

Intelligence MEMOS



From: Lesley Matthews
To: Concerned Canadians
Date: February 9, 2018
Re: **HOW THE FEDERAL GOVERNMENT PLANS TO RESTORE PUBLIC TRUST AND CREDIBILITY AT THE NATIONAL ENERGY BOARD**

In a flurry of press conferences and technical briefings this week, the federal government took its long-awaited broom to the Fisheries Act, the Navigation Protection Act, the Canadian Environmental Assessment Act, 2012, and to the National Energy Board (NEB).

I am still nose-deep, reviewing the text of the proposed Bills, learning new acronyms, and unearthing myself from a stack of paper (and Calgary snow), so it is too early for a comprehensive assessment. There are, however, several aspects worthy of early praise and early concern.

To summarize the changes: the NEB will be replaced with a new Canadian Energy Regulator (CER) and the Canadian Environmental Assessment Act, 2012 will be replaced with the new Impact Assessment Act (IAA). The Canadian Environmental Assessment Agency survives, but is renamed the Impact Assessment Agency of Canada (IAAC).

With respect to the first, the governance structure of the CER (it's going to take some getting used to that acronym) closely resembles the evolution of Alberta's energy conservation board to the current Alberta Energy Regulator. It replaces the current Board Member structure at the NEB, and separates a board of directors from commission members who are the ones responsible for reviewing and making decisions on project. It also effectively creates a chief operating officer (they call it the CEO) for the new regulator.

The CER will regulate the lifecycle of interprovincial and international pipelines and electrical transmission lines, but also gets to regulate offshore renewable energy projects and offshore power lines.

Pipelines will continue to be reviewed by the CER as they were under the NEB, with one large exception.

If the proposal is a "designated project" under the new Impact Assessment Act (and note, we haven't seen the regulations defining a designated project), the IAAC takes over the review of the project and a review panel is automatically established. The federal environment minister appoints a minimum of three people who meet the following criteria:

- They are unbiased and free from conflict of interest related to the project.
- They have relevant experience related to the project's anticipated effects, or have knowledge of the interests and concerns of Indigenous people relative to the assessment of the project.

CER Commission members are eligible to serve on the review panel.

With respect to the new IAA, one clause I found particularly concerning was the minister's power under section 17 (1)(b), which in effect could kill a project in the early stages of review if the minister was of the "opinion" that it is clear a designated project would cause unacceptable effects. This clause appears to give the minister the power to reject a project based on opinion, rather than evidence, with no requirement to provide a reason for the decision.

This clause opens the door for parties to potentially influence the minister to reject projects that may result in benefits for one part of the country and challenges for others – an issue that is front-and-centre these days.

The one key positive change to both pieces of legislation is the focus on the rights of Indigenous people. Respecting Indigenous rights is included first in the preamble and purpose of both Acts. In addition, there are provisions to include and protect Indigenous traditional knowledge in the review of projects, as well as a provision to enable collaborative efforts between the CER and Indigenous governments or organizations. While this sounds vague, this provision could provide flexibility for the CER and Indigenous governments to negotiate mechanisms for more meaningful participation of affected Indigenous people and communities in the lifecycle of CER-regulated projects, such as an Indigenous Advisory and Monitoring Committee, which has been initiated for the Trans Mountain Expansion Project.

I anxiously await the regulations to support the IAA.

Lesley Matthews is the Principal at Polaris Solutions and author of the [C.D. Howe Institute study How to Restore Public Trust and Credibility at the National Energy Board](#).

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