 of the proposed IAA may prove to be challenging in the absence of strong regional assessments completed before project decisions are made.

For those concerned about jurisdictional constraints on federal regional assessments beyond federal land, the issue is not whether the federal government has jurisdiction over all the information needed for a thorough regional assessment; rather, the issue is whether this information will be helpful for project decisions that are within federal jurisdiction.

Doelle, The Proposed New Federal Impact Assessment Act (IAA):Assessment & Reform Proposals, Schulich School of Law, Dalhousie University

Bill C69 – Significant Unrealized Opportunity to Advance Reconciliation and Good Decision Making

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