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LEGISLATIVE SUMMARY

BILL C-69:
AN ACT TO ENACT THE IMPACT ASSESSMENT ACT AND THE CANADIAN ENERGY REGULATOR ACT, TO AMEND THE NAVIGATION PROTECTION ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-69
(Legislative Summary)

Publication No. 42-1-C69-E

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LEGISLATIVE SUMMARY OF BILL C-69: AN ACT TO ENACT THE IMPACT ASSESSMENT ACT AND THE CANADIAN ENERGY REGULATOR ACT, TO AMEND THE NAVIGATION PROTECTION ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, was tabled in the House of Commons and read for the first time on 8 February 2018.[1]

The bill:

- enacts the Impact Assessment Act, which will replace the *Canadian Environmental Assessment Act, 2012*;[2]
- enacts the Canadian Energy Regulator Act, which will replace the *National Energy Board Act*;[3] and
- amends the *Navigation Protection Act*,[4] which will be renamed the Canadian Navigable Waters Act.

The bill received Royal Assent on 21 June 2019, after having been modified with several amendments by the House of Commons and the Senate.[5]

1.1 THE 2012 LEGISLATIVE AND REGULATORY AMENDMENTS

In 2012, the federal government made changes to several project approval processes that could have an impact on the environment.

The *Jobs, Growth and Long-term Prosperity Act*[6] (Bill C-38) replaced the *Canadian Environmental Assessment Act* with the *Canadian Environmental Assessment Act, 2012* and amended the *National Energy Board Act* and the *Fisheries Act*. Parliament adopted Bill C-38 in June 2012.

The *Jobs and Growth Act, 2012*[7] (Bill C-45) subsequently amended the *Fisheries Act* and the *Navigable Waters Protection Act* (now the *Navigation Protection Act*). Parliament passed Bill C-45 in December 2012.

1.2 REVIEW OF ENVIRONMENTAL AND REGULATORY PROCESSES

In June 2016, the federal government launched a review of federal environmental and regulatory processes. The review included the framework for the National Energy Board (NEB) and the protection measures found in the *Fisheries Act* and the *Navigation Protection Act*.

The review was conducted by two expert panels (for the environmental assessment process and the NEB) and two parliamentary committees (for the protection measures in the *Fisheries Act* and the *Navigation Protection Act*). The federal government then conducted its own consultations with Indigenous peoples, industry, provinces and territories, and the public.[8]

2 DESCRIPTION AND ANALYSIS

The following description focuses on some aspects of the bill. It does not review all of its provisions.

2.1 PART 1 OF BILL C-69: ENACTMENT OF THE IMPACT ASSESSMENT ACT

Part 1 of the bill (clauses 1 to 9) enacts the Impact Assessment Act (IAA) and repeals the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012).

The IAA renames the following:

- the Canadian Environmental Assessment Agency, which becomes the Impact Assessment Agency of Canada (see section 2.1.14 of this Legislative Summary); and
- the Canadian Environmental Assessment Registry, which becomes the Canadian Impact Assessment Registry (see section 2.1.9 of this Legislative Summary).

Section 2 of the IAA defines certain terms that are also used in this Legislative Summary. They include the following:

- designated project:
  - physical activities carried out in Canada or on federal lands that are designated by regulations or by ministerial order, and any incidental activities.
- effects within federal jurisdiction:
  - a change to components of the environment that are within the legislative authority of Parliament (fish and fish habitat, aquatic species at risk,

migratory birds and any other component of the environment set out in Schedule 3 to the IAA, which is currently empty);

- a change to the environment on federal lands, in a province other than the one where the project is being carried out, or outside Canada;
- an impact in Canada from any change to the environment on the physical and cultural heritage of Indigenous peoples, their current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance to Indigenous peoples;
- any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- any change to a health, social or economic matter that is within the legislative authority of Parliament and that is set out in Schedule 3 to the IAA.

- federal authority:
  - a minister of the Crown;
  - a Government of Canada department, agency or departmental corporation;
  - a Crown corporation;
  - any other body that is accountable through a minister of the Crown to Parliament for the conduct of its affairs; or
  - any other body that is set out in Schedule 1 to the IAA.
- federal lands:
  - lands, and all waters on and airspace above those lands, that belong to the federal government – other than lands under the administration of a territorial government;
  - the internal waters and the territorial sea of Canada, in any area of the sea not within a province;
  - the exclusive economic zone of Canada and the continental shelf of Canada; and
  - Indian reserves and other lands subject to the *Indian Act*, and all waters on and airspace above them.
- Indigenous governing body:
  - a council, a government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Unless otherwise stated, “the minister” in this part refers to the Minister of the Environment.

2.1.1 Prohibitions
(Sections 7 to 9 of the Impact Assessment Act)

One of the main effects of the IAA is to prohibit proponents from carrying out certain projects unless it has been determined that an impact assessment is not required or the minister or the Governor in Council has decided to permit the project (section 7 of the IAA). The Act also prohibits federal authorities from doing anything that would permit such a project to be carried out, in whole or in part, in the absence of such a determination or decision (section 8 of the IAA).

Projects covered by the IAA are those designated by regulations (see the definition of "designated project" in section 2 of the IAA) or that are designated, on request or on the initiative of the minister, by order of the minister (section 9 of the IAA). On that front, the IAA maintains the approach established in the CEAA, 2012 of designating types of projects likely to be subject to environmental assessment.

2.1.2 Planning Phase
(Sections 10 to 20 of the Impact Assessment Act)

During the planning phase of a designated project, the Impact Assessment Agency of Canada (IAAC) must determine whether the project requires an impact assessment. The IAA stipulates that an impact assessment is necessary when a designated project:

- has an effect on:
  - fish and fish habitat, as defined in section 2(1) of the *Fisheries Act*;
  - aquatic species, as defined in section 2(1) of the *Species at Risk Act*; and
  - migratory birds, as defined in section 2(1) of the *Migratory Birds Convention Act, 1994*, or any other component of the environment that is set out in Schedule 3 (currently empty) to the IAA;
- causes a change to the environment:
  - on federal lands;
  - in a province other than the one where it is being carried out; or
  - outside Canada;
- causes a change to the environment in Canada that has an impact on:
  - the physical and cultural heritage of Indigenous peoples;
  - the current use by Indigenous peoples of lands and resources for traditional purposes; and
  - any structure, site or thing that is of historical, archaeological, paleontological or architectural significance to Indigenous peoples;
- causes a change, in Canada, to the health, social or economic conditions of the Indigenous peoples of Canada; or

- causes a change to a health, social or economic matter that is set out in Schedule 3 (currently empty) to the IAA (section 7(1) of the IAA).

The planning phase begins when the proponent of a designated project provides the IAAC with an initial description of the project. The IAAC must then post the description on the website of the Canadian Impact Assessment Registry (section 10(1) of the IAA) and invite the public to provide comments on the project (section 11 of the IAA). The IAAC must also consult with any federal or provincial public agency with a role in the project, as well as any Indigenous group affected by it (section 12 of the IAA).

During the planning phase, every federal authority must make its expertise available to the IAAC upon request. Every federal authority – including the Canadian Energy Regulator, the Canadian Nuclear Safety Commission, the Canada-Nova Scotia Offshore Petroleum Board and the Canada–Newfoundland and Labrador Offshore Petroleum Board – must also inform the proponent of the information that it will require in order to make a decision about the project by virtue of powers conferred on it under another Act (section 13 of the IAA).

Following these consultations, the IAAC must prepare a summary of issues raised by the public, government bodies and Indigenous groups and post a copy of it on the Registry website (section 14 of the IAA). The proponent must indicate how it intends to address the issues, and it must submit a detailed description of the project to the IAAC. This description must also be posted on the Registry website (section 15 of the IAA).

During this phase, the minister must inform the project proponent if:

- a federal authority decides that it will not authorize the project, in whole or in part, by exercising powers conferred on it by another Act; or
- the minister is of the opinion that it is clear that the designated project would cause unacceptable effects within federal jurisdiction.

The federal authority's reasons for not authorizing the project or the basis for the minister's opinion must be posted on the Registry website (section 17 of the IAA).

Finally, the IAAC decides whether an impact assessment is required and posts its decision and the reasons for it on the Registry website. The entire planning phase must be completed within 180 days. This time limit may be extended by the IAAC for up to 90 days at the request of a provincial government, an Indigenous governing body, or a body responsible for conducting environmental assessment under a land claim agreement. Furthermore, the IAAC may suspend the time limit for the planning phase until any activity related to the project's impact assessment that is prescribed by regulation is completed (section 18 of the IAA).

2.1.3 Commencement of Impact Assessments

If it decides that an impact assessment of a designated project is required, the IAAC provides the proponent with a notice of the commencement of the impact assessment. The notice must set out the scope of information or studies that the proponent is required to provide to the IAAC in the project's impact statement (section 18 of the IAA).

The impact statement must be provided to the IAAC within three years of the notice of commencement having been issued. This time limit can be extended by the IAAC at the request of the proponent. If the proponent does not provide the impact statement to the IAAC within the relevant time frame, the impact assessment will not take place (sections 19 and 20 of the IAA).

2.1.4 Impact Assessments (Sections 21 to 74 of the Impact Assessment Act)

Like the CEAA, 2012, the IAA provides for two types of assessment: an impact assessment undertaken by the IAAC, and an impact assessment referred to a review panel.

2.1.4.1 Impact Assessment by the Impact Assessment Agency of Canada (Sections 24 to 28 of the Impact Assessment Act)

By default, an impact assessment of a project requiring one is conducted by the IAAC. For this type of assessment, the IAAC collects the information and carries out the studies it needs to assess the project, enables the public to participate in the assessment, and prepares the assessment report (sections 25, 26 and 27 of the IAA).

Under the IAA, the IAAC must consider a number of factors in an impact assessment that are in addition to those that were required by the CEAA, 2012:

- the impact that the designated project may have on any Indigenous group, on Indigenous cultures, and on the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*;
- the contribution of the project to sustainability;
- the project's contribution to or negative effects on the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- the project's impact on the interaction of sex and gender with other identity factors; and
- the need for the project and any technically and economically feasible alternatives.

Once the assessment is completed, the IAAC must identify in a draft report the effects that are likely to be caused by the project, including adverse effects within federal jurisdiction and their extent. The report must also:

- set out how the IAAC took into account Indigenous knowledge provided with respect to the project;
- include a summary of comments received by the public; and
- include the IAAC's recommendation with respect to any mitigation measures and follow-up program (sections 28(3) to 28(3.2) of the IAA).[9]

The draft of the report must be made public, and the public must be given an opportunity to provide comments to the IAAC before it is finalized. After taking these comments into account, the IAAC prepares the final impact report, which it submits to the minister. A copy is posted on the Registry website (sections 28(1), 28(2) and 28(4) of the IAA).

The impact assessment conducted by the IAAC must be completed within 300 days, unless the IAAC has specified a different period at the commencement of the impact assessment, or the minister or the governor in council has granted an extension (sections 28(2) to 28(10) of the IAA).

2.1.4.2 Delegation or Substitution by a Provincial or Indigenous Assessment Process (Sections 29 to 35 of the Impact Assessment Act)

Like the CEAA, 2012, the IAA provides mechanisms to avoid subjecting the same project to more than one assessment as a result of federal laws, provincial laws or land claim agreements with Indigenous groups. The following mechanisms are provided for in the IAA:

- *Delegation*: The IAAC may delegate to a federal, provincial or Indigenous body the carrying out of all or part of an impact assessment, including preparation of the report (section 29 of the IAA).
- *Substitution*: On request of a provincial or Indigenous body, the minister may substitute that body's impact assessment process for the impact assessment if:
  - the assessment will consider all the factors that an impact assessment must take into account under the IAA;
  - federal authorities with relevant expertise or knowledge will be given an opportunity to participate in the assessment;
  - the body conducting the assessment will cooperate with Indigenous authorities in the context of the assessment;

- the assessment will include consultations with any Indigenous group affected by the carrying out of the project;
- the public will be given an opportunity to participate in the assessment and to provide comments on a draft report;
- the public will have access to the records related to the assessment;
- at the end of the assessment, a report will be submitted to the minister and will be made public; and
- the report will identify the same effects as an impact assessment report carried out by the IAAC (sections 31 and 33 of the IAA).

Before the minister approves the substitution, the IAAC must post the request for substitution on the Registry website and give the public 30 days to provide comments. The minister's decision must then be posted on the Registry website (sections 31(2) to 31(4) of the IAA).

The IAA does not allow the minister to substitute the assessment process of a provincial or Indigenous body for an impact assessment that the minister has referred to a review panel or for an impact assessment regarding:

- a project for oil or gas exploration or operations in Nunavut, on Sable Island, in the internal waters of Canada or the territorial sea of Canada not within a province, or on the continental shelf of Canada;
- a project for oil or gas exploration or operations in the offshore areas of Nova Scotia or Newfoundland and Labrador covered by a federal–provincial management agreement; or
- a project governed by the *Canada Transportation Act* (section 32 of the IAA).

2.1.4.3 Assessment by a Review Panel or a Joint Review Panel (Sections 36 to 59 of the Impact Assessment Act)

The IAA allows the minister to refer the impact assessment to a review panel if the minister believes that doing so is in the public interest. In making the decision, the minister must consider the potential adverse effects of the project, public concerns regarding the project, opportunities for cooperation with other jurisdictions and any potential adverse effects of the project on Indigenous rights (section 36 of the IAA). The minister may also enter into an agreement with a federal, provincial, Indigenous or foreign body having jurisdiction over the project for the establishment of a joint review panel (section 39 of the IAA).

For projects subject to the *Mackenzie Valley Resource Management Act*, where the national interest requires an impact assessment, the minister is required to refer the impact assessment to a joint review panel established with the Mackenzie Valley Environmental Impact Review Board (sections 39 and 40 of the IAA).

Within 45 days of the impact assessment having been referred to a review panel, the minister must establish the panel's terms of reference, and the IAAC must appoint one or more of the panel's members (section 41(1) of the IAA). In the case of a joint review panel, the minister must approve the panel's terms of reference and – the IAAC must appoint the chairperson or a co-chairperson and at least one other member (section 42 of the IAA). These people must have the necessary experience and knowledge to assess the effects of the project, including with regard to the interests and concerns of the Indigenous people of Canada, and be unbiased and free from any conflict of interest relative to the project (section 41(1) of the IAA).

Once established, a review panel must conduct the impact assessment of the project submitted to it. When conducting its assessment, the review panel must hold public hearings, make public any information it uses, and prepare an assessment report (section 51(1) of the IAA). The review panel can also use any information available to it, and if it believes that it does not have enough information to conduct the impact assessment, it may require that studies be undertaken or other information be collected by entities that include the project proponent (section 52 of the IAA). Moreover, it can summon any person to appear as a witness before it and compel that person to give evidence, orally or in writing, or to produce any records the panel considers necessary (sections 53(1), 53(2) and 53(6) of the IAA).

Hearings by a review panel must be public (section 53(3) of the IAA) and be flexible and informal (section 54 of the IAA). A review panel may nevertheless hold in camera meetings or decide not to make public certain evidence to avoid causing specific and substantial harm to a person or Indigenous group or the environment (sections 53(3) to 53(5) of the IAA). Furthermore, a review panel may refuse to make public a document that might reveal the substance of the members' deliberations (section 57 of the IAA).

A review panel must submit its report to the minister within the time limit set by the IAAC, which cannot be longer than 600 days. However, the minister or the governor in council may extend this period (section 37 of the IAA).

If a review panel fails to submit its report within the time limit established for it, or if the minister is of the opinion that it will fail to do so, the IAA allows the minister to terminate the review panel's assessment (section 58 of the IAA). In such cases, the IAAC must complete the impact assessment of the project in question and prepare the impact assessment report and submit it to the minister (section 59 of the IAA).

2.1.4.3.1 Review Panels for Projects Regulated by Certain Authorities (Sections 37 and 39, 44 to 51 58 and 59 of the Impact Assessment Act and Clauses 2 to 8 of Bill C-69)

The IAA provides for different requirements for projects governed by the following regulators:

- Canadian Nuclear Safety Commission (CNSC);
- the Canadian Energy Regulator (CER) created under Part 2 of Bill C-69;
- the Canada–Nova Scotia Offshore Petroleum Board (C–NSOPB); and
- the Canada–Newfoundland and Labrador Offshore Petroleum Board (C–NLOPB).

The minister must refer the impact assessment of these projects to a review panel (section 43 of the IAA and clause 2 of the bill). In addition, the minister cannot enter into an agreement for the establishment of a joint review panel with these regulators for projects they regulate (section 39(2) of the IAA and clause 3 of the bill).[10]

The IAAC appoints the chairperson and at least two (in the cases of projects regulated by the CNSC or the CER) or four (in the cases of projects regulated by the C–NSOPB and the C–NLOPB) other members of these review panels. In the case of projects regulated by the CNSC or the CER, at least one of the members so appointed must be a member or commissioner of the pertinent regulator; in the cases of projects regulated by the C–NSOPB and the C–NLOPB, at least two such members must be members or commissioners of the pertinent regulator. The latter review panel members must not constitute the majority of the review panel (sections 44(1), 44(4), 47(1), 47(4), 50(1)(b) and 50(1)(c) of the IAA and clauses 6, 7 and 8 of the bill).

For projects regulated by the CNSC or the CER, in addition to the factors that must be included in any impact assessment report, the licence, permit, authorization, approval or exemption to be granted for the project must be included in reports of review panels (sections 51(2) and 51(3) of the IAA). To be able to include this information in its report, such a panel may exercise the powers conferred on the CNSC or the CER, as the case may be, in their respective incorporating Acts (sections 46 and 48 of the IAA).

A review panel conducting an impact assessment of a project regulated by the CNSC, the CER, the C–NSOPB or the C–NLOPB must submit its report to the minister within the time limit set by the IAAC before the beginning of the assessment. This time frame cannot be longer than 300 days, unless the IAAC believes that the review panel requires more time, in which case IAAC can set the limit to up to 600 days. However, the time limit can be extended by the governor in council or, under certain circumstances, by the minister (section 37.1 of the IAA).

As with other review panels, if a panel for a project regulated by the CNSC, the CER, the C–NSOPB or the C–NLOPB fails or will likely fail to submit its report within the time limit established for it, the minister can terminate the review panel's assessment (section 58 of the IAA). In such a case, the IAAC must complete the report (section 59 of the IAA).

2.1.4.4 Decision Making (Sections 60 to 72 of the Impact Assessment Act)

The IAA provides that it is up to the minister or the Governor in Council to allow a project that has been the subject of an impact assessment to be carried out. Therefore:

- within 30 days of receiving an impact assessment report prepared by the IAAC, the minister must determine whether the adverse effects of the project within federal jurisdiction are in the public interest, or refer the decision to the Governor in Council (sections 60 and 65(3) of the IAA); and
- within 90 days of receiving an impact assessment report prepared by a review panel or referred by the minister, the Governor in Council must determine whether the adverse effects of the project within federal jurisdiction are in the public interest (sections 61, 62 and 65(4) of the IAA).

In reaching a decision with regard to the project, the minister or the Governor in Council must take into account the IAAC or review panel report and consider the following factors:

- the extent to which the designated project contributes to sustainability;
- the extent to which the effects within federal jurisdiction are adverse;
- the implementation of mitigation measures and a follow-up program as conditions for the project;
- the impact of the project on any Indigenous group and on the rights of the Indigenous peoples of Canada; and
- the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change (section 63 of the IAA).

The decision of the minister or Governor in Council must be issued to the project proponent and posted on the Registry website in a decision statement by the minister that includes:

- the reasons for the decision;
- any conditions the proponent must comply with;
- the period within which the project must begin; and
- a description of the approved project (sections 65 and 66 of the IAA).

The conditions set out in a decision statement are part of any permit, certificate, authorization or licence for the project required from the Canadian Energy Regulator created under Part 2 of the bill or under the *Canada Oil and Gas Operations Act*. The minister may also designate any condition that is contained in the decision

statement to be part of any licence or permit issued for the project by the CNSC (section 67 of the IAA).

2.1.5 Participant Funding (Section 75 of the Impact Assessment Act)

The IAA requires the IAAC to create a participant funding program to facilitate the participation of the public in the preparations for an impact assessment, the impact assessment itself, and regional and strategic assessments conducted by the IAAC. Such a program is not, however, required to facilitate participation in provincial or Indigenous bodies' assessment processes substituting for an impact assessment.

2.1.6 Cost Recovery (Sections 76 to 80 of the Impact Assessment Act)

The IAA allows the Governor in Council to make regulations providing for the recovery of costs incurred by the IAAC or a review panel in relation to its work. The regulations may also stipulate which service costs incurred by the IAAC or a review panel must be reimbursed by project proponents.

2.1.7 Projects of Federal Authorities (Sections 81 to 91 of the Impact Assessment Act)

Sections 81 to 91 of the IAA apply to federal authorities and the bodies designated in Schedule 4 to the IAA (airport authorities designated under the *Airport Transfer (Miscellaneous Matters) Act*). These provisions prohibit these authorities and bodies from carrying out, permitting or providing financial assistance to certain projects on federal lands or outside Canada, or to projects or a class of project designated by the minister[11] (section 81 definition of "project" and section 87) unless:

- it determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or
- the Governor in Council decides that those effects are justified in the circumstances (sections 82 and 83 of the IAA).

The prohibition does not apply to classes of projects that the minister,[12] after having sought comments from the public, designates as having only insignificant adverse environmental effects (sections 88 and 89 of the IAA). Also exempt are projects:

- related to matters of national security;
- carried out under the *Emergencies Act*; or
- to be carried out urgently to protect the environment or in the interests of public health or safety (section 91 of the IAA).

The "environmental effects" that must be considered by an authority, a designated body and the Governor in Council are "changes to the environment and the impact of these changes on the Indigenous peoples of Canada and on health, social or economic conditions" (section 81 of the IAA). Under section 84(1), in determining whether a project is likely to cause significant adverse environmental effects, an authority or a designated body must consider:

- adverse impacts of the project on the rights of the Indigenous peoples of Canada (except for projects outside Canada, as specified in section 84(2) of the IAA);[13]
- Indigenous knowledge provided with respect to the project (except for projects outside Canada, as specified in section 84(2) of the IAA);[14]
- community knowledge;
- comments received from the public; and
- mitigation measures that are technically and economically feasible and that will be put in place.

Before making a determination with respect to a project, the authority must post a notice on the Registry website for at least 30[15] days indicating that it intends to make a determination, and inviting the public to provide comments.[16] Subsequently, the decision of the authority or the designated body, including a statement of any mitigation measures that will be taken, but not necessarily the reasons for the determination, must also be posted on the Registry website (section 86 of the IAA).

2.1.8 Regional and Strategic Assessments (Sections 92 to 103 of the Impact Assessment Act)

The IAA provides for regional assessments of existing activities or strategic assessments of Government of Canada policies, plans or programs or relevant issues raised in the context of an impact assessment for a project (sections 92, 93 and 95 of the IAA). Upon receipt of a request for a regional or strategic assessment, the minister must respond, with reasons, within the time limit prescribed by regulation, and post that response on the Registry website (section 97 of the IAA).

Regional and strategic assessments may be conducted by a committee established by the minister, or by the IAAC at the IAAC's request (sections 92, 93(1) and 95). The minister may also enter into an agreement with a federal, provincial, Indigenous or foreign body for the establishment of a joint committee to conduct a regional assessment (section 93(1) of the IAA).

The IAAC or the committee conducting a regional or strategic assessment must give the public an opportunity to participate in the assessment (sections 98 and 99 of the IAA). Moreover, a committee conducting such an assessment can summon any person to appear as a witness before it and compel that person to give evidence, orally or in

writing, or to produce any records the committee considers necessary (section 101 of the IAA). The IAAC or the committee must also consider scientific information and Indigenous knowledge related to the assessment (section 97(2) of the IAA).[17]

On completion of its assessment, the committee, the joint committee or the IAAC prepares a report and provides it to the minister. The report is posted on the Registry website (sections 102 and 103 of the IAA).

2.1.9 Canadian Impact Assessment Registry (Sections 104 to 108 of the Impact Assessment Act)

The IAA provides for the establishment and maintenance of the Canadian Impact Assessment Registry, which is similar to the current Canadian Environmental Assessment Registry maintained under the CEAA, 2012. Like the current registry, the Canadian Impact Assessment Registry is intended to ensure public access to information regarding impact assessments, independent of any right of access to information provided through other federal laws (section 104 of the IAA).

This Registry must consist of a website and project files. The website content includes:

- notices required by the IAA, including those inviting the participation of the public in an impact assessment;
- mandates given to a review panel for a study;
- impact assessment reports prepared by the IAAC or a review panel;
- any scientific information received from a proponent or federal authority in the context of an impact assessment, or a summary of that information;
- any public comments received during an impact assessment;
- a description of the results of follow-up programs implemented with respect to a project, or a summary of these results;
- any other information regarding a project that the IAAC considers appropriate; and
- any other record or information prescribed by regulation.

This site is administered by the IAAC, which determines, among other things, when information may be removed from it (section 105 of the IAA).

Project files must contain all records produced, collected or received by the IAAC in the planning phase and during the impact assessment of the project. The IAA stipulates that the IAAC must maintain a file on each project from the day the IAAC receives a project notice from the proponent to the day that the follow-up program on that project is completed, unless it has already terminated the impact assessment (section 106 of the IAA).

The IAA provides that unless they have already been made public, records containing the following material may not be held in the Registry:

- trade secrets;
- financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party;
- information that concerns the vulnerability of buildings or other structures, networks or computer systems, supplied in confidence to a government institution by a third party for the preparation of emergency management plans;
- information which, if disclosed, could reasonably be expected to result in material financial loss or gain for a third party; or
- information which, if disclosed, could reasonably be expected to interfere with contractual negotiations of a third party.

The minister may nevertheless allow the above-mentioned information to be added to the Registry, with the exception of trade secrets, if the public interest as it relates to public health, public safety or protection of the environment would be served (section 107 of the IAA).

2.1.10 Regulations and Powers (Sections 109 to 116 of the Impact Assessment Act)

Section 109 of the IAA authorizes the Governor in Council to make regulations, among other things, to:

- add a body or a class of bodies to or delete them from:
  - the list of federal authorities (Schedule 1 to the Act); or
  - the list of bodies, in addition to federal authorities, that must conduct impact assessments for certain of their projects;
- designate the physical activities or classes of physical activities that are subject to the Act, as well as those that the minister can exclude from its application;
- exempt any class of proponents or designated projects from the requirement to reimburse the costs incurred by the IAAC or a review panel in the context of its work; and
- vary or exclude any requirement set out in the Act with regard to physical activities:
  - on lands subject to the *Indian Act*;
  - on lands covered by land claim agreements;
  - on lands covered by an agreement with an Indigenous group for conducting impact assessments;

- under international agreements or arrangements entered into by the Government of Canada; or
- in relation to which there are matters of national security.

The IAA also authorizes the Governor in Council to:

- amend Schedule 2 to add or delete lands that are subject to a land claim agreement with an Indigenous group to which the Act does not apply (section 110 of the IAA); and
- exclude a designated project from application of the Act if in the Governor in Council's opinion, matters of national security apply to the project (section 115(1) of the IAA).

Section 112 of the IAA authorizes the minister to make regulations to, among other things:

- designate, after consideration of a regional or a strategic assessment, physical activities that do not require an impact assessment and the conditions that must be met for the designation, as well as the information that the person or entity carrying out the activity must provide to the IAAC;
- frame the participant funding program created by the IAAC to facilitate public participation in its work and that of the review panels;
- govern the information to be posted on the website and the establishment and maintenance of the Registry project files; and
- govern the fees that will be charged for copies of any document in the Registry.

Section 114 of the IAA also gives the minister the power to do the following:

- issue guidelines and codes of practice respecting the application of the Act;
- establish research and advisory bodies in the area of impact assessment;
- if authorized by the regulations, enter into agreements or arrangements with a co-management body established under a land claim agreement or with an Indigenous governing body to allow it to exercise powers and duties in relation to impact assessments; and
- establish criteria for the appointment of members of committees established to conduct regional or strategic assessments.

Additionally, the minister may exclude from application of the IAA designated projects in relation to which there are matters of national security, whether they are carried out under the *Emergencies Act* or in response to an emergency to protect the environment or public health or safety (section 115(2) of the IAA).

2.1.11 Minister's Advisory Council (Sections 117 and 118 of the Impact Assessment Act)

The IAA provides for the establishment of an advisory council to advise the minister on the implementation of the impact assessment and regional and strategic assessment regimes. Members of this advisory council are appointed by the minister, and at least three of them must be recommended by Indigenous entities representing the interests of each of the following groups: First Nations, Inuit, and Métis peoples (section 117 of the IAA).[18]

The advisory council must meet at least once a year. Within three months of the end of the fiscal year during which the first anniversary of the coming into force of the IAA occurred, and every two years after that, the council must submit a report to the minister setting out the advice it has provided, including advice about which regional and strategic assessments should be given priority.[19] A copy of the report will be tabled in each house of Parliament and posted on the Registry website. The minister must provide comments on the report to the council and post them on the Registry website (section 118 of the IAA).

2.1.12 Rights and Interests of Indigenous Peoples (Sections 3 and 119 of the Impact Assessment Act)

The IAA contains several provisions to protect the rights and interests of Indigenous peoples. First, section 3 affirms that nothing in the Act is to be interpreted as circumventing the protection afforded to Indigenous people by section 35 of the *Constitution Act, 1982*. Second, numerous provisions of the IAA require that consideration be given to Indigenous knowledge.

Section 119 of the IAA allows this Indigenous knowledge to be provided in confidence to the minister, the IAAC, a review panel, or a committee established to conduct a regional or a strategic assessment. Knowledge so provided cannot be made public without written consent unless:

- the knowledge is publicly available;
- the disclosure is necessary for use in legal proceedings or for ensuring procedural fairness; or
- the disclosure is authorized by regulations made by the Governor in Council.

In cases where Indigenous knowledge provided in confidence needs to be disclosed in legal proceedings or for ensuring procedural fairness, the minister, the IAAC, the review panel or the committee must consult with the person or entity that provided the knowledge to determine the scope of the disclosure and its conditions.

2.1.13 Administration and Enforcement (Sections 120 to 152 of the Impact Assessment Act)

2.1.13.1 Notice of Non-compliance and Orders (Sections 120 to 139 and 152 of the Impact Assessment Act)

The IAA allows the president of the IAAC to appoint enforcement officers and analysts to enforce the Act (section 120 of the IAA).

Enforcement officers investigate compliance with the Act. To do so, they may require any person to provide them with documents containing information relevant to the application of the IAA. They are also authorized, if they have reasonable grounds, to enter any place, including a private property, to investigate compliance with the Act. This includes:

- examining anything in the place;
- using any means of communication found there;
- examining the data contained in any computer system;
- removing anything from the place for examination;
- taking photographs or making recordings or sketches;
- directing the owner or person in charge of the place or a person at the place to establish their identity and to stop an activity; and
- prohibiting or limiting access to all or part of the place (sections 122 and 124 of the IAA).

Enforcement officers must, however, obtain a warrant from a justice of the peace to enter a dwelling house, and may only use force to enter if that has been authorized in the warrant and they are accompanied by a peace officer (section 123 of the IAA). When analysts accompany enforcement officers, they may exercise some of the powers conferred on such officers (section 122(4) of the IAA).

If they have grounds to believe that a person has contravened the IAA, enforcement officers may issue a notice of non-compliance to that person (section 126 of the IAA). They may also order a person to stop doing something, or they may take any measure to stop or avoid non-compliance with the IAA or to mitigate the effects of such non-compliance (sections 127 to 129 of the IAA). Within 30 days of receipt of such an order from an enforcement officer, the person may ask the president of the IAAC for a review of the order (section 130 of the IAA). The president must then designate a review officer who may, as per the procedure established in writing by the IAAC, confirm, cancel or amend the order (sections 131 and 134 to 137 of the IAA). Unless so requested by the person, the request for review does not suspend the order in question (section 132 of the IAA). The minister or the person to whom the order is

directed may appeal the review officer's decision to the Federal Court (sections 138 and 139 of the IAA).

The IAAC must publish on the Registry website the reports, notices of non-compliance and orders prepared by enforcement officers, as well as the decisions of review officers (section 152 of the IAA).

2.1.13.2 Injunctions
(Section 140 of the Impact Assessment Act)

The IAA allows a court of competent jurisdiction to issue an injunction, at the request of the minister and with the intention of preventing an offence under the Act, ordering any person to refrain from doing something or to do something (section 140 of the IAA).

2.1.13.3 Voluntary Reports
(Section 141 of the Impact Assessment Act)

Section 141 of the IAA enacts a whistleblowing system for offences under the Act, which did not exist under the CEAA, 2012. Any person, including an employee of a company, may report information relating to the commission of an offence to an enforcement officer or the IAAC. The identity of the person providing the information is confidential and may not be disclosed without the person's consent. If the information is provided by an employee, the employer may not retaliate.

2.1.13.4 Offences
(Sections 142 to 151 of the Impact Assessment Act)

Sections 142 to 151 of the IAA establish certain offences, including:

- carrying out a project subject to the Act without the authorization of the IAAC or the minister;
- obstructing or hindering the work of an enforcement officer or analyst;
- failing to comply with an order of an enforcement officer;
- as an employer, retaliating against an employee who has reported an offence under the Act;
- contravening a condition of a decision authorizing a project; and
- making a false or misleading statement.

Persons committing these offences are liable to the penalties summarized in Table 1 (section 144 of the IAA).

Table 1 – Penalties Under the Impact Assessment Act

Offender	Fine, First Offence	Fine, Second Offence or Subsequent Offence
Individual	$5,000–$300,000	$10,000–$600,000
Corporation with revenues of $5 million and less	$25,000–$2,000,000	$50,000–$4,000,000
Corporation with revenues above $5 million	$100,000–$4,000,000	$200,000–$8,000,000

The senior officers of a corporation that has committed an offence may be considered party to and guilty of the offence and be liable to a fine (section 147 of the IAA). Moreover, any corporation convicted of an offence under the IAA must inform its shareholders of that fact (section 151 of the IAA).

Proceedings regarding an offence under the IAA must be instituted within two years of the day on which the minister becomes aware of the alleged offence (section 149 of the IAA).

2.1.14 Impact Assessment Agency of Canada (Sections 153 to 163 of the Impact Assessment Act)

The IAA continues the Canadian Environmental Assessment Agency, renaming it the Impact Assessment Agency of Canada (section 153 of the IAA). The IAAC maintains the mission, duties, powers and structure of the Canadian Environmental Assessment Agency (sections 155 and 156 of the IAA). It must also continue to have an expert committee to advise it on issues related to impact assessments and regional and strategic assessments, and an advisory committee, composed of at least one representative from entities that represent First Nations, Inuit, and Métis peoples, to advise it on the interests and concerns of the Indigenous people of Canada in relation to impact assessments (sections 157 and 158 of the IAA). Furthermore, the current president, executive vice-president and employees of the IAAC will continue in office until the expiration of their mandate, if applicable (sections 169 to 171 of the IAA).

To ensure that impact assessments are conducted without political influence, the minister is forbidden to give any direction to the president of the IAAC or its employees or to any review panel member with respect to a report, decision, order or recommendation (section 153(2) of the IAA).

2.1.15 Annual Report
(Section 166 of the Impact Assessment Act)

The IAA maintains the requirement found in the CEAA, 2012 for the minister to prepare a report on the administration and implementation of the Act and the IAAC's activities each year and to table that report in both houses of Parliament.

2.1.16 Review of the Act
(Section 167 of the Impact Assessment Act)

The IAA maintains the requirement found in the CEAA, 2012 for a comprehensive review of its provisions by a parliamentary committee 10 years after the Act comes into force.

2.1.17 Transitional Provisions
(Sections 168 to 188 of the Impact Assessment Act)

The IAA contains a number of provisions for the transition from the *Canadian Environmental Assessment Act* (CEAA) and CEAA, 2012 to the new impact assessment regime. These include the following:

- Any screening commenced under the CEAA before 2012 is terminated (section 178 of the IAA).
- Any comprehensive study commenced under the CEAA for which no study report has been produced is terminated (section 179(1) of the IAA).
- Any comprehensive study of a project commenced under the CEAA before 2012 and that continued under the CEAA, 2012 and for which a study report has been produced is continued as an environmental assessment under the CEAA, CEAA, 2012 (sections 179(2) and 179(3) of the IAA).
- The screening of any project commenced under the CEAA, 2012 for which the Canadian Environmental Assessment Agency has not yet made a decision is terminated, and the description of the project becomes an initial description of the project under the IAA (section 180 of the IAA).
- Any project for which the Canadian Environmental Assessment Agency has determined that no environmental assessment was required under the CEAA, 2012, or to which the CEAA has determined that the CEAA, 2012 did not apply, is not subject to the IAA (section 185.1(1) of the IAA).[20]
- Any project commenced or authorized by a federal authority before the IAA comes into force and that was not subject to the CEAA, 2012 is not subject to the IAA (section 185.1(2) of the IAA).[21]

- Any environmental assessment of a project by the Canadian Environmental Assessment Agency commenced under the CEAA, 2012 is continued under the CEAA, 2012. In this case, the proponent has three years (subject to possible extension) after the coming into force of the IAA to give the IAAC all information and studies required by the Canadian Environmental Assessment Agency or the IAAC, or the assessment is terminated (sections 181(1) to 181(3) and of the IAA).
- On request made to the IAAC by the project proponent, any environmental assessment of a project by the Canada Environmental Assessment Agency commenced under the CEAA, 2012 can be continued as an impact assessment under the IAA (sections 181(4) to 181(4.3)).
- Any environmental assessment of a project commenced under the CEAA, 2012 by the CNSC or the NEB for which no decision has been made is continued under the CEAA, 2012 (sections 182 and 182.1 of the IAA).
- Any environmental assessment of a project referred to a review panel under the CEAA, 2012 before the IAA comes into force is continued under the CEAA, 2012 (section 183(1) of the IAA).[22]
- On request made to the minister by the project proponent, any environmental assessment of a project referred to a review panel under the CEAA, 2012 before the IAA comes into force can be continued under the IAA by the same review panel (sections 183(2) and 183(3) of the IAA).[23]
- Any environmental assessment of a project commenced under the CEAA, 2012 for which the substitution of a provincial assessment process was approved continues under the CEAA, 2012 (section 185 of the IAA).

2.1.18 Subsequent Amendments to the Impact Assessment Act (Clauses 2 to 8 of Bill C-69)

Clauses 2 to 8 of the bill introduce amendments to the IAA that are intended, after the coming into force of the Act, to require the minister to refer to an impact assessment review panel for study projects governed by the Canada–Newfoundland and Labrador Offshore Petroleum Board or the Canada–Nova Scotia Offshore Petroleum Board and to provide for the establishment of the review panel.

2.1.19 Coming into Force (Clauses 196(1) to 196(3) of Bill C-69)

The IAA comes into force on a day to be fixed by the Governor in Council. The same applies to the subsequent amendments to the IAA, but only after the coming into force of the IAA[24].

2.2 PART 2 OF BILL C-69: ENACTMENT OF THE CANADIAN ENERGY REGULATOR ACT

Part 2 of the bill (clauses 10 to 44) enacts the Canadian Energy Regulator Act (CERA), repeals the *National Energy Board Act* and replaces the National Energy Board (NEB) with the Canadian Energy Regulator.

These legislative changes follow actions by the Government of Canada. In his 2015 mandate letter, the Prime Minister gave the Minister of Natural Resources the responsibility to

> [m]odernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.[25]

The minister's mandate letter noted,

> It is a core responsibility of the federal government to help get our natural resources to market, but that is only possible if we achieve the required public trust by addressing environmental, Indigenous Peoples', and local concerns.[26]

Accordingly, the minister was mandated to work with ministerial colleagues to review the environmental assessment processes "to regain public trust."[27]

As part of the NEB modernization process, in November 2016, the minister announced the creation of a five-person expert panel – the Expert Panel on the Modernization of the National Energy Board – with policy, energy, business, environment, scientific, regional and Indigenous knowledge expertise, whose task was to examine the NEB's governance structure, role and mandate, "with particular focus on enhancing the participation of the public and Indigenous peoples in regulatory reviews."[28] Under its terms of reference, the panel was required to engage with Indigenous peoples, key stakeholders, provinces and territories, and the public, and to deliver a report to the minister with recommendations and advice no later than 15 May 2017.[29] Between January and March 2017, the panel held public sessions in 10 cities across Canada, heard from approximately 1,200 participants in person, online and by teleconference, and received 202 documents and 89 comments on discussion papers.[30]

In its report to the minister released on 15 May 2017, the panel provided 46 recommendations and sub-recommendations for modernizing the NEB and its processes.[31]

Following the release of the expert panel's report, the federal government published a discussion paper in June 2017 that contained a review of potential reforms under consideration. The government then undertook several months of engagement with Indigenous people and others, which informed the drafting of the relevant provisions in Bill C-69.

The new CERA incorporates large portions of the *National Energy Board Act*, with minor changes. It does make a number of substantive changes to the regulatory review process, as well as to the way in which the regulatory body is constituted and operates. Unlike the NEB, the regulator is no longer a "responsible authority" and no longer performs assessments of designated projects. Rather, reviews for designated projects are given to a review panel established under the proposed IAA, as discussed in section 2.1 of this Legislative Summary, with one of three panel members from the energy regulator, and the decision-making role resting with the minister or Governor in Council. While the regulator has some input into the IAA review process for designated projects regulated under the CERA, its primary role is the regulation of projects throughout their life cycles rather than the impact assessment of new projects. The regulator continues to conduct assessments for non-designated projects.

Clause 10 of the bill contains a preamble that sets out the purposes of the CERA and states that the federal government is committed to the following:

- establishing an independent energy regulatory body that is reflective and respectful of the diversity of Canada;
- "achieving reconciliation with First Nations, the Métis and the Inuit" and to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*;[32]
- using a transparent and inclusive process based on early engagement and "the best available scientific information and data," as well as Indigenous knowledge; and
- "assessing how groups of women, men and gender-diverse people may experience policies, programs and projects and … taking actions that contribute to an inclusive and democratic society and allow all Canadians to participate fully in all spheres of their lives."

The purpose of the CERA is further articulated and explicitly set out in section 6 of the Act.

Unless otherwise stated, "the minister" in this part refers to the Minister of Natural Resources.

2.2.1 Part 1 of the Canadian Energy Regulator Act: The Canadian Energy Regulator

The Canadian Energy Regulator is established in section 10(1) of the CERA. The requirement that the members of the board of directors and the commissioners live in Calgary is removed; while the head office continues to be located in Calgary, Alberta, the Chief Executive Officer (CEO) may open or close other regional offices after consulting the board of directors (section 10(3)). Unlike in the *National Energy Board Act*, the mandate of the regulator is explicitly set out (section 11), with the addition of offshore renewable energy projects to its regulatory responsibilities, and a directive that the regulator must exercise its powers and duties in a manner that respects the federal government's commitments regarding the rights of Indigenous people. Section 13 gives the Governor in Council the power to issue written binding policy directions to the regulator on matters within the regulator's mandate.

2.2.1.1 Operating and Governance Structure (Sections 14 to 54 of the Canadian Energy Regulator Act)

The CERA divides responsibilities for governance and operations, on the one hand, and regulatory reviews and decisions, on the other, between a board of directors and a commission. The board of directors is responsible for day-to-day operations, providing strategic direction and advice to the regulator; the commission is responsible for the adjudicative functions of the regulator.

2.2.1.1.1 Day-to-Day Business: Board of Directors and Chief Executive Officer (Sections 14 to 25 and 54 of the Canadian Energy Regulator Act)

The regulator is governed by a board of directors appointed by the Governor in Council, with no more than nine directors, including the chair and vice-chair, each of whom holds office part time for no longer than five years. At least one of the directors of the board must be an Indigenous person (sections 14 and 15(1)).

The regulator is managed by a CEO, who is appointed by the Governor in Council on the recommendation of the minister after the minister has consulted the directors. The CEO holds office full time for up to six years and may be reappointed for an additional term but is limited to serving no more than 10 years. A current director cannot be the CEO (sections 21(1) to 21(3) and 21(5)).

The CEO is responsible for the day-to-day business and affairs of the regulator but must not give directions with respect to any particular decision, order or recommendation that is made by the commission or a commissioner (section 23(1)).

To ensure that the commission has the technical expertise necessary to exercise its powers and perform its duties and functions, the CEO is empowered to designate employees of the regulator as "designated officers" to carry out certain functions

under the Act (section 24). The Governor in Council may make regulations specifying the following:

- the powers, duties and functions of the commission that are technical or administrative in nature and may be exercised or performed by designated officers, including, for example, specified matters related to safety, the environment or engineering;
- any circumstances in which only designated officers may exercise those powers and perform those duties and functions; and
- the procedures and practices that apply to the exercising of those powers and the performance of those duties and functions by designated officers (section 54).

2.2.1.1.2 Project Reviews and Decisions: Commission (Sections 26 to 53 of the Canadian Energy Regulator Act)

The Act establishes a commission composed of up to seven full-time commissioners, at least one of whom must be an Indigenous person (section 26). Commissioners are appointed by the Governor in Council for terms not exceeding six years and may be reappointed for an additional term but are limited to serving no more than 10 years (sections 28(1) and 28(2)). The commission retains the powers and duties of the NEB with respect to its being a court of record and its power to hold inquiries into any matter within its jurisdiction (sections 31 to 36).

The Governor in Council must designate two of the full-time commissioners to be Lead Commissioner and Deputy Lead Commissioner (section 37). The Lead Commissioner is responsible for the business and affairs of the commission. These responsibilities largely mirror those of the chairman of the NEB under the *National Energy Board Act* and include the following:

- apportioning the commission's work among the commissioners;
- authorizing commissioners or panels of commissioners to exercise the powers of the commission and to perform its duties and functions, such as conducting hearings or making reports; and
- issuing instructions regarding timelines (sections 38 to 52).

Commission hearings related to issuing, suspending or revoking certificates for pipelines or international or interprovincial power lines must be public (section 52).

The commission must issue written reasons for each recommendation it makes to the Governor in Council or the minister, and the regulator must make the recommendations and the reasons for them publicly available (section 53).

2.2.1.2 Rights and Interests of the Indigenous Peoples of Canada (Sections 56 to 59 of the Canadian Energy Regulator Act)

Section 56 adds an obligation for the commission and designated officers to consider any adverse effects that a decision, order or recommendation they make may have on the rights of the Indigenous peoples of Canada as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Section 57 provides that the regulator must establish an advisory committee to enhance the involvement of Indigenous peoples and Indigenous organizations in respect of pipelines, power lines and offshore renewable energy projects, as well as abandoned pipelines. While the number of advisory committee members is not specified, section 57(2) provides that the committee must include the following:

- at least one person recommended by an Indigenous organization that represents the interests of First Nations;
- at least one person recommended by an Indigenous organization that represents the interests of the Inuit; and
- at least one person recommended by an Indigenous organization that represents the interests of the Métis.[33]

Any Indigenous knowledge that is provided in confidence to the regulator must not knowingly be, or be permitted to be, disclosed without written consent. Knowledge so provided may only be rendered public if:

- the knowledge is publicly available;
- the disclosure is necessary for use in legal proceedings or for ensuring procedural fairness; or
- the disclosure is authorized by regulations made by the Governor in Council (sections 58(1), 58(2) and 59)).

Before disclosing Indigenous knowledge for the purposes of procedural fairness and natural justice, the regulator must consult the person or entity who provided the Indigenous knowledge and the person or entity to whom it is to be disclosed about the scope of the proposed disclosure and potential conditions with respect to that disclosure (section 58(2)).

2.2.1.3 Confidentiality of Information (Sections 60 to 62 of the Canadian Energy Regulator Act)

The provisions with respect to confidentiality of information are enhanced with the inclusion of section 60(c), a provision that did not exist under the *National Energy Board Act*. This provision allows the commission or a designated officer to take any

measures or make any order considered necessary where there is a real and substantial risk that the disclosure of information will compromise the safety and well-being of persons or cause harm to property or the environment.

2.2.1.4 Decisions and Orders
(Sections 63 to 72 of the Canadian Energy Regulator Act)

The commission or a designated officer must issue written reasons for each decision or order made, and these decisions or orders, and the reasons for them, must be made available to the public (section 63).

The commission may review, vary or rescind any decision or order it makes and, if applicable, may rehear any application before deciding it, while designated officers or inspection officers may vary or rescind decisions or orders they make and rehear any application before deciding it. An order or decision of a designated officer or an inspection officer may be appealed to the commission, which may dismiss the appeal or allow it and vary or rescind the decision or order (sections 69 to 71).

2.2.1.5 Alternative Dispute Resolution
(Section 73 of the Canadian Energy Regulator Act)

The CERA gives the regulator the power to provide an alternative dispute resolution process to parties in a dispute related to a matter under the Act if all parties consent to the process. The regulator may take the results of the process into account when making a decision, order or recommendation and may make the results public with the consent of the parties, but the results of the process are not binding (section 73).

2.2.1.6 Public Engagement
(Sections 74 and 75 of the Canadian Energy Regulator Act)

When holding public hearings concerning the issuing, suspending or revoking of certificates for pipelines or international or interprovincial power lines or applications to abandon a pipeline, the regulator has the discretion to establish processes to engage meaningfully with the public and, in particular, Indigenous peoples and Indigenous organizations. In addition, the regulator must establish a participant funding program to facilitate the participation of the public – and, in particular, that of Indigenous peoples and Indigenous organizations – in these hearings.

2.2.1.7 Collaborative Processes and Ministerial Arrangements
(Sections 76 to 78 of the Canadian Energy Regulator Act)

The regulator may enter into arrangements with any government or Indigenous organization to establish collaborative processes. The Governor in Council may make regulations concerning entering into arrangements with Indigenous governing bodies for carrying out the purposes of the CERA, and the content of those arrangements.

If such regulations are made, the minister may authorize any Indigenous governing body with whom an arrangement is made to exercise the powers or perform the duties and functions of the Act specified in the arrangement. Ministerial arrangements must be published on the regulator's website.

2.2.1.8 Advice
(Sections 80 to 82 of the Canadian Energy Regulator Act)

The commission retains the NEB's obligation to study and review matters related to its mandate, including the exploration, production, distribution and sale of energy and sources of energy inside and outside Canada, as well as the safety and security of regulated facilities. However, unlike the NEB, the commission is not required to report on these matters to the minister from time to time with any recommendations it considers necessary in the public interest. Rather, such reports and recommendations are now discretionary (section 81). The CERA also adds that, regarding energy matters, sources of energy, and the safety and security of regulated and abandoned facilities, the regulator may make recommendations to the minister for cooperative measures with governmental or other agencies inside or outside Canada (section 82).

2.2.2 Part 2 of the Canadian Energy Regulator Act: Safety, Security and Protection of Persons, Property and Environment

This part of the CERA incorporates parts III and IX of the *National Energy Board Act*, including those provisions related to existing deterrence measures, such as administrative monetary penalties, with some changes.

2.2.2.1 Definitions
(Section 93 of the Canadian Energy Regulator Act)

A new definition is added in section 93: a "holder" is a person or company to whom a certificate, permit, order or authorization under the Act is granted, or who has been granted leave to abandon an international or interprovincial power line.

2.2.2.2 Reasonable Care
(Section 94 of the Canadian Energy Regulator Act)

Section 94 introduces an obligation for holders to take all reasonable care to ensure the safety and security of persons and of regulated and abandoned facilities, as well as the protection of property and the environment.

2.2.2.3 Regulation
(Sections 95 to 99 of the Canadian Energy Regulator Act)

The regulation-making authority of the regulator is expanded to include the power to make regulations

- respecting surveillance or monitoring measures for the safety and security of persons and for the protection of property and the environment;
- requiring holders to have management systems in place and to comply with them; and
- providing for the elements to be included in those management systems, including human or organizational factors (section 96).

2.2.2.4 Security
(Sections 100 and 101 of the Canadian Energy Regulator Act)

Similarly, the regulator's authority to make regulations concerning the security of regulated facilities is enhanced to include cybersecurity matters (section 100).

2.2.2.5 Administration and Enforcement
(Sections 102 to 112 of the Canadian Energy Regulator Act)

The administration and enforcement provisions of the Act are broadened and more explicitly articulated in section 102(2). In order to verify compliance with the Act, inspection officers are empowered to enter a place where they believe, on reasonable grounds, that the Act applies. This includes the power

- to use any means of communication or any computer system in the place;
- to take measurements, samples or photographs or to make recordings or remove anything for copying or examination; and
- to prohibit access to all or any part of the place.

Inspection officers may be accompanied by any other person they believe necessary to help them. These individuals may enter private property in order to gain access to a place to verify compliance with the Act, and they are not liable for doing so. However, a warrant issued by a justice of the peace must be obtained before an inspection officer can enter a dwelling-house or living quarters (sections 103 and 104).

Where an inspection officer believes, on reasonable grounds, that a person has contravened Part 2, any of parts 3 to 5 or section 335 of the Act, the officer may issue a notice of non-compliance to the person. The notice must be in writing and set out the following:

- the name of the person;
- the provisions of the Act or regulations that are alleged to have been contravened; the order or decision that is alleged to have been contravened; or the condition of any certificate, order or decision, permit or authorization, leave or exemption that is alleged to have been contravened;
- the relevant facts of the alleged contravention; and
- the period within which the person may provide comments in response to the notice (section 108).

An inspection officer designated under section 102 may order the person to stop doing something or to take necessary measures to ensure compliance or ensure the safety or security of persons or the environment (section 109).

It is an offence to obstruct, hinder, knowingly make a false or misleading statement or knowingly provide false or misleading information to an inspection officer. Committing such an offence may result in fines of up to $300,000 (sections 103(4), 106, 107 and 112).

2.2.2.6 Privilege
(Sections 113 and 114 of the Canadian Energy Regulator Act)

New provisions relating to privilege for video and voice recordings are introduced in section 113. Recordings are privileged and must not be knowingly communicated or required to be produced, subject to specified exceptions. These exceptions include the following situations:

- when the regulator requests a recording related to an accident that is subject to an inquiry by the regulator;
- when the recording is requested by a coroner conducting an investigation; or
- when the recording is requested by any person carrying out a coordinated investigation referred to in the *Canadian Transportation Accident Investigation and Safety Board Act*.

If a request is made for the production and discovery of a recording in any proceedings before a court or coroner, the court or coroner can examine the recording in camera; if the court or coroner concludes, after examination, that the public interest in the administration of justice outweighs the privilege attached to the recording, the court or coroner must order the production and discovery of the recording, subject to any restrictions or conditions it considers appropriate. The court or coroner may also require any person to give evidence that relates to the recording.

Recordings cannot be used against employees or agents directly or indirectly involved in the operation of a regulated facility in disciplinary proceedings, proceedings relating to their capacity or competence to perform their functions, or in legal or other proceedings.

Section 114(1) empowers the regulator, subject to the approval of the Governor in Council, to make regulations to establish and administer systems for the voluntary reporting to the regulator of alleged non-compliance with the CERA. Under section 114(3), regulations made under section 114(1) may include rules for the protection of the identity of persons who make a report. Where a person's identity is protected by rules referred to in section 114(3), information that could reasonably be expected to reveal that identity is privileged, and a person must not knowingly communicate it or permit it to be communicated to any person, or be required to produce it or give evidence relating to it in any legal, disciplinary or other proceedings.

A report made to the regulator under a voluntary reporting system established in section 114(1) must not be used against the person who made the report in any legal, disciplinary or other proceedings if the person's identity is protected by rules referred to in section 114(3).

2.2.3 Part 3 of the Canadian Energy Regulator Act: Pipelines

2.2.3.1 Factors that the Commission Must Consider When Making Its Recommendation (Section 183(2) of the Canadian Energy Regulator Act)

The factors that the commission must consider before recommending whether or not a certificate for a pipeline be issued are significantly expanded in section 183(2). They include the following, which the commission must take into account when formulating its recommendation, made in light of any Indigenous knowledge that has been provided to the commission, and scientific information and data:

- the environmental effects, including any cumulative environmental effects;
- the safety and security of persons and the protection of property and the environment;
- the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
- the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

- the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; and
- any relevant assessments referred to in section 92, 93 or 95 of the IAA concerning regional or strategic assessments.[34]

2.2.3.2 Representations by the Public (Section 183(3) of the Canadian Energy Regulator Act)

Public participation in applications for pipeline certificates is broadened. The *National Energy Board Act* provides that participation is limited to those who, in the board's opinion, are directly affected by the granting or refusing of the application, and the board may consider the representations of any person who, in its opinion, has relevant information or expertise (sometimes referred to as the "test for standing" or "interested party" requirements). These restrictions are eliminated in the CERA. Section 183(3) provides that any member of the public may make representations with respect to an application for a certificate.

Under section 185 of the CERA, where an application for a certificate relates to a "designated project" – as defined in the IAA – that is subject to an impact assessment under that Act, a review panel established under the relevant provisions of the IAA is to exercise the commission's powers and duties to prepare a report for submission to the minister that takes into consideration the factors set out in section 183(2) of the CERA. In this specific instance, the provisions of section 183(3) concerning representations by the public do not apply, as hearings are included as part of the process set out in section 54 of the IAA.

2.2.3.3 Reconsideration of Recommendations (Section 184 of the Canadian Energy Regulator Act)

As provided for in section 43 of the IAA, designated projects regulated under the CERA must also undergo an impact assessment conducted by a review panel. The Minister of Environment and Climate Change establishes the review panel's terms of reference and appoints the chairperson and at least two other members, one of whom must be a commissioner of the regulator. The review panel must include in its report the information necessary for the regulator to issue its regulatory approval document, such as a licence or certificate.

After the commission has submitted its report to the minister under section 183, the Governor in Council may by order refer the report back to the commission for reconsideration of any of the recommendations or conditions in it (section 184).

2.2.3.4 Decision by the Governor in Council (Section 186 of the Canadian Energy Regulator Act)

The Governor in Council retains the power it has under the *National Energy Board Act* as the final authority for pipeline certificate decisions. Where the report prepared by the commission recommends that a certificate be issued, the Governor in Council must take one of three actions:

- it can refer the recommendation or any of the conditions in the report back to the commission for reconsideration under section 184(1) or 184(9), as the case may be;
- it can direct the commission, by order, to issue a certificate for the pipeline, subject to any conditions set out in the report; or
- it can direct the commission, by order, to dismiss the application for a certificate, thereby overturning a positive recommendation by the commission to approve a project (section 186(1)).

If the report recommends that a certificate not be issued, the Governor in Council can refer the recommendation or any of the conditions back to the commission for reconsideration under section 184(1) or 184(9), or direct the commission, by order, to dismiss the application for a certificate. In contrast to the provisions in the *National Energy Board Act*, the Governor in Council cannot overturn a recommendation by the commission not to issue a certificate. In making its order under section 186(1), the Governor in Council must set out the reasons for making the order, which must demonstrate that the Governor in Council took into account all the considerations referred to in section 183(2) that appeared to the Governor in Council to be relevant and directly related to the pipeline.[35]

2.2.3.5 Additional Powers for the Commission (Sections 190 to 197 of the Canadian Energy Regulator Act)

The commission is given additional powers to have final decision-making authority for specified minor administrative functions, such as the variation, transfer or suspension of certificates, permits, licences or authorizations (see sections 190 to 196 and also sections 288, 289, 348 to 350, 356 and 366). The commission cannot revoke a certificate for the contravention of a condition of the certificate without the approval of the Governor in Council (section 197(1)).

2.2.3.6 Determination of Route, Deviations, Relocations, Exemptions and Regulations (Sections 202 to 216 of the Canadian Energy Regulator Act)

Section 202, related to public hearings for landowners who oppose a proposed pipeline route, differs from the corresponding section in the *National Energy Board Act*. As in that Act, under the CERA, the commission must hold a public hearing

when it receives written statements of opposition to a proposed pipeline route from landowners or persons who anticipate that their lands may be adversely affected (section 202(1)). Section 202(2) adds that the commission must select a region for those public hearings that is convenient for those who filed written statements of opposition, and must provide reasons for its selection, including the factors the commission took into account.

In section 212, the power of the commission to direct a company to relocate its pipeline is broadened from that provided in the *National Energy Board Act*. Two provisions are added to the requirement that a company relocate its pipeline to facilitate the construction, reconstruction or relocation of a highway, railway or any other work of public interest or to prevent or remove an interference with a drainage system. The commission may also require a company to relocate its pipeline to ensure the safety of persons and the pipeline, or to protect the environment (sections 212(1)(a) to 212(1)(d)).

As provided for the NEB in the *National Energy Board Act*, the commission has the authority to exempt certain facilities from complying with specified sections of the CERA, including those dealing with the need to file plans, profiles and books of reference and to obtain leave to open pipelines; however, under the CERA, the exempted facilities are expanded to include pipelines that have already been constructed (section 214(1)(b)). If the commission receives an application for an exemption order, the maximum time within which it must decide to approve or dismiss the application is shortened from the 15 months set out in the *National Energy Board Act* to 300 days (section 214(4)).

Section 216 gives the regulator the authority to make regulations concerning periods to be excluded from the calculation of time limits for the preparation of a report made under section 183(5) or for an application for an exemption order provided for in section 214(5).

2.2.3.7 Discrimination (Section 237(2) of the Canadian Energy Regulator Act)

Added to the provisions in the *National Energy Board Act* relating to the price a pipeline company can charge for transportation and its terms of service (“Traffic, Tolls and Tariffs”) is a defence of due diligence in relation to unjust discrimination in tolls, service or facilities by offering a rate less than that set out in the tariff. Section 237(2) of the CERA states that persons are not to be found guilty of an offence under section 237(1)(a) if they establish that they exercised due diligence to prevent the commission of the offence.

2.2.3.8 Abandonment
(Sections 241 to 246 of the Canadian Energy Regulator Act)

Several new provisions relate to the abandonment of pipelines. A company applying to the regulator to abandon a pipeline must serve notice on all owners of lands through which the pipeline passes and publish a notice in a publication of general circulation in the area (section 241(2)). If the regulator receives a written statement of opposition to the abandonment or a written request for a hearing to be held for the application to abandon a pipeline, the commission must order a public hearing. The commission does not have to hold a public hearing where the person who filed the written statement or requested the hearing withdraws the request or statement, or where the commission considers that the opposition or request is frivolous, vexatious or not made in good faith (section 241(3)).

The powers of the commission with respect to costs, expenses, funds or security related to abandoned pipelines are enhanced. As is the case for the NEB under the *National Energy Board Act*, the commission may order a company to maintain funds or security to pay for the abandonment of a pipeline or for costs related to the abandonment, and it may order the company to use those funds or security to pay costs and expenses related to an abandoned pipeline. Under the CERA, the commission may order a third party to use the funds or security in this way (section 242(2)(b)), and it may order that any surplus funds or security be paid into the Consolidated Revenue Fund and credited to the Orphan Pipelines Account (section 242).

Sections 243 through 246, which address orphan pipelines, are provisions not found in the *National Energy Board Act*. Designated officers are empowered to designate a pipeline as an orphan pipeline where the company directors or officers who hold the pipeline certificate cannot be located, or where the company is unknown, bankrupt or cannot be located. A designated officer can designate an abandoned pipeline as an orphan abandoned pipeline under similar circumstances (sections 243 and 244).

Designated officers or authorized third parties can take any actions or measures they consider necessary related to the abandonment of an orphan pipeline or an orphan abandoned pipeline, and they are not liable for any acts or omissions committed or measures taken in doing so (section 245).

The Orphan Pipelines Account is established in the accounts of Canada, with amounts credited to it in accordance with a formula set out in section 246(3). Amounts may be paid out of that account to pay for the costs and expenses of any measures taken in relation to the abandonment of an orphan pipeline or an orphan abandoned pipeline, but payments must not exceed the amount of the balance of the account (section 246).

2.2.4 Part 4 of the Canadian Energy Regulator Act: International and Interprovincial Power Lines

2.2.4.1 Designated Interprovincial Power Lines and Issuance of Certificates (Sections 261 and 262 of the Canadian Energy Regulator Act)

The Governor in Council may designate an interprovincial power line as one to be constructed and operated in accordance with a certificate issued under section 262, and can specify what the commission must consider when deciding whether to issue the certificate (section 261(1)).

In deciding whether to issue a certificate, the commission must take into account all considerations that it finds to be relevant to the power line, in light of any Indigenous knowledge that it has received, and scientific information and data, including those factors set out in section 2.2.3.1 of this Legislative Summary concerning section 183(2) of the CERA (section 262(2)).The maximum time that the commission may take to decide whether a certificate for an international or interprovincial power line should be issued is reduced from the 15 months set out in the *National Energy Board Act* to 300 days (section 262(5)). Under section 262(7), the minister may grant extensions of this time limit.

2.2.4.2 Facilities, Ground Disturbances and Relocation (Section 275 of the Canadian Energy Regulator Act)

The powers of the commission to give directions governing the design, construction, operation and abandonment of facilities constructed across, on, along or under an international or interprovincial power line are broadened in section 275(1). Included in other provisions is the authority to:

- give directions governing the apportionment of costs directly incurred as a result of a construction or disturbance authorized under this section;
- specify activities that constitute a ground disturbance in respect of international or interprovincial power lines; and
- authorize a holder of a permit or certificate to give an authorization referred to in section 275(1)(c), 275(1)(d) or 275(1)(f) (relating to the construction of facilities across, on, along or under an international or interprovincial power line, ground disturbances within the prescribed area, or the operation of vehicles or equipment across an international or interprovincial power line) on any conditions that the holder considers appropriate.

2.2.4.3 Variation, Transfer or Suspension of Certificates and General Provisions (Sections 280 to 291.1 of the Canadian Energy Regulator Act)

The existing Governor in Council authority to make final decisions on variances, transfers and suspensions of certificates is delegated to the commission, unless directed by the Governor in Council in special cases.

The Governor in Council may make regulations to carry out the purposes and provisions of this part (section 291). New section 291.1 gives the regulator the power to make regulations prescribing – for the purposes of section 262(6), under which the Lead Commissioner may specify that a period is to be excluded from the calculation of the time limit within which the commission must make its decision – the circumstances in which such periods may be excluded.

2.2.5 Part 5 of the Canadian Energy Regulator Act: Offshore Renewable Energy Projects and Offshore Power Lines

The provisions contained in Part 5 of the CERA did not exist in the *National Energy Board Act*. Under the CERA, the regulator has the specific mandate to make decisions, orders and recommendations regarding offshore renewable energy projects. It also has legislative authority to regulate renewable energy projects and power lines in the federal offshore, addressing a regulatory gap under the *National Energy Board Act*, which did not specifically address jurisdiction over offshore renewable projects. (The provinces lack the jurisdiction to regulate beyond the low-water mark of their boundaries.)

2.2.5.1 Definitions, Prohibition and Authorizations (Sections 296 to 298 of the Canadian Energy Regulator Act)

A new term – "debris" – is introduced and defined in section 296(1). It means:

> any facility, equipment or system that was put in place in the course of any work or activity required to be authorized under [Part 5 of the CERA] and that has been abandoned without an authorization, or anything that has broken away or been jettisoned or displaced in the course of any such work or activity.

"Offshore renewable energy project" and "offshore power line" are defined in section 2 of the CERA. Work or activity related to an offshore renewable energy project or offshore power line is prohibited without an authorization under Part 5 (section 297).

The commission may, on application, issue authorizations for work or activities for offshore renewable energy projects and power lines (section 298(1)). Section 298(3) sets out factors the commission must take into account – in light of any Indigenous knowledge that has been provided to the commission, and scientific information and data – when deciding whether to issue an authorization.

The commission must issue the authorization or dismiss the application within 300 days following the receipt of a completed application, although the minister may extend this time limit (sections 298(4) to 298(7)).

2.2.5.2 Impact Assessment Act
(Section 299 of the Canadian Energy Regulator Act)

If the authorization under section 298 relates to a designated project that is subject to an impact assessment under the IAA, then despite the time limit established under sections 298(4) and 298(5), the commission must make the decision to issue the authorization or dismiss the application within seven days after the day on which the decision statement is posted on the Internet under section 66 of the IAA.
The commission must make its decision based solely on the report made under section 51(1)(d) of the IAA, and sections 298(3) and 298(6) to 298(8) of the CERA do not apply to the application.

2.2.5.3 Liability and Financial Requirements
(Sections 302 to 304 of the Canadian Energy Regulator Act)

The CERA provides for recovery of loss or damage caused by debris related to an authorized work or activity under Part 5 of the Act. These provisions mirror existing liability and financial requirements set out in the *National Energy Board Act*, modified to reflect the circumstances of damage caused by debris as defined in this part of the Act.

2.2.5.3.1 Recovery of Loss, Etc., Caused by Debris
(Section 302 of the Canadian Energy Regulator Act)

All persons to whose fault or negligence the debris is attributable, or who are by law responsible for others to whose fault or negligence the debris is attributable, are liable for:

- all actual loss or damage incurred by any person as a result of the debris or as a result of any action or measure taken in relation to the debris;
- the costs and expenses reasonably incurred by the federal or a provincial government in taking any action or measure in relation to the debris; and
- all loss of non-use value[36] relating to a public resource that is affected by the debris or by any action or measure taken in relation to the debris (section 302(1)(a)).

If loss or damage from debris is attributable to the fault or negligence of a contractor retained by a person required to obtain an authorization to carry on a work or activity, the person required to obtain the authorization is liable with the contractor (section 302(2)).

Without proof of fault or negligence, the person required to obtain an authorization for the work or activity from which the debris originated is liable for all loss, actual loss or damage and related costs and expenses up to $1 billion (or a greater amount, if prescribed by regulations) (section 302(1)(b)).

If a person is also liable for the loss or damage caused by debris, without proof of fault or negligence, under any other Act, the liability limit is the greater of the limits set out in the two Acts. If the other Act does not prescribe a limit, then the limit under the CERA does not apply (section 302(6)).

The minister may, on the recommendation of the commission, approve an amount that is lower than the statutory liability limit, and the Governor in Council may, on the recommendation of the minister, by regulation increase those liability limits (sections 302(4) and 302(5)).

Costs and expenses recoverable by the federal or a provincial government are not recoverable under section 42(1) of the *Fisheries Act*, which imposes liability for costs and expenses incurred by the federal or a provincial government in relation to the unauthorized deposit of a deleterious substance into waters frequented by fish (section 302(7)).

Section 302(9) states that claims relating to loss or damage from debris may be pursued in any court of competent jurisdiction in Canada. Claims for recovery rank in this order:

- claims for actual loss or damage;
- claims for costs and expenses in taking an action or measure; and
- claims for loss of non-use value.

The fact that an act or omission is an offence under the CERA does not mean that no other legal liability or remedy may apply for that act or omission. A person who is liable under the CERA for loss or damage from debris may seek a legal remedy against another person, and applicable laws and rules of law consistent with the liability provisions in Part 5 of the CERA continue to operate (section 302(10)).

Proceedings for a claim relating to loss or damage caused by debris may be instituted within three years from the day on which the loss, damage, costs or expenses were incurred, but proceedings may not be instituted after six years from the day the facility, equipment or system in question was abandoned or the material in question broke away or was jettisoned or displaced (section 302(11)).

2.2.5.3.2 Financial Resources and Proof of Financial Responsibility (Sections 303 and 304 of the Canadian Energy Regulator Act)

The obligation to provide proof of financial resources and responsibility set out in the *National Energy Board Act* is continued through the CERA. An applicant for an authorization must provide proof that it has the financial resources necessary to pay the amount of its liability limit ($1 billion or greater, or a prescribed amount) that is determined by the commission. The proof must be in the form and manner that are prescribed by regulation or, in the absence of regulations, as specified by the regulator (section 303(1)). Applicants for an authorization must also provide proof of financial responsibility in an amount that is determined by the commission. The proof must be in the form of a letter of credit, guarantee or indemnity bond or in any other form satisfactory to the regulator (section 304(1)).

2.2.5.4 General Provisions (Sections 305 to 312 of the Canadian Energy Regulator Act)

Provisions in Part 4 of the CERA relating to specified sections of the Act concerning the construction or relocation of international or interprovincial power lines, ground disturbances, and orders and temporary prohibitions against ground disturbances apply as if those sections referred to offshore power lines or authorizations for offshore power lines (section 305). Similarly, specified provisions in Part 6 of the CERA relating to powers of companies operating a pipeline apply for any part of an offshore power line that is in a province as though those sections referred to holders of authorizations respecting a power line, as though pipelines referred to power lines, and as though hydrocarbons or any other commodity referred to electricity (sections 305 and 306).

Section 308 provides that unless the commission has granted leave by order, the holder of an authorization for an offshore renewable energy project or offshore power line must not:

> (a) sell or otherwise transfer to any person its offshore renewable energy project or offshore power line, in whole or in part;
>
> (b) purchase or otherwise acquire an offshore renewable energy project or offshore power line from any person, in whole or in part;
>
> (c) lease to any person its offshore power line or any facility, equipment or system related to its offshore renewable energy project, in whole or in part;
>
> (d) lease from any person an offshore power line – or any facility, equipment or system related to an offshore renewable energy project – other than the one in respect of which the authorization is issued, in whole or in part; or

(e) if the holder is a company, amalgamate with another company.

2.2.5.4.1 Right of Entry
(Section 309 of the Canadian Energy Regulator Act)

Any person may enter and use any portion of the offshore area in order to carry on a work or activity authorized under section 298(1) or section 101 respecting an abandoned offshore power line or an abandoned facility, equipment or system that is in respect of an offshore renewable energy project. If a person occupies a portion of the offshore area under lawful authority, other than through an authorization, no other person is permitted to enter and use that portion without the consent of the occupier or, if consent has been refused, except in accordance with the conditions imposed in an arbitration.

2.2.5.4.2 Study and Report
(Section 310 of the Canadian Energy Regulator Act)

Section 310 provides that the regulator may, by order, direct the holder of an authorization to study any safety or environmental protection issue that relates to the authorization holder's offshore renewable energy project or offshore power line, and to report to the regulator on the results within the period specified in the order.

2.2.5.4.3 Offence and Punishment
(Section 311 of the Canadian Energy Regulator Act)

It is an offence to perform work or activity on an offshore renewable energy project or offshore power line in an offshore area without an authorization under section 297, or to contravene an authorization made under section 298(9), an order made under section 310 or a regulation made under section 312. The following punishments apply:

- on indictment, a maximum fine of $1 million or a maximum term of imprisonment of five years or both; or
- on summary conviction, a maximum fine of $100,000 or a maximum term of imprisonment of one year or both.

2.2.5.4.4 Regulations
(Section 312 of the Canadian Energy Regulator Act)

Section 312 gives the Governor in Council the authority to make regulations prescribing anything authorized in Part 5 of the CERA, as well as regulations:

- respecting works and activities related to offshore renewable energy projects and to offshore power lines, for the purposes of safety, security and environmental protection;
- respecting the conditions to which an authorization may be subject as specified in section 298(9);

- "prohibiting the introduction into the environment of substances, classes of substances and forms of energy in specified circumstances";
- respecting the creation, updating, conservation and disclosure of records; and
- respecting arbitrations for the purposes of section 309(2), which addresses the right of entry onto an offshore area to carry on authorized work, including the costs associated with such arbitrations.

New section 312.1 gives the regulator the authority to make regulations prescribing – for the purposes of section 298(6), under which the Lead Commissioner may specify that a period is to be excluded from the calculation of the time limit within which the commission must make its decision – the circumstances in which such periods may be excluded.

2.2.6 Part 6 of the Canadian Energy Regulator Act: Lands

The CERA incorporates provisions of the *National Energy Board Act* related to pipeline companies' acquisition of, entry onto and compensation for lands for pipelines, subject to some changes.

2.2.6.1 Lands for Which Consent is Required (Sections 317 and 318 of the Canadian Energy Regulator Act)

The procedure for a company wishing to take possession of or to occupy reserve lands is changed. The CERA replaces the *National Energy Board Act* requirement that a company seek Governor in Council approval to take or occupy reserve lands with the requirement that the consent of a band council be obtained (section 317(1)). This provision also appears to override an expropriation power in section 35 of the *Indian Act* that allows the Governor in Council to take or use reserve lands for public purposes by transferring them to an "expropriating authority," such as a government or a pipeline company acting under statutory authority.[37]

2.2.6.2 Acquisition or Lease of Lands (Sections 320 to 323 of the Canadian Energy Regulator Act)

Section 321, related to methods by which a company may acquire or lease land for a pipeline, is amended to add two new elements that must be set out in an agreement. The land acquisition or lease agreement must include provisions for compensation to the owner of the lands if the use of those lands is restricted by construction or ground disturbances provided for in section 335 of the CERA (concerning construction or a ground disturbance activity near a pipeline), and for any adverse effect on the remaining lands owned by the person, including the restriction of their use by the operation of section 335 (sections 321(2)(f) and 321(2)(g)).

2.2.6.3 Determination of Compensation (Sections 327 to 332 of the Canadian Energy Regulator Act)

The procedure for determining the amount of compensation payable where a landowner and a company have not agreed on the amount under this part of the CERA is modified from that set out in the *National Energy Board Act*. The *National Energy Board Act* provides that parties in disagreement may serve a notice of negotiation on the other and that the minister must then appoint a negotiator. A party that wishes to dispense with the negotiating proceedings may serve a notice of arbitration on the other and on the minister, requesting that the matter be determined by an arbitration committee as provided for under that Act.

The CERA transfers the minister's mediation and arbitration roles for land acquisition disagreements to the commission. Where a company and a land owner have not agreed on the compensation payable under this part of the CERA, the commission, on application by a company or any owner, must determine the matter (section 327). Section 327(2) sets out the factors the commission must consider in making its determination. These factors copy those an arbitration committee must consider under section 97 the *National Energy Board Act*.

2.2.6.4 Orders Respecting Acquisition, Lease or Taking of Lands and Compensation Matters (Sections 333 and 334 of the Canadian Energy Regulator Act)

Section 334 provides that the commission may, by order, give directions, including directions to determine any compensation payable under this part of the CERA, with respect to pipelines and abandoned pipelines in relation to:

- the acquisition, lease or taking of lands;
- lands whose use is restricted by the operation of section 335 (concerning construction or a ground disturbance activity near a pipeline), whether or not the lands were acquired, leased or taken; and
- damages caused by the activities of the company to any person, provincial government, local authority and government or Indigenous governing body during the planning, construction, operation or abandonment of the activities.

In determining any compensation matter under section 334, the commission must consider the factors set out in section 327(2), such as the market value of the land, the adverse effects to the landowner that may be caused by taking the land, any loss of or damage to livestock or personal property, or nuisance, inconvenience and noise that may be caused by the company's operations.

2.2.6.5 Damage Prevention
(Section 335 of the Canadian Energy Regulator Act)

The powers of the commission to, by order, give directions in relation to construction or ground disturbances within a prescribed area are enhanced in section 335(4) with the inclusion of the following:

- directions governing the apportionment of costs directly incurred as a result of the construction or disturbance authorized under this section; and
- directions allowing a company to authorize, on any conditions that it considers appropriate, the construction of facilities across, on, along or under pipelines; ground disturbances within the prescribed area; or the operation of vehicles or equipment across a pipeline.

2.2.7 Part 7 of the Canadian Energy Regulator Act: Exports and Imports

2.2.7.1 Division 1: Oil and Gas
(Sections 343 to 354 of the Canadian Energy Regulator Act)

Section 344 provides that the commission may, with the approval of the minister, issue a licence for the export of oil and gas and impose conditions on the licence, subject to any regulations under Part 7.

On application, the commission may transfer a licence issued under Division 1. However, it must not do so without the approval of the minister if it considers that the transfer is neither minor nor technical. The minister may approve a transfer of a licence if the minister considers that it is in the public interest to do so (sections 349(1) and 349(2)).

When it transfers a licence, the commission may impose, in addition to or in lieu of any conditions to which the licence was previously subject, any conditions that it considers necessary or appropriate to give effect to the purposes and provisions of the CERA (section 349(3)).

The authority to make regulations under Part 7 of the CERA is divided between the Governor in Council and the regulator in sections 353 and 354. The Governor in Council retains the authorities set out in the *National Energy Board Act* and is given an additional power to make regulations detailing the conditions under which the exportation of oil or gas may be carried out without a licence. The regulator may make regulations exempting persons or classes of persons from the application of section 352, which concerns the information required from those who import oil and gas. The regulator is also given the authority to make regulations:

- concerning the information to be provided by applicants for licences to export oil and gas;

- concerning the procedure to be followed in applying for and issuing licences; and
- prescribing units of measurement and measuring instruments or devices to be used in connection with the exportation or importation of oil or gas.

2.2.7.2 Division 2: Electricity (Sections 365 and 367 of the Canadian Energy Regulator Act)

On application or its own initiative, the commission may vary a permit or licence issued in respect of the exportation of electricity and may transfer such a permit or licence on application. When it varies or transfers a licence or permit, the commission may impose any conditions it considers necessary or appropriate (sections 365(1) and 365(2)).

Regulation-making authority under Division 2 is divided. The Governor in Council's authorities mirror those set out in section 119.094 of the *National Energy Board Act*. The regulator has the authority to make regulations that set out the information to be provided with applications for permits to export electricity, and the units of measurement and measuring instruments or devices to be used in connection with the exportation of electricity (sections 367(1) and 367(2)).

2.2.7.3 Division 3: Interprovincial Oil and Gas Trade (Section 372 of the Canadian Energy Regulator Act)

As with exports and imports of oil and gas and exports of electricity, the Governor in Council and the regulator have separate regulation-making powers. Section 372(1) empowers the Governor in Council to make regulations respecting:

- the period of validity of licences;
- the approval required for the issuance of licences;
- the quantities that may be moved out of the "designated area," as defined in section 368, under the authority of a licence; and
- any other conditions to which licences may be subject.

As well, the Governor in Council may make regulations prescribing the inspection of any instruments, devices, plant, equipment, books, records or accounts or any other thing used for or in connection with the movement of designated oil or gas out of the designated area.

Under section 372(2), the regulator may make regulations prescribing the information to be provided by applicants for licences and the procedure to be followed in applying for and issuing licences, and prescribing units of measurement and measuring instruments or devices to be used in connection with the movement of designated oil or gas out of the "designated area" as it is defined in section 368.

2.2.7.4 Division 4: Implementation of Free Trade Agreements (Sections 373 to 378 of the Canadian Energy Regulator Act)

The provisions of the *National Energy Board Act* concerning free trade agreements are reproduced in Division 4.

2.2.7.5 Division 5: Offences and Punishment (Section 379 of the Canadian Energy Regulator Act)

The punishments described in Division 5 match those provided in the *National Energy Board Act*. To those punishments is added a defence of due diligence for offences related to exports and imports: individuals are not to be found guilty of an offence under Part 2 of the CERA if they establish that they exercised due diligence to prevent the commission of the offence (section 379(2)).

2.2.8 Part 8 of the Canadian Energy Regulator Act: Oil and Gas Interests, Production and Conservation

2.2.8.1 Orders (Section 387 of the Canadian Energy Regulator Act)

Part 8 reproduces the provisions of the *National Energy Board Act*, Part II.1, with one modification: a defence of due diligence for failing to comply with an order of the commission under sections 384 (relating to certain appeals under the *Canada Oil and Gas Operations Act*) and 385 (relating to show cause hearings relating to waste) has been added to (section 387(2)).

2.2.9 Part 9 of the Canadian Energy Regulator Act: General

Part 9 reproduces the provisions of the *National Energy Board Act*, with the following differences.

2.2.9.1 Regulations (Sections 389 to 391 of the Canadian Energy Regulator Act)

The Governor in Council's power to make regulations exempting any oil or gas or any kind, quality or class of oil or gas or any area or transaction from all or any of the provisions of the CERA may only be exercised after consultation with the regulator (section 390(2).

Due diligence is added as a defence for offences specified in Part 9 (sections 389(4) and 391(3)).

2.2.9.2 Review of the Act
(Section 392 of the Canadian Energy Regulator Act)

Section 392 requires that a parliamentary review of the provisions and operation of the CERA take place 10 years after the day the Act comes into force.

2.2.10 Transitional Provisions
(Clauses 11 to 43 of Bill C-69)

In order to provide for the transition to the new Canadian energy regulation regime, a number of transitional provisions are set out in clauses 11 to 43 of Bill C-69.

Clauses 12 to 14 address the termination, compensation and continuation of members of the NEB. The appointments of permanent and part-time members of the NEB are terminated on the day the CERA comes into force ("commencement day"). Permanent members of the NEB who are not appointed as commissioners under the CERA are entitled to specified compensation; part-time members receive no compensation. The lead commissioner of the CERA may request that permanent or part-time members of the NEB continue to hear and decide any matter that was before them before the commencement day, and they are considered commissioners for that purpose. In such an instance, if the matter is not disposed of within one year of the commencement day, the lead commissioner may withdraw the matter from them and assign it to a panel of the commission.

Clauses 15 to 32 of Bill C-69 ensure the continued employment of the current NEB employees following the creation of the new Canadian Energy Regulator. These provisions preserve the positions, collective agreements, arbitral awards and right to collective bargaining of individuals in that office. These provisions also impose conditions on the Public Service Labour Relations and Employment Board.

Clauses 33 to 36 provide that all decisions, orders, certificates, licences or permits made or issued or leave granted by the NEB are considered to have been made under the CERA. Applications pending before the NEB immediately before the CERA comes into force are to be taken up before the regulator's commission and continued in accordance with the *National Energy Board Act* as it read immediately before the commencement day.

Clauses 42.1 and 42.2 provide that references to the NEB in documents and in unexpended amounts of parliamentary appropriations to defray the expenditures of the NEB are to be read as referencing the regulator.

The Governor in Council is given authority to make any regulations it considers necessary to provide for any other transitional matter arising from the coming into force of the CERA (clause 43).

2.2.11 Repeal of the *National Energy Board Act* (Clauses 44, 81 to 188 and 190 to 195 of Bill C-69)

Clause 44 of Bill C-69 repeals the *National Energy Board Act*.

Part 4 of the bill contains a number of consequential amendments to other Acts in clauses 81 to 188 that replace the *National Energy Board Act* with the Canadian Energy Regulator Act and reflect new terminology and section numbers. As well, coordinating amendments in clauses 190 to 195 relate to provisions of specified Acts and bills currently before Parliament that are not yet in force, and set out what will happen if those sections come into force prior to certain related provisions of the CERA. This ensures that the text of the relevant legislation will be consistent.

2.2.12 Coming into Force (Clause 196(1) of Bill C-69)

The provisions of Bill C-69 that enact the CERA come into force on a day to be fixed by the Governor in Council.

2.3 PART 3 OF BILL C-69: AMENDMENTS TO THE *NAVIGATION PROTECTION ACT*

In the late 19th century, water transportation was essential for commercial and other transport in Canada, and therefore the public right to unimpeded navigation, even over waterways only deep enough to float a log, was of great importance. Nonetheless, public infrastructure and other construction projects affecting shipping were also necessary. As navigation was an area of exclusive federal jurisdiction under the *British North America Act, 1867*,[38] these competing priorities were reconciled through an Act of Parliament that sought to regulate and make lawful works that would otherwise violate the public right to navigation. The *Navigation Protection Act* (NPA) is the modern-day version of legislation that has existed for these purposes (under various titles) since the late 1800s.[39]

In recent years, navigation protection legislation has undergone a number of substantive changes. In 2009, a series of amendments were introduced via the *Budget Implementation Act, 2009* with a view to accelerating the application process for public infrastructure and natural development projects.[40] A second series of changes were introduced in 2012, at which time the Act's name was changed from the *Navigable Waters Protection Act* to the *Navigation Protection Act*. The 2012 amendments also restricted the application of many of the Act's provisions to works in waterways listed in a new schedule to the Act[41] or, at the request of the project

proponent, to an unlisted waterway.[42] This stands in contrast to the pre-2012 position, where all navigable waterways were provided with protection.

According to Transport Canada, Bill C-69 seeks to "restore lost protections" and provide "greater oversight of navigable waters in Canada."[43] The changes are centred on four main themes:

- advancing reconciliation and establishing new opportunities for Indigenous peoples to partner with Canada;
- introducing new protections for the public right of navigation across Canada;
- improving transparency; and
- providing enhanced enforcement measures.

Part 3 of the bill (clauses 45 to 80) amends the NPA and changes its name to An Act respecting the protection of navigation in Canadian navigable waters or, in its short version, the Canadian Navigable Waters Act (clauses 45 and 46). Unless otherwise stated, "the Minister" in Part 3 of the bill refers to the Minister of Transport.

2.3.1 Definitions (Clauses 47 and 61 of Bill C-69)

Clause 47 of the bill introduces a number of changes to the "Interpretation" section of the NPA, several of which reflect the proposed changes to the way in which works on navigable waters are regulated. For example, as is discussed in more detail below, the bill repeals the definition of "minor water" and adds a definition of "major work."

The bill also introduces a more comprehensive codified definition of "navigable water." The NPA currently relies on a partial definition of navigable water to complement and clarify the common-law definition.[44] The new, comprehensive definition specifically notes that the term "navigable water" includes a body of water that is used "as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."

While the definition of navigable water contained in the bill is broad, clause 61 adds new section 28(1)(g.1), which allows the Governor in Council to exclude from the definition any body of water that it considers to be small.

2.3.2 Rights and Interests of Indigenous Peoples (Clauses 47 to 49 and 58 of Bill C-69)

Bill C-69 introduces to the NPA several measures that address the rights and interests of Indigenous peoples, some of which reflect existing constitutional protections and practices.[45]

Clause 47(4) amends existing section 2 by incorporating into the NPA the definition of "Indigenous peoples of Canada" provided in the *Constitution Act, 1982*.

Clause 48 adds a non-derogation clause (new section 2.2) affirming that nothing in the NPA is to be interpreted as circumventing the protection afforded to Indigenous people by section 35 of the *Constitution Act, 1982*.

Clause 48 also adds new section 2.3, which provides that the Minister of Transport must consider the adverse effects that any decision made under the NPA may have on the constitutional rights of Indigenous peoples.

Clause 49 introduces new section 7, which sets out nine factors the minister must consider when deciding whether to issue an approval for a work. Included in the list is a requirement to consider any Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the minister (new section 7(f)).

Clause 58 introduces new section 26.2, which provides that any Indigenous knowledge provided to the minister in confidence is protected and must not be disclosed without written consent unless:

- the knowledge is publicly available;
- the disclosure is necessary for use in legal proceedings or for ensuring procedural fairness; or
- the disclosure is authorized by regulations made by the Governor in Council.

Before disclosing Indigenous knowledge for the purposes of procedural fairness and natural justice, the minister must consult the person or entity who provided it, and the person or entity to whom it is proposed to be disclosed. The consultation must address both the scope of the proposed disclosure and any potential conditions attached to it with respect to that disclosure (section 26.2(2.1)).[46]

2.3.3 A New Approach to Protecting the Public Right of Navigation (Clauses 47, 49, 53, 61 and 62 of Bill C-69)

The majority of the changes connected with new processes that seek to better protect the public right of navigation are set out in clause 49, which replaces sections 3 to 10 of the existing legislation.

New section 3 extends the protection the legislation affords the public right of navigation on listed waters to all navigable waters. However, while all navigable waters enjoy protection, the degree of risk associated with the project dictates the process that is followed to ensure protection is secured.

In broad terms, this means that project proponents wishing to construct a major work are subject to more rigorous requirements than those wishing to construct a minor work. Transport Canada defines works as "any structure, device or thing – temporary or permanent – made by humans that is in, on, over, under, through or across any navigable waters."[47]

2.3.3.1 Minor Works (Clauses 49 and 61 of Bill C-69)

New section 4 addresses minor works. Examples of minor works include aerial cables, submarine cables, boat ramps and mooring systems.[48] New section 4 deems minor works as pre-approved on all navigable waters when built to established criteria.

The existing regime also allows the government to pre-approve works posing a low risk to navigation through the *Minor Works and Waters (Navigable Waters Protection Act) Order*. The current rules differ from the proposed new system in that they allow certain classes of both works and waterways to be exempted from the approval process.[49] The regime proposed in Bill C-69 does not recognize the concept of "minor waters" and repeals the definition of the term currently contained in section 2 of the NPA.

The NPA defines a minor work as "any work designated under section 28(2)(a)." Bill C-69 does not change this definition, but it does alter the wording of the provision, allowing only "works that are likely to slightly interfere with navigation" to be designated as minor works (clause 61(4)) rather than permitting the minister to designate "any works as minor works."

2.3.3.2 Major Works in Any Navigable Water and Works in Navigable Waters Listed in the Schedule (Clause 49 of Bill C-69)

Bill C-69 introduces a "new requirement for approvals of major works that significantly impact navigation on all navigable waters."[50] This process is set out in new sections 5 to 9 of the Act. The new approval process provided for in section 5 also applies to works, other than minor works, undertaken on waters listed in the schedule. According to Transport Canada, this requirement allows for "greater oversight for navigable waters where it is needed most and [for navigable waters] that are of greatest importance to Canadians and to Indigenous peoples."[51]

2.3.3.3 Major Works (Clauses 47 and 61 of Bill C-69)

In its current form, the NPA does not employ the term "major work." Clause 47 of the bill adds the term to section 2 of the Act, defining a major work as any work designated (by a future order) under section 28(2)(b). New section 28(2)(b) further

clarifies that works the minister may designate as major works are works "that are likely to substantially interfere with navigation" (clause 61(4)). Although it is as yet unclear exactly which types of work will be designated as major works, Transport Canada has provided "large dams" as an example that is likely to be captured by future orders.[52]

2.3.3.4 Works in Navigable Waters Listed in the Schedule (Clause 62 of Bill C-69)

Clause 62 of the bill adds new sections 29(1) and 29(2) to the Act. Section 29(1) sets out the factors the minister must consider when determining whether to add a navigable water to the schedule. These factors include:

- the safety of navigation in the navigable water;
- whether Indigenous peoples of Canada navigate, have navigated or will likely navigate in the navigable water in order to exercise their constitutional rights; and
- the cumulative impact of works on navigation in the navigable water.

New section 29(2) allows any person to request that the minister add a navigable water to the schedule.

2.3.3.5 Applying for Approval (Clause 49 of Bill C-69)

Clause 49 replaces the existing approval process set out in the NPA.

New section 4.1 authorizes the owner of a proposed work that would not interfere with navigation to undertake the work after having submitted specified information to the minister and published a notice. If, however, the proposed work would interfere with navigation, new section 5(1) provides that the owner of the proposed work must apply to the minister for approval.

If the minister is of the opinion that the work that is the subject of an application under new section 5(1) would not interfere with navigation, the minister must inform the owner of the proposed work, in writing, of that opinion, and no approval is required (new section 6). If, on the other hand, the minister is of the opinion that the work may interfere with navigation, the approval process will be initiated. No work can begin unless the minister issues an approval for the work (new section 7(1)). However, the minister has the power to approve a work after construction has begun or been completed, if the minister considers it justified in the circumstances (new section 7(13)).

The approval process includes opportunities for public participation. New section 7(2) stipulates that the owner must deposit any information specified by the minister in any place specified by the minister, while new section 7(3) sets out a requirement that the owner must publish a notice containing any information specified by the minister in any way noted by the minister. The notice must invite interested persons to provide written comments on the owner's proposal to the minister within 30 days after publication of the notice, or within any other specified period (new section 7(4)).

New section 7(7) sets out the nine factors that the minister must consider when determining whether to issue the approval. They include:

- any comments received during the consultation process;
- any Indigenous knowledge that has been provided to the minister;
- the cumulative impact of the work, in combination with other works, on navigation; and
- the owner's compliance record under the Act.

The minister may attach any terms or conditions that the minister considers appropriate to an approval, including a requirement that the owner maintain the water level or water flow needed for navigation[53] or that the owner provide some form of financial security, such as an indemnity bond or a guarantee (new section 7(9)).

2.3.3.6 Amending, Suspending or Cancelling an Approval (Clause 49 of Bill C-69)

Clause 49 of the bill also sets out, in new sections 9 and 10 of the Act, a process for amending, suspending or cancelling an approval. Subject to limited exceptions, the minister must give the owner 30 days' notice of any amendment, suspension or cancellation (new section 9(5)).

The minister may amend an approval by amending or revoking any term or condition of the approval (new section 9(1)). In addition, new section 9(3) allows the minister to amend an approval by adding terms and conditions if the minister considers that:

- the work that is the subject of the approval interferes more with navigation than it did at the time the approval was issued;
- the work causes, or is likely to cause, serious and imminent danger to navigation;
- the amendment is in the public interest; or
- the owner consents to the amendment.

Under new section 9(4), the minister may suspend or cancel an approval if the minister considers that:

- the owner has not complied with the approval;
- the approval was obtained by fraud, misrepresentation or other improper means;
- the owner has not paid a fine imposed under the Act;
- the owner has contravened the Act; or
- the suspension or cancellation is in the public interest.

2.3.3.7 Works That Are Neither Major nor Minor (Clause 49 of Bill C-69)

In addition to defining major works and minor works, the Canadian Navigable Waters Act recognizes a third category of works: works that are neither major nor minor and that are not undertaken on water listed in the schedule.

New section 9.1 authorizes proponents of such works to proceed where:

- the proposed work would not interfere with navigation; and
- the owner has submitted the information about the proposed work to the minister and has published a notice (new section 9.1).

If the proposed work would interfere with navigation, the project proponent must either:

- apply for ministerial approval (new section 10(1)(a)); or
- deposit any information specified by the minister and publish a notice in any manner specified (new section 10(1)(b)).

An application for approval is deemed to be an application under section 5(1) and, if an approval is issued, the work to which the approval relates is deemed to be a work constructed on a navigable water listed in the schedule (new section 10(2)).

If the owner of a work chooses to deposit any information specified by the minister and publish a notice in any manner specified, the published notice must invite interested persons to provide written comments on the proposal to the owner within 30 days after publication of the notice, or within any other period prescribed by regulation (new section 10(3)). If concerns regarding navigation are raised, the owner and the concerned person must attempt to resolve the concern within a prescribed period (new section 10.1(1)). If the concern is not resolved, the person can request that the minister decide whether the project owner is required to apply for an approval for the work (new section 10.1(3)), and new section 10.1(4) gives the minister the power to decide that the owner is required to make an application for approval.

The minister must inform the owner and the person who made the request of the decision (new section 10.1(6)).

2.3.3.8 Ongoing Responsibilities and Emergency Measures (Clause 49 of Bill C-69)

Clause 49 of the bill also replaces the provisions in the NPA dealing with ongoing responsibilities and emergency measures.

In addition to complying with all relevant rules before commencing a project, the owner of a work has ongoing responsibilities throughout the life cycle of the work. For example, the owner must immediately notify the minister if the work causes, or is likely to cause, a serious and imminent danger to navigation (new section 10.3(1)) and take steps to mitigate that danger (new section 10.3(2)).

In addition, new section 10.4 allows the minister to authorize work over any navigable water without an application having been made, or a notice having been published, if the minister is of the view that the work must be carried out immediately in order to respond to:

- a matter of national security;
- a national emergency;
- an emergency that poses a risk to public health, safety, the environment or property; or
- an emergency that threatens to cause social disruption or a breakdown in the flow of essential goods, services or resources.

These provisions are similar to provisions contained in sections 12 and 13 of the existing NPA.

2.3.3.9 Additional Protections (Clause 53 of Bill C-69)

Introduced in clause 53 of the bill, new section 13.1 allows the Governor in Council to designate areas where no works may be constructed or placed.

2.3.4 Obstructions (Clauses 55 and 195 of Bill C-69)

Clause 55 replaces section 20 of the NPA, which grants the minister the power to authorize the removal of an abandoned vessel from any navigable water (other than a minor water) that is listed on the schedule. New section 20(1) grants the minister the power to authorize a person to take possession of an abandoned or wrecked vessel in any navigable water.

Vessel abandonment is also addressed by Bill C-64, an Act respecting wrecks, abandoned, dilapidated or hazardous vessels and salvage operations. Much like clause 55 of Bill C-69, clause 38 of Bill C-64 grants the minister the power to authorize a person to take possession of an abandoned or wrecked vessel in any Canadian water, effectively repealing section 20 of the NPA.

In order to ensure coordination between the two bills, clause 195(8) has been included in Bill C-69. It provides that new section 20 will appear in the Canadian Navigable Waters Act only if the corresponding provision in Bill C-64 does not become law first.[54]

2.3.5 Dewatering (Clauses 57 and 58 of Bill C-69)

Unlike many provisions in the existing NPA, the dewatering provisions apply to all navigable waters and not only to those listed in the schedule. In clauses 57 and 58, Bill C-69 introduces a number of changes to the dewatering provisions, the majority of which clarify existing rules and prohibitions. For example, whereas existing clause 23 simply prohibits dewatering any navigable water, new section 23(1) is more explicit, specifying that no person shall take any action to lower any part of any navigable water to extinguish navigation for any class of vessel likely to navigate that water.

New section 25.1 introduces a list of powers that the minister may exercise to combat dewatering and other prohibited activities. For example, the minister may order any person both to stop taking action that is lowering the level of the navigable water and to take any action necessary to restore the level of the navigable water.

2.3.6 Transparency and Efficiency (Clauses 58, 60 and 73 of Bill C-69)

Clause 58 introduces new section 26.1, which allows the minister to undertake any study and collect any information that the minister considers necessary for administering the Act.

In addition, clause 60 introduces new section 27.2, which compels the minister to establish and maintain a registry in which information the minister specifies is to be deposited. The minister must make the registry accessible to the public on the Internet (and by any other means the minister considers appropriate). Information contained in the registry must only be information that is already publicly available or would likely be disclosed if a request were made under the *Access to Information Act*.[55]

Finally, clause 73 adds new section 47(1), which introduces a requirement for a one-time review of the legislation after five years.

2.3.7 Enforcement
(Clauses 65, 67 and 71 to 73 of Bill C-69)

2.3.7.1 Compliance
(Clause 65 of Bill C-69)

Bill C-69 contains several measures related to verifying and enforcing compliance. For example, clause 65 adds new section 36.1, which empowers a designated person[56] to order the production of any document or information for the purpose of verifying compliance with the Act. In a similar vein, new section 36.2(1) authorizes the designated person to seize and detain anything that the person has reasonable grounds to believe was used in the contravention of any provision of the Act, while new sections 36.2(2) and 36.3 set out rules regarding the custody and return of any detained items.

2.3.7.2 Violations
(Clauses 67 and 71 of Bill C-69)

Section 28(1)(i) of the existing legislation allows the Governor in Council to designate any provision of the NPA (or of regulations or orders made under it) as a provision whose contravention may be proceeded with as a violation. This permits a contravention to be treated as a violation to be addressed through an administrative monetary penalty regime, which is often viewed as an effective alternative to prosecution to promote regulatory compliance. Section 39.1(2) of the NPA specifically states that the purpose of a penalty for a violation is to promote compliance, not to punish.

Under the current legislation, the maximum penalty for a violation is $5,000 in the case of an individual and $40,000 in any other case (for example, a corporation). Clause 67 of the bill replaces current section 39.1(3) with a new section, which increases the maximum penalty for a violation to $50,000 in the case of an individual and $250,000 in any other case.[57]

Clause 71 extends the period during which proceedings in respect of a violation may be commenced. Under the current legislation, proceedings must be initiated within six months of the day on which the designated person becomes aware of the alleged violation; new section 39.23 increases the period to two years.

2.3.7.3 Offences and Punishments
(Clauses 72 and 73 of Bill C-69)

The NPA also establishes a number of offences and sets out corresponding punishments. Bill C-69 introduces changes to the punishments that can be handed down on conviction. Under the existing legislation, every person guilty of an offence is liable on summary conviction to imprisonment for a term of not more than six months or to a fine of not more than $50,000 or both.[58] New section 40(1.1), introduced under clause 72 of the bill, increases the minimum financial penalty and establishes different thresholds for individuals and corporations.

Under the provisions contained in Bill C-69 an individual is liable on summary conviction to:

- a fine of not more than $100,000 for a first offence; or
- a fine of not more than $200,000 or a prison term of not more than six months for a second or subsequent offence.

In contrast, on summary conviction, a corporation is liable to a fine of not more than:

- $500,000 for a first offence; or
- $1 million for a second or subsequent offence.

Section 786 of the *Criminal Code*[59] provides that proceedings in respect of statutory offences punishable on summary conviction must be instituted within six months after the time when the subject matter of the proceedings arose, unless otherwise provided by law. While the existing NPA makes no alternative provision to the default six-month time limitation period, new section 41, added under clause 73 of Bill C-69, provides that proceedings in respect of an offence must be commenced no later than five years after the designated person became aware that the alleged offence existed.

In addition to any punishment imposed, new section 43 provides that the court may make an order imposing one or more of seven prohibitions or requirements. These include a direction to:

- perform community service in accordance with any reasonable conditions that may be specified;
- pay the minister an amount of money to compensate for costs incurred as a result of the offence; and
- make information about the offence public.

2.4 PART 4 OF BILL C-69: COMING INTO FORCE

Subject to certain exceptions, the provisions contained in Part 3 of the bill come into force on a day to be fixed by order of the Governor in Council.[60]

NOTES

1. Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, 1st Session, 42nd Parliament (S.C. 2019, c. 28).
2. *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.
3. *National Energy Board Act*, R.S.C. 1985, c. N-7.

4. *Navigation Protection Act*, R.S.C. 1985, c. N-22.

5. For the complete legislative history of Bill C-69, please consult Parliament of Canada, "Bill C-69," *LEGISInfo*.

6. *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19.

7. *Jobs and Growth Act, 2012*, S.C. 2012, c. 31.

8. Government of Canada, *Environmental and Regulatory Reviews*.

9. These two provisions were added by the House of Commons Standing Committee on Environment and Sustainable Development (ENVI) at committee stage.

10. This provision was modified by ENVI at committee stage to allow the creation of joint review panels with non-regulators, such as provinces.

11. This provision was modified by ENVI at committee stage to give the power to designate projects or classes of projects to the minister, rather than to federal authorities.

12. Ibid.

13. The exception was added by ENVI at committee stage.

14. Ibid.

15. The posting period was changed from 15 days to 30 days by ENVI at committee stage.

16. At committee stage, ENVI removed from Bill C-69 the possibility for federal authorities to decide whether to invite the public to comment, a provision that had been in the House of Commons first reading version of the bill.

17. This provision was added by ENVI at committee stage.

18. The inclusion on the advisory council of a minimum number of Indigenous members was added by ENVI at committee stage.

19. This provision was amended by ENVI at committee stage to allow the advisory council to set out which regional and strategic assessments should be given priority.

20. This provision was amended by ENVI at committee stage to ensure that no project would be sent back at the beginning of the process.

21. Ibid.

22. Section 183 of the Impact Assessment Act (IAA) was amended by ENVI at committee stage to allow an environmental assessment referred to a review panel under the CEAA, 2012 before the coming into force of the IAA to be continued under the CEAA, 2012.

23. Ibid.

24. The IAA was brought into force on 28 August 2019 (Order in Council 2019-1186).

25. Prime Minister of Canada, *Minister of Natural Resources Mandate Letter (November 12, 2015)*.

26. Ibid.

27. Ibid.

28. Natural Resources Canada, "Government of Canada Moves Forward With National Energy Board Modernization," News release, 8 November 2016.

    The review focused on issues that fell outside a separate review of federal environmental assessment processes being conducted by another expert panel appointed for the purpose, the Expert Panel for the Review of Environmental Assessment Processes. For information on this panel, see Government of Canada, *Review of environmental assessment processes: Expert Panel Terms of Reference*. This panel released its final report, entitled *Building Common Ground: A New Vision for Impact Assessment in Canada*.

29. Government of Canada, "Terms of Reference," *National Energy Board Modernization: Expert Panel*.

30. Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada's Clean, Safe, and Secure Energy Future – Volume II: Annexes – Report of the Expert Panel on the Modernization of the National Energy Board*, 2017, p. 59.

31. Ibid., "Annex I: Recommendations."

32. This provision was added by ENVI at committee stage.

33. This provision was amended by ENVI at committee stage to require the mandatory establishment of the advisory committee, together with a minimum number of Indigenous members on that committee.

34. As noted in the *Canadian Environmental Assessment Act, 2012*, a regional assessment studies the "effects of existing or future physical activities carried out in a region," such as the Ring of Fire in northern Ontario. Strategic assessments help align projects with government policies, plans and programs, as set out in Government of Canada, *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*.

35. This provision was added by ENVI at committee stage.

36. Use values and non-use values are defined in Government of Canada, *Economic value of the environment*, as follows:

> Use values are associated with direct use of the environment such as fishing and swimming in a lake, hiking in a forest – or commercial uses such as logging or farming. Non-use values are related to the knowledge of the continued existence of the environment (existence values), or the need to leave environmental resources to future generations (bequest values).

37. While section 35 of the *Indian Act* gives the Governor in Council this power, it is Indigenous and Northern Affairs Canada policy that the affected First Nation must consent to the transaction before it can proceed. See Indian and Northern Affairs Canada, "Section 6: Policy" in "Chapter 9 – Land Transactions Under Section 35," *Land Management Manual*, September 2005.

38. Exclusive federal jurisdiction over navigation in Canada was established in the *British North America Act, 1867*, 30–31 Vict., c. 3 (U.K.), s. 91(10).

39. Transport Canada, "Background and overview," *A Guide to the Navigation Protection Program's Notification, Application and Review Requirements*.

40. See House of Commons, Standing Committee on Transport, Infrastructure and Communities [TRAN], *A Study of the* Navigation Protection Act, Eleventh Report, 1st Session, 42nd Parliament, March 2017.

41. For ease of reading, the term "works in waterways" is used to refer to any work that is constructed or placed in, on, over, under, through or across any waterway.

42. TRAN (March 2017), p. 2. The proponent of a work on, in, under, over or through a non-listed waterway might choose to opt in to the federal approval process to reduce the chance of litigation after the work commences.

43. Government of Canada, *The Canadian Navigable Waters Act: Restoring Lost Protections and keeping Canada's Navigable Waters Open for Public Use for Years to Come* [Handbook].

44. In the absence of a formal definition of navigable water under the *Navigation Protection Act*, Transport Canada "applies a 'navigability test' that includes a threshold, consistent with case law, for when a waterway is considered navigable and subject to the Act" (Government of Canada, *Determining navigability*).

45. Government of Canada, *The Canadian Navigable Waters Act: Restoring Lost Protections and keeping Canada's Navigable Waters open for public use for years to come*.

46. This provision was added by ENVI at committee stage.

47. Government of Canada, *The Canadian Navigable Waters Act: Restoring Lost Protections and keeping Canada's Navigable Waters open for public use for years to come*.

48. TRAN (March 2017), p. 2.

49. The *Minor Works and Waters (Navigable Waters Protection Act) Order* that came into force in June 2009 permitted designated works posing a low risk to navigation to proceed as pre-approved. Section 2 of the *Navigation Protection Act* defines a "designated work" as "a minor work or a work that is constructed or placed in, on, over, under, through or across any minor water."

50. Government of Canada, *The Canadian Navigable Waters Act: Restoring Lost Protections and keeping Canada's Navigable Waters open for public use for years to come*.

51. Ibid.

52. Government of Canada, *The Canadian Navigable Waters Act: Restoring Lost Protections and keeping Canada's Navigable Waters open for public use for years to come*.

53. This provision was added by ENVI at committee stage.

54. Clause 195(8) of Bill C-69 provides that if clause 138 of Bill C-64 comes into force before clause 55 of Bill C-69, then clause 55 is deemed never to have come into force and is repealed.

55. *Access to Information Act*, R.S.C. 1985, c. A-1.

56. Section 33 of the existing legislation provides that the minister may designate persons or classes of persons for the purposes of the administration and enforcement of the Act.

57. Section 39.12(2) of the existing legislation states that a person named in a notice of violation may request a review by the Transportation Appeal Tribunal of Canada. Section 15(5) of the *Transportation Appeal Tribunal of Canada Act* specifies that in any proceedings before the tribunal, a party that has the burden of proof discharges it by proof on the balance of probabilities. New section 39.18 provides that the minister has the burden of establishing that a person has committed a violation (clause 70).

58. Canadian law classifies offences as indictable offences and offences punishable upon summary conviction, the former being the more serious of the two basic categories (Morris Manning and Peter Sankoff, *Manning, Mewett and Sankoff: Criminal Law*, 5th ed., Lexis Nexis, 2015, para. 1.169).

59. *Criminal Code*, R.S.C. 1985, c. C-46.

60. Where an Act provides that certain provisions come into force later than the day of Royal Assent, the remaining provisions are deemed to have come into force on the date of assent to the Act. See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5(4).