Bill C-69 and the Offshore: Uncertainty is Certain

Stephanie Hickman, QC, G. Todd Stanley, QC, and Thomas Munn*

Petroleum activity in the East Coast of Canada is experiencing unprecedented regulatory uncertainty. The regulatory framework governing environmental assessments ("EAs") and approvals for petroleum activities offshore the coast of Newfoundland and Labrador ("NL") and Nova Scotia ("NS") is under significant scrutiny and revision and the East Coast is struggling to understand new legislation that may have an unexpected and detrimental impact on one of the most important industries in both provinces, especially in NL. This uncertainty is shared with the rest of Canada, as all resource development industries are grappling with the potential implications of Bill C-69, the federal government's overhaul and expansion of approval processes for development projects. However, operators in NL's offshore are dealing with two other significant sources of uncertainty. The first is an expected regional EA process, announced by the Canadian Environmental Assessment Agency ("CEA Agency") in the middle of Bill C-69's progression through the legislative process, by an entity which will no longer exist in name if and when Bill C-69 is passed. The other source of uncertainty remains the existing 2012 amendments to the federal EA process. While those changes were perceived generally in Canada as being a weakening or lessening of the rules regarding EAs, they had the opposite effect in the Atlantic Canadian offshore. The implications of these changes are still being worked through in the industry. This means the changes introduced by Bill C-69 and a new regional EA process will potentially be implemented in an industry already challenged to understand exactly what is expected of it. For an industry which operated from 1987 to 2012 in a relatively stable legislative environment, this rapid rate of regulatory change and revision is creating significant uncertainty for the industry participants.

Legislative Issues to 2012

Until 2010, federal environmental law was set out in the *Canadian Environmental Assessment Act (1992)*.[1] CEAA 1992 contained a number of characteristics which had direct implications for the NL and NS offshore areas. CEAA 1992 prescribed a strict legal test to determine projects that were to be captured by and required to undergo the federal EA process. CEAA 1992 applied to all "federal" projects, meaning any project that involved the federal government as a proponent, federal lands, a federal permit,

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* Stephanie Hickman, Q.C. is a Partner with the St. John's office of Cox & Palmer. She practices in the areas of energy, construction/infrastructure, and commercial law. Todd Stanley, Q.C. is a Partner with the St. John's office of Cox & Palmer, practicing in the areas of energy and commercial law. Thomas Munn is an Associate of Cox & Palmer's St. John's office, practicing in commercial law, with a focus in construction and infrastructure.

[1] *Canadian Environmental Assessment Act*, SC 1992, c 37 [CEAA 1992].

or any form of federal financial assistance.[2] Projects listed on the exclusion list or projects that were carried out in response to a national emergency were specifically excluded from federal EAs.[3] The second characteristic important to the offshore was that the Canada Newfoundland & Labrador Petroleum Board ("CNLOPB") and the Canada Nova Scotia Petroleum Board ("CNSOPB" and together with the CNLOPB, the "Boards") were "designated authorities" for the purposes of conducting the required EAs for exploratory drilling and seismic activities.

There was no requirement for full EAs for exploratory drilling programs; instead the CNLOPB, as the responsible authority, satisfied the CEAA 1992 framework requirements. This generally resulted in an EA process for an exploration well that took between six and nine months. The project proponent was required to provide a description of the proposed physical activity with a particular emphasis on the existing geotechnical, shoreline, and biological environments. In coming to a decision, the CNLOPB considered the interaction between the project phases and the existing environments, while referencing the environmental factors listed in section 16 of CEAA 1992. The CNLOPB had the authority to prescribe certain mitigation and monitoring procedures in light of any identified effects, project or accidental.[4]

CEAA 2012 Amendments

Starting in 2010, the then minority Conservative federal government began the process to amend CEAA 1992. The process was not uncontroversial. Amendments were included in an omnibus 2010 budget bill, thereby hindering significant detailed consideration of the legislation. When the mandatory seven-year review of the EA process was conducted by the Standing Committee on Environment and Sustainable Development in late-2011, the controversy continued, as the Committee terminated the review hearings before it heard from all interested parties. The Committee filed its report in early 2012. Opposition parties argued that a large number of interested parties did not get a chance to participate in the hearings and the Committee should therefore extend proceedings. The NDP and Liberal parties both filed opposition reports in early 2012.[5] Their lobbying failed and, in April 2012, in association with the 2012 Budget Implementation Bill, the *Canadian Environmental Assessment Act (2012)*[6] was introduced and passed.

CEAA 2012 created a significantly different "triggering process" for EAs. Under CEAA 2012, the presumption is that projects are required to undergo a federal EA if they are a "designated project" on the Regulations Designating Physical

[2] *Ibid*, s 5.

[3] *Ibid*, s 7.

[4] *Ibid*.

[5] House of Commons, Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources* (March 2012) (Chair: Mark Warawa) at 43, 49.

[6] SC 2012, c 19, s 52 [CEAA 2012].

Activities ("Project List").[7] The Minister is responsible for creating and adding physical activities to the Project List.[8] In the event that there is a physical activity not on the Project List, the Minister may use his or her discretion to require that an EA be completed for that project if he or she believes it could have adverse environmental effects.[9] Once a project is either on the list or has been deemed to have potential "adverse environmental effects" by the Minister, the CEA Agency conducts a screening process. The first stage of the screening process involves the proponent of a project describing the designated project and the CEA Agency ultimately deciding whether an EA is required.[10]

Given the process changes from the greater certainty of CEAA 1992, there were concerns that the new CEAA 2012 could drastically reduce the number of projects that were subjected to federal EAs. The concern was that the Project List itself could remain limited, and further to that the CEA Agency and Minister were given what appeared to be broad discretion to exempt both designated projects and non-Project List projects respectively from federal EAs. Further, the CEA Agency could decide through the screening process that something other than a complete federal EA was required.[11] This raised a further concern of uncertainty as to what projects would be subjected to EAs.

It is not clear to what extent these concerns respecting the operation of CEAA 2012 were fully realized in the rest of Canada. However, in the context of offshore energy projects in Atlantic Canada, the practical implications of CEAA 2012 were the opposite of what had been feared elsewhere. Instead of reducing the number or scope of EAs, the combined result of the change in responsible agency, the changes in the Project List, and the CEA Agency's interpretation of the scope of CEAA 2012 has been to significantly change and expand the EA process in the offshore to the point where it is arguably inclusive and repetitive.

For offshore oil and gas activities in NL and NS the Project List includes a significant amount of major offshore activity. Some of this is unchanged from CEAA 1992; for example, construction, installation, and decommissioning activities at a project level required EAs under CEAA 1992 and were included under the Project List in CEAA 2012. This has not been controversial, as there is little dispute in the industry that major and long term project developments should undergo significant and thorough EAs. However, the Project List also includes the following activities:

> 10 The drilling, testing and abandonment **of offshore exploratory wells in the first drilling program in an area set out in one or more exploration licences** issued in accordance with the Canada–Newfoundland and Labrador

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[7] *Ibid*, s 2(1); *Regulations Designating Physical Activities*, SOR/2012-147 [Project List].

[8] CEAA 2012, *supra* note 6, s 84.

[9] *Ibid*, s 14(2).

[10] *Ibid*, ss 8, 10.

[11] Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2010) 24 J Envtl L & Prac 1.

> Atlantic Accord Implementation Act or the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act.[12]

The other major change of CEAA 2012 for the NL offshore was a change in the responsible agency for conducting these EAs. As set out above, under CEAA 1992, activities in the Atlantic offshore short of development project applications that required federal EAs were conducted by the CNLOPB and CNSOPB in offshore NL and NS respectively.[13] Specifically in the 1992 regime, the assessment and approval of activities such as exploratory drilling and seismic exploration was with the Boards, who were directly responsible for collecting the necessary information for EAs and completing the EAs.

CEAA 2012 reduced the number of federal decision makers involved in conducting EAs across several industries, including offshore energy in the Atlantic Canadian region. Currently, the CEA Agency is responsible for EAs for physical activities included on the Project List and thus most federal EAs for major offshore oil and gas activities.[14] The Board's role is reduced to providing technical information and their expertise when required by the CEA Agency, and continuing to conduct the assessments for activities not included under the Project List, such as seismic testing. For these activities, the Boards can conduct EAs under the Accord Acts rather than pursuant to CEAA 2012.[15]

In this new role, the CEA Agency interpreted "area" in section 10 of the Project List so as to include the area in a project proponent's exploration licence. The consequence of this interpretation was a significant increase in the amount of offshore activity that is captured under CEAA 2012 and in the number of EAs required in the NL offshore, because it means the first drilling program on every exploration license requires a full EA. This interpretation leads to a repetitive process, as it does not consider whether the geographic region in which the exploration license is issued has been the subject of previous EAs under nearby or even adjacent exploration licenses or other offshore activities. As a result, license holders have been required to invest significant time and resources into EAs for exploration wells in areas with substantially the same environmental traits as areas which have been the subject of numerous EAs in the past.

The cumulative effects of these changes were particularly noticeable for exploration well activity. With CEAA 2012, as a result of the Project List inclusion,

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[12] Project List, *supra* note 7, s 10 [emphasis added].

[13] CEAA 1992, *supra* note 1, ss 2(1), 5, 11; *Federal Authorities Regulations*, SOR/96-280.

[14] CEAA 2012, *supra* note 6, s 15(d).

[15] See CNLOPB, *Development Plan Guidelines* (February 2006) at s 1.3.2, online (pdf): <cnlopb.ca/wp content/uploads/guidelines/devplan.pdf>; *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3 and provincial *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2 [NL Accord Acts]; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28 and provincial *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, SNS 1987, c 3 [*NS Accord Acts* and, together with the NL Accord Acts, the *Accord Acts*].

this exploration activity became subject to a full EA, and that assessment was to be conducted by the CEA Agency as opposed to the CNLOPB. The result has been the requirement for a complete EA approval process for the first exploratory well on each license.

This has significantly extended the timelines of the process. As of March 2019, three out of the six exploration programs currently being assessed under CEAA 2012 submitted project descriptions in August or September of 2016 – amounting to over 800 days since submission. This timeline does not include the time for acceptance of a project description.[16] This is far in excess of the six to nine months (180 to 270 days) commonly experienced under CEAA 1992, and has created potential conflicts with the timelines of the underlying environmental licences described below.

It is a point of some legitimate debate whether federal decision makers, like the Boards, or more independent regulatory bodies, like the CEA Agency, are better suited to conduct federal EAs. As federal decision makers like the Boards have other primary functions, there is an argument that adding a substantive EA process to their role is outside their mandate, which usually is specific to their industry, and may constitute a conflict of interest.[17] This is the primary concern expressed with putting a process that considers broad environmental implications in the hands of the CNLOPB, a body that is mandated, in part, to "facilitate the exploration for and development of petroleum resources…in a manner consistent with…maximum hydrocarbon recovery and value; and Canada/Newfoundland and Labrador benefits."[18] The concern is that the CNLOPB will get "captured" by its industry and become unable to effectively perform its EA functions. There has been further concern expressed that conducting onerous EAs, in addition to their regular duties, may stretch the resources available to federal decision makers. Having one agency such as the CEA Agency, some assert, will "bring coherence".[19]

Opposing arguments cite the practical advantage of having the Boards carry out EAs in the Atlantic offshore, an area in which the Boards possess expertise and already regulate.[20] The CEA Agency, which needs time to get up to speed on technical matters and often rigorously consults the Board, can expend considerable effort to complete the process. The results are longer and more costly assessments. Having the

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[16] Newfoundland and Labrador Oil & Gas Industries Association, "Submission of the Newfoundland and Labrador Oil & Gas Industries Association to the House of Commons Standing Committee on Environment and Sustainable Development regarding Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy act, to amend Navigation Protection Act and to make consequential amendments to other Acts* (Undated) online (pdf): <noia.ca/Portals/0/Communications/General%20and%20Mics/House%20of%20Commons%20on%20Bill%20C-69%20Final%20Submission%20-%20180406.pdf > [NOIA Submissions].

[17] "Environmental Groups Perplexed Over Possible Offshore Assessment Changes", *CBC News* (24 January 2018), online: <cbc.ca/news>.

[18] "Mandate", online: *C-NLOPB* <cnlopb.ca/about/mandate/>.

[19] *House of Commons Debates*, 42-1, Vol 148, No 267 (27 February 2018).

[20] Canadian Association of Petroleum Producers, "Bill C-69 Impact Assessment" (October 2018), online: <capp.ca> [Bill C-69 Assessment].

Boards, which generally have existing working relationships with the project proponents, conduct the EAs themselves may cut down on the time the EAs take and reduce the ultimate cost to the taxpayer and the project proponent. Project proponents have publicly stated that timelines have expanded since the Board was removed as the "responsible authority" for EAs.[21] The Boards, proponents lobby, conduct EAs more efficiently due to their expertise, experience in, and deep knowledge of the Atlantic offshore industry. Some say overlooking that expertise in the context of EAs would be detrimental to the offshore industry in terms of exploration, development, safety, and the environment.[22]

Industry members have explicitly lobbied for the removal of exploratory wells from the Project List.[23] They assert that EAs for this activity are more appropriately conducted under the Accord Acts (the potential for which is discussed in more detail below). The CNLOPB has expertise in this field as it has completed a significant number of EAs on numerous exploration programs in the past. Further, industry highlights that exploratory drilling is a temporary activity; the drilling period for an exploration well is typically 60-90 days of activity, after which the well is capped and abandoned. However, CEAA 2012 requires the same EA for exploration wells as permanent activities that do not have the same environmental impact, such as pipeline projects or nuclear energy projects.[24]

There is evidence that the issues noted above were acknowledged by the federal government. In 2015 the Conservative government tried to expand the Boards' involvement under CEAA 2012 by developing regulations to significantly add to their authority. The rationale was cited as "…to reduce duplication and streamline the regulatory process for offshore oil and gas projects".[25] The Harper government ultimately abandoned the regulations and the Trudeau administration did not pursue the matter any further.

CEAA 2012 also changed how EAs are conducted. CEAA 1992 had various options for levels of EAs including screening, comprehensive studies, mediation, and panel reviews.[26] These options could occur independently or in certain circumstances in addition to one another. The 2012 CEAA has two potential options for how an EA is conducted: the standard EA or a panel review.[27]

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[21] Terry Roberts, "Proposal to Retool Environmental Assessments Rattling Nerves in Newfoundland's Offshore" *CBC News* (19 June 2017), online: <cbc.ca/news>.

[22] NOIA Submissions, *supra* note 16.

[23] *Ibid*.

[24] *Ibid*.

[25] "Federal Authority as a Responsible Authority for Designated Projects Regulations: Regulatory Impact Analysis Statement" (27 June 2015) 149:26 Can Gaz.

[26] CEAA 1992, *supra* note 1, ss 14–45.

[27] CEAA 2012, *supra* note 6, ss 15–65.

Under CEAA 2012 the Minister has the discretion to refer EAs to the review panel after considering a list of certain factors. For offshore projects in NL and NS, there is no requirement in CEAA 2012 that any member of the panel review be a member of either Board. This represented a further departure from the Boards' involvement with the process.

Project proponents in the offshore and elsewhere have shown consistent frustration with the uncertainty and complexity of CEAA 2012's standard EA process. The process has been described as "long, drawn-out uncertain regulatory and judicial processes" that ultimately places an unreasonable cost on the proponents and governments involved.[28] As noted by Canada's Oil & Natural Gas Producers in their submission to the House of Commons Standing Committee, "[a] 2016 WorleyParsons Canada study of [EA] practices worldwide observed that, while Canada has an EA process that is one of the most thorough and comprehensive, it also "currently has one of the most expensive, time and resources consuming EA processes in the world.""[29]

The Effects on Licensing

The CEAA 2012 changes came at the same time as an unprecedented increase in exploration drilling activity offshore NL. Since 2014, significant exploration licensing rounds have resulted in 22 new exploration licenses being issued by the CNLOPB and $3,381,016,331 of committed exploration activity. This represents a doubling of exploration expenditure commitments over the pre-2014 total from all previously licensing rounds since 1988.[30]

The new exploration licenses issued as a result of this activity have terms and requirements fixed by the Accord Acts. Exploration licenses are issued subject to nine-year terms that are divided into two "Periods". Period I is six years (which can be extended for three additional one year periods by posting escalating drilling deposits which are refundable if a validation well is drilled during the applicable extension period). Failure to drill a well during Period I results in the termination of the exploration at the end of Period I and Period II is not commenced. Where a well has been drilled, Period II runs for the remaining term of the license. These timeframes have not changed since 1987.

Before CEAA 2012, the environmental approval process through the CNLOPB for exploratory drilling was not an issue – while the process could take 9 months, it was a known timeframe that fit easily within the six-year Period I drilling requirement. However, the new EA process, taking in excess of 24 months, causes significant pressures in a context where exploration activity cannot easily occur year

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[28] Bill C-69 Assessment, *supra* note 20.

[29] Canada's Oil & Natural Gas Producers, "Submission of Canada's Oil and Gas Producers to the House of Commons Standing Committee on Environment and Sustainable Development on 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" (6 April 2018) [CAPP Submissions].

[30] CNLOPB, "Call for Bids Chronology", online (pdf): <cnlopb.ca/wp-content/uploads/bidchron.pdf>.

round and the CNLOPB has no discretion to extend or vary the statutorily-mandated license timeframes.

In other words, interest in exploration in NL has accelerated at the same time the environmental approval requirements for such activity has fundamentally changed, but the timeframes for the underlying activities and rights have not been adjusted to compensate for lengthy environmental review. This has resulted in a time crunch which complicates exploration, by compressing the timeframes for activities, and reduces the flexibility and margins of error for other aspects of the activities besides EAs. In the extreme, a license holder could be unable to drill and subjected to the forfeiture of its security deposits to the Federal government, notwithstanding that the regulatory processes imposed by the Federal government contributed to the license holder's default in its obligation to drill. This situation could certainly have a detrimental impact on industry participants and is unfortunately a real possibility that license holders could face. Despite this, there is no indication that either the province or the Federal government have a plan to address this circumstance.

Project proponents have indicated that reducing unnecessary regulatory burden and duplication and introducing clear, predictable legislation will encourage global exploration investment.[31]

Bill C-69 – The Future?

On February 8, 2018, the Government of Canada introduced Bill C-69, the full title of which is "*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*". Catherine McKenna, the Minister of Environment and Climate Change, described it to her fellow parliamentarians as follows:

> I have two words to describe what we announced today: better rules. We understand that we need to have a process to review major projects that is based on good science and indigenous traditional knowledge, that we need to be consulting with Canadians, that we need to be working in partnership with indigenous peoples, and that we need good projects to be able to go ahead in a timely fashion. That is exactly what we announced today.[32]

Bill C-69 is an enormous legislative undertaking. It will continue the CEA Agency as the Impact Assessment Agency (the "IAA"), and transition the National Energy Board to the Canadian Energy Regulator. While the scope and mandate of these organizations will expand, they are not being dissolved. In fact, it appears functionally not much within the new Agency will change.[33] The sitting President and Vice President of the former CEA Agency before the continuation will continue in those offices at the

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[31] NOIA Submissions, *supra* note 16; CAPP Submissions, *supra* note 29.

[32] House of Commons Debates, 42-1, Vol 148, No 260 (8 February 2018).

[33] 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 Sess, 42nd Parl, 2018 [Bill C-69], s 153(1), "Transitional Provisions".

IAA.[34] Bill C-69 also doesn't affect the employment status of any current CEA Agency employees.[35] Further, any legal contract, agreement or document to which the former CEA Agency was a party shall equally bind the new IAA.[36] Although the processes for EAs may change, the resources used to conduct them will largely remain the same, for now.

The Bill will expand what was previously an EA into an Impact Assessment ("IA"), adding a number of new criteria that will have to be considered. These include cumulative effects, project need, contributions to sustainability, traditional Indigenous knowledge, biodiversity, climate change impacts, and the intersection of sex and gender.[37]

This list of factors, along with the "public interest factors" the Impact Agency must consider,[38] are broadly worded and address a host of social topics, but fail to address relevant economic factors. The IAA is not required to explicitly consider certain potential economic benefits the activity might bring, such as employment to the region in which the project is located. Industry participants argue the Bill would benefit from the explicit inclusion of such economic factors, including the provision of all necessary infrastructures.[39]

While Bill C-69 reduces the statutory timeframes which the IAA will have to complete its work from the legislative timeframes for the CEA Agency in CEAA 2012, it is more selective as to when those clocks start running, providing that time spent by proponents answering questions in the process will not count. Further, the timelines *exclude* a new pre-assessment or "screening" stage that proponents argue will help streamline the assessment process once initiated. Rather, it prescribes a 180-day timeline for the IAA to make a decision during the "Planning Phase".[40] Proponents have expressed concern at this length of time. 180 days represents over three times the number of days that CEAA 2012 provides for the project description and initial determination of the CEA.[41] Proponents are also concerned about the vagueness of the 180-day period, namely the lack of milestones built in to the legislation.[42] As per section 14(1) of Bill C-69, proponents may not be provided with a summary of the IAA's issues with the project until the end of the 180-day period.[43] Further, the 180-

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[34] *Ibid*, ss 169, 170.

[35] *Ibid*, s 171.

[36] *Ibid*, s 172.

[37] *Ibid*, s 22(1).

[38] *Ibid*, s 63.

[39] CAPP Submissions, *supra* note 29, s 13.

[40] Bill C-69, *supra* note 33, ss 10–15.

[41] NOIA Submissions, *supra* note 16.

[42] CAPP Submissions, *supra* note 29, s 2.

[43] Bill C-69, *supra* note 33, s 14.

day period is a significant commitment to a project proponent who may find out at the end of the timeline that it is not required to conduct an IA.

To provide clarity and efficiency for proponents, industry has submitted that Bill C-69 should be amended to require that the IAA provide (i) the summary of issues and (ii) the final decision as to whether an IA is required at shorter timeframes than the full 180 days.[44] Without a further explanation of what the IAA is supposed to be doing during the timeframe, the 180-day time period overall appears unnecessarily long and there is significant industry support for it being shortened.

Bill C-69 has been controversial since its introduction; it is not universally agreed whether Bill C-69, if enacted as currently drafted, will actually be a step towards the worthwhile objectives described above by Minister McKenna. While the federal government has made amendments to Bill C-69 in an attempt to provide greater certainty and predictability for corporate proponents,[45] critics of Bill C-69 say, even as currently drafted, it will make the project assessment process in Canada less certain and more political and discretionary than is the case today.[46] The Fraser Institute, which is one of the most vocal opponents of Bill C-69, points to the following three issues in support of its opposition:[47]

1. The pre-planning phase, which occurs before the IAA has to "start the clock" on the statutorily imposed timelines, creates new opportunities for project opponents to create delay;[48]
2. Removal of the "standing" requirement for public participation: now any person or group wishing to be heard will be permitted to participate, regardless of where they are located or what, if anything, their connections to the project or region are;[49] and
3. Despite repeated references to science-based decision-making, the requirement to consider traditional indigenous knowledge and the "intersection of sex and gender with other identity factors" during project assessment.[50]

While each of those issues, and how they will actually be interpreted and applied by the IAA, are on the radar of those engaged in the offshore industry on Canada's east

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[44] CAPP Submissions, *supra* note 29, s 2.

[45] Government of Canada, "Key Amendments to Bill C-69 and Bill-68" (June 2018), online: <canada.ca/en/services/environment/conservation/assessments/environmental-reviews/bill-c-69.html >.

[46] Bruce Pardy, "Federal Reforms and the Empty Shell of Environmental Assessment" (31 May 2018), online: *Fraser Institute* <fraserinstitute.org/studies/federal-reforms-and-the-empty-shell-of-environmental-assessment>.

[47] Kenneth Green, "Trudeau Sticking with Bill C-69" (16 November 2018), online (blog): *Fraser Forum: The Fraser Institute Blog* <fraserinstitute.org/blogs/trudeau-sticking-with-bill-c-69>.

[48] Bill C-69, *supra* note 33, ss 10–20.

[49] *Ibid*, ss 11, 27, 33(1)(e), 51(1)(c), 99.

[50] *Ibid*, s 22(1).

coast, there are also other specific concerns. The primary one is the uncertainty that remains with respect to both the requirement for an impact assessment, and the impact assessment process itself, with respect to exploration drilling programs.[51] This ambiguity has been further compounded by the delayed release of any draft regulations for the Impact Assessment Act, especially the highly anticipated updates to the "Designated Project List".

It is this potential for conflict between federal EA requirements and the Atlantic Accords, including the statutory requirements under the Accord Acts, which made NL's offshore oil and gas industry particularly sensitive to the changes created by CEAA 2012. The same is true of the intended reforms should Bill C-69 be enacted. These concerns extend beyond the specifics of the assessment processes, to the entire joint management regime for the offshore that underpins the Accords. These concerns with respect to the Atlantic Accord's relationship to Bill C-69 have been raised in the Senate, where a robust debate of Bill C-69 occurred throughout the Fall of 2018. Senator Denise Batters, who represents Saskatchewan, rose in the Senate on December 12, 2018 to say:

> Another problem with Bill C-69 is that it undermines the joint management principles of the Atlantic Accord Acts. The Governments of Canada and Newfoundland and Labrador jointly manage the Canada-Newfoundland and Labrador Offshore Area through the Canada-Newfoundland and Labrador Offshore Petroleum Board. As currently written, the Impact Assessment Act gives the federal minister and cabinet the power to pause, suspend or cancel a project, potentially overriding the terms of the accord. This discretionary power creates the potential for further politicization of the process and increases uncertainty for project proponents.

The concerns about Bill C-69 are not only that the new legislation fails to improve upon the problems created by CEAA 2012 for offshore development; there is significant concern new legislation may also make it worse. For instance, under CEAA 2012, the CNLOPB remained responsible for EAs for seismic programs as well as other offshore activities which are not included within the Project List. The CNLOPB's timeline for completion of an EA process is 19 weeks, substantially less than that under either CEAA 2012 or Bill C-69. However, there is increasing concern that, not only will exploratory drilling programs remain subject to federal impact assessments under Bill C-69, but that geophysical activities like seismic and other routine offshore activities may get caught within the expanded impact assessment requirements as well.

During Bill C-69's second reading in the Senate, there was at least some indication that "exploration, geophysical activities, like seismic, and expansions to existing offshore projects" may be excluded from federal impact assessments under Bill C-69.[52] On December 7, 2018, Senator Grant Mitchell, in response to a question by Senator David Wells on such activities, suggested that while the composition of the

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[51] CAPP Submissions, *supra* note 29; NOIA Submissions, *supra* note 16.

[52] *Debates of the Senate*, 42-1, Vol 150, No 226 (18 September 2018).

designated project list was still an open process, perhaps such routine activities would be left off the designated project list by saying:

> […] a couple of factors will mitigate your concern. The IAA will have a limited budget. The CER will have a limited budget. The board you were on will have a limited budget. There will be lots of pressure not only to go off and do every possible project in an extensive review, and there will be a settling process. In fact, that's one of the things that will occur in a preplanning process.
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> However, many projects will never go that route. They won't be designated projects under the project list; they won't be major projects. That principle will hold firm. **So it's very unlikely, I would say — but we'll see what the regulations say — that the kinds of projects that you're mentioning — which is a very good point — will not be subjected to major project review under the IAA or under the joint or integrated process**. In fact, if it's relatively small, it will be done specifically by the offshore board through what is called a regulatory process and not the designated project process.[53]

Notwithstanding this statement, the composition of the Project List is still an open process, and lobbying efforts for it to be both more and less inclusive in respect of offshore activities continue.

Finally, proponents take issue with the preclusion of Atlantic offshore projects from substituted processes. The new Impact Assessment Act gives the Minister discretion in some instances to defer to the environmental assessment process of other jurisdictions, rather than requiring a full federal impact assessment. However, Bill C-69 states that the Minister must not approve the substitution of a process in relation to a designated project that includes activities regulated under the Accord Acts.[54] In fact, under the new legislation,[55] the Minister must refer offshore projects in NS and NL to review panels. The industry in NL argues that by never allowing the Minister to defer environmental assessments for offshore projects to the CNLOPB, the new act fails to utilize the expertise of the CNLOPB in handling exploratory development and offshore health and safety matters. Participants believe these provisions of Bill C-69 should be deleted.[56] However, review panels under the Impact Assessment Act do look to employ the Board's expertise to some degree. At least two members of the review panel must be chosen from a roster established on recommendation from the Chairperson of the Board in NL and NS.[57]

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[53] *Ibid* [emphasis added].

[54] Bill C-69, *supra* note 33, s 32(b).

[55] *Ibid,* s 43 and "Amendments to the Impact Assessment Act", *supra* note 33, s 5.

[56] NOIA Submissions, *supra* note 16.

[57] Bill C-69, *supra* note 33 at "Amendments to the Impact Assessment Act", ss 6–7.

Regional Assessment

Further muddying the waters, but potentially providing a solution that may completely or partially satisfy the requirement for an EA with respect to each individual drilling program,[58] is the announcement of an Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador between Canada and Newfoundland and Labrador (the "Regional Assessment Agreement").[59]

The Regional Assessment Agreement contemplates the appointment of a Committee that will:

> conduct a Regional Assessment of offshore oil and gas exploratory drilling east of Newfoundland and Labrador […] On completion of the Regional Assessment, the Committee will provide the Ministers with a Report which includes the Committee's advice on how to best use the results in a systematic way to aid decision-making based on geographically-referenced knowledge and clear criteria. As such it will meet or exceed the rigour and performance of the current environmental assessment and regulatory review process used for the approval of exploratory drilling.[60]

The Committee is established by the federal Minister of the Environment pursuant to the CEAA 2012, which allows the Minister to establish a committee to conduct a study of the effects of existing or future physical activities carried out in a region that is entirely on federal lands.[61] If the region in question consists of some or no federal lands, the Minister may enter into an agreement with any federal authority (i.e. the CNLOPB) respecting the joint establishment of a committee to conduct the study.[62] The Committee is granted the same powers as a review panel under the CEAA 2012, namely the ability to summon witnesses to give evidence or produce records and to hold public hearings.[63] The Committee is required to consider the factors listed in

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[58] CAPP Submissions, *supra* note 29.

[59] *Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador Between Her Majesty the Queen in Right of Canada as Represented by the Federal Minister of the Environment and the Federal Minister of Natural Resources and Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, as Represented by the Provincial Minister of Natural Resources and the Provincial Minister Responsible for Intergovernmental Affairs and Indigenous Affairs* [Regional Assessment Agreement] at Appendix D – "Terms of Reference – Committee", s 1.1.

[60] *Ibid* at Appendix A, s 1.1.

[61] CEAA 2012, *supra* note 6, s 73.

[62] *Ibid*, s 74.

[63] *Ibid*, ss 77, 45.

Appendix A to the Regional Assessment Agreement[64], and must furnish a report to the Minister upon completion of the study.[65]

The stated purpose of the Regional Assessment Agreement includes creating a more efficient EA process while maintaining the highest standards of environmental protection.[66]

The Regional Assessment Agreement, if intended to serve as a comprehensive and anticipatory EA process for its Proposed Regional Assessment Study Area (described in Appendix 'B' – "Proposed Regional Assessment Study Area" therein), is an initiative that project proponents may see as a step in the right direction towards a less onerous and costly EA process. It represents a coordinated effort to improve the efficiency of the regulatory process given the Province's recently announced goal of having 100 new exploratory wells drilled by the year 2030.

Importantly, the Regional Assessment Agreement states that "[s]hould CEAA 2012 be repealed and replaced by new legislation, this agreement remains valid with any necessary modifications" and that "[t]he agreement has been designed to meet the requirements of CEAA 2012 as well as those of the proposed Impact Assessment Act."[67] This anticipates the passing of Bill C-69 and the replacement of CEAA 2012 with the new Impact Assessment Act. In the event Bill C-69 is passed, the Regional Assessment Agreement will not require significant revisions. Like CEAA 2012, Bill C-69 allows for the joint establishment of a Committee with a federal authority "to conduct a regional assessment of the effects of existing or future physical activities carried out in a region". However, Bill C-69 contemplates the possibility of the IAA, rather than the Minister, being in charge of establishing the Committee.[68] The factors to be considered by the Committee listed in Appendix 'A' of the Regional Assessment already mirror the listed factors in Bill C-69 more closely than they do the factors of CEAA 2012. The public (and particularly Indigenous) consultation requirements placed on the Committee are more onerous in Bill C-69 than in CEAA 2012, but that onus is somewhat addressed in the Draft Regional Assessment Agreement itself.[69] The Committee must also explicitly consider "scientific information".[70] Bill C-69 also allows a Committee to conduct "strategic assessments", which may assess "any issue that is relevant to conducting impact assessments of

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[64] Regional Assessment Agreement, *supra* note 59 at Appendix A.

[65] CEAA 2012, *supra* note 6, s 75.

[66] Government of Canada, *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador*, online: <ceaa-acee.gc.ca/050/evaluations/proj/80156?culture=en-CA>.

[67] Regional Assessment Agreement, *supra* note 59, ss 1.2–1.3.

[68] Bill C-69, *supra* note 33, s 92.

[69] *Ibid*, ss 97(2), 98, 99, 102(1).

[70] *Ibid*, s 97(2).

designated projects or of a class of designated projects". A strategic assessment could also potentially tackle the issues surrounding exploration wells.[71]

While it is encouraging that the Regional Assessment Agreement contemplates its continued validity under a new Impact Assessment Act, some have raised concerns about how well the current draft of Bill C-69 addresses the actual process of strategic and regional assessments.[72] It is also unclear what triggers a strategic or regional assessment aside from the Minister's discretion. Further, is it also unclear what the effect of a completed regional or strategic assessment will be.

We submit that Bill C-69 would benefit from a more detailed description of what each assessment entails, and what factors the Minister must consider in deciding whether or not an issue is referred to an assessment Committee. CAPP suggests that a list of completed assessments should be maintained and used as a part of the exclusion criteria on the designated project list to reduce duplication of efforts.[73] At a minimum, the Act should explicitly address what effect a completed regional or strategic assessment has on the IAA when it is deciding what projects move forward to full IAs. It should also be noted that there are no specific requirements for the appointment of regional or strategic assessment Committee members.[74] Industry suggests that Bill C-69 should be amended to include more detail on the composition of the Committee, especially in the situation of a joint assessment Committee with a federal authority, and should consider requiring a minimum percentage of the Committee to be comprised of members of that federal authority to properly utilize their expertise.

Further, it remains unclear what the relationship between the regional assessments completed pursuant to the Regional Assessment Agreement will be with impact assessments required under the Impact Assessment Act. At least three possibilities exist:

1. Exploratory Drilling will be included on the Designated Project List and an approved regional assessment will eliminate the need for impact assessments for individual exploratory drilling programs under the Impact Assessment Act if conducted in accordance with the approved regional assessment;
2. Exploratory Drilling will not be included on the Designated Project List and the regional assessment will serve as a discretionary assessment process for all exploratory drilling within the Proposed Regional Assessment Study Area; or
3. Exploratory Drilling will be included on the Designated Project List and individual exploratory drilling programs will be subject to review under the Impact Assessment Act, with the regional assessment only removing the

[71] *Ibid*, s 95(b).

[72] NOIA Submissions, *supra* note 16.

[73] CAPP Submissions, *supra* note 29.

[74] Bill C-69, *supra* note 33, s 96(1).

requirement for consideration of "cumulative impacts" within the impact assessments process.

The most likely outcome is the first possibility noted above, that the regional assessment will remove the need for individual assessments for each drilling campaign. However, until the proposed regional assessment is complete and its application to the industry known, operators will likely initiate or continue their own individual assessments under either CEAA 2012, or the Impact Assessment Act (if enacted), to remain in closer control of their own regulatory timelines. Notwithstanding that the Regional Assessment Agreement states that "[t]he Committee will submit its Report to the Ministers no later than fall, 2019", such a timeline appears completely unrealistic. The Regional Assessment Agreement was only signed in mid-April of this year. Twenty-three groups submitted comments on the Draft of the Regional Assessment Agreement, many with substantive concerns or recommendations that largely do not appear to have been addressed by the Agreement. These groups included operators, indigenous communities throughout eastern Canada, industry associations, environmental non-governmental organizations, and individual citizens. Cumulatively, what these responses illustrated was that the regional assessment process, if initiated, will be keenly attended and likely attract a wider group of participants than all prior EAs for individual drilling programs.

Conclusion

Bill C-69's stated purpose is an attempt by the federal government to relieve some of the existing uncertainty and lack of predictability faced by proponents across a range of resource development industries across Canada, including petroleum activities in the Atlantic offshore. Although CEAA 2012 was seen by some as a de-regulation of the EA process by the Harper Government, project proponents in the Atlantic offshore have voiced their concern that the legislation had a contrasting, and possibly unintended effect. Federal EAs are currently expensive and onerous, and their bloated timelines are difficult to reconcile with existing licensing regulations for the exploration of the offshore.

As industry members wait out the potential effect of Bill C-69, the EA landscape appears more uncertain than ever. The Regional Assessment Agreement may prove to be a solution to the problems identified by proponents, but it currently adds to the existing uncertainty. The offshore industry is unclear how the Agreement will interact with Bill C-69 if and when it is passed. Add to that the fact that the new project list regulations for Bill C-69 have not yet been published, and offshore operators find themselves trying to try to understand the way in which a new regulatory regime is going to affect their industry before they had a chance to fully digest the existing regime. Industry participants are continuing to lobby for the more predictable and stable EA process that existed prior to 2012, even with all its flaws. Although it is difficult to determine at this stage whether their voices will be heard, if history is anything to go by, it appears unlikely.