INTRODUCTION

Madam Chair and Honourable Senators, thank you for inviting me. And a special thanks to Maxime Fortin for arranging my presentation.

I am here because I want Canada’s impact assessment process to work well, for the sake of my children and grandchildren, and for those of all Canadians. That will not be the case unless C-69 is significantly amended. Good ideas that are badly implemented don’t make good laws. Without major amendments it is unlikely that there will be any new pipeline or electricity transmission proposals under C-69.

I have had a 45 year legal career advising and representing clients across Canada. Clients have included some First Nations (FNs), environmental groups, domestic and international corporations and federal and provincial governments. I have taught and practiced environmental law and advocacy. The federal government retained me to draft the first environmental assessment rules for its impact assessments. I have appeared as legal counsel for both the federal government and NGOs in pipeline hearings and court applications arising from them. I have also worked on drafting different kinds of laws for Ottawa and several provinces.

MY WRITING ON C-69

I recently published two blog posts on C-69, receiving over 4,000 views, here:

Analysis of C-69

How to Amend C-69
The second of these has a table providing a detailed list of suggested amendments. I would encourage you to read these blogs.

**WHO WILL BE THE WINNERS AND LOSERS UNDER C-69?**

Those who want to keep Canada’s oil and gas in the ground will be the winners. Everyone else will be the losers.

1. If anyone opposed to a pipeline asked me to represent them in stopping the pipeline I would advise that C-69 makes it easier than ever to do that. If the proposal somehow eventually gets Cabinet approval, opponents can overrule it in the court, or at least delay it for years until the proponent gives up. Like TransMountain.

2. If a prospective proponent asked me to represent them in obtaining project approval, I would advise that final approval will be even less likely under C-69 than it is under the 2012 Act. After several years of public hearings, even if the Cabinet approves the project, this will inevitably trigger years of litigation, with an uncertain outcome. Such litigation has already succeeded against both the TransMountain Pipeline Expansion (TMX) and Northern Gateway under the 2012 Act. That’s why the TMX pipeline investors bailed, and the government bought the pipeline. But the government can’t buy them all. And there will be another round of TMX litigation challenging both the NEB’s re-assessment of marine traffic and the Crown’s additional FN consultations. It will be interesting to see who wins that litigation.

The several litigation triggers under the 2012 Act enabled successful court challenges. C-69, with its numerous new litigation triggers, makes litigation success much easier.

**SOME OF THE MANY KEY PROBLEMS WITH C-69**

- The 2012 Act transferred power from the NEB to the Cabinet. Moving the decision-making power from the hearing agency to the apex of the political hierarchy destroyed the integrity of the FN's consultation process. That is the main reason why two Federal Court of Appeal decisions have held the consultation process to be inadequate. If the consultations are to be meaningful the people who consult must have the power to resolve the problems revealed by the consultations. The purpose of consultation is not to
have a pleasant chat and take notes, but to respond to legitimate Indigenous concerns by accommodating and mitigating them wherever possible. However, the people sent to consult have no power to do anything but take notes, which then flow up the ladder and disappear into the black box of the Cabinet. For practical reasons, the entire Cabinet cannot meet repeatedly with the 100+ FNs potentially affected by a long pipeline or electricity transmission line, or even consider their numerous individual issues. Yet only the Cabinet can decide what to do about them. This is a serious structural flaw created in 2012 and retained in C-69.

- **The Cabinet is not the final decision-maker, the court is.** The numerous new litigation triggers in C-69 will ultimately transfer a lot of the power of the Cabinet to the courts. C-69 will encourage and facilitate successful court applications, both to try to stop the hearings in progress and to overturn any Cabinet approval.

- **C-69 simply requires too much work to be done in too little time.** If we don’t want to have endless hearings we have to cut back the workload substantially. Statutory time limits cannot work. Public hearings cannot be shut down half way through just because the statutory time limit has expired. The hearings will take as long as they take. C-69 cannot control the number of parties choosing to appear at the hearing (there were 1,600 in TMX), the length of their presentations, court applications during the hearing, etc.. And C-69 requires hearing evidence on almost twice as many mandatory environmental, social and economic considerations as the 2012 Act, with an unlimited number of self-selected hearing participants. By the time these hearings get near their end, several years after beginning, many of the facts presented in the original proposal will have changed. The hearings will then have to examine the impact of the changed facts, further extending hearing time. The Minister will have to extend the statutory time limit, repeatedly, rendering the statutory time limit meaningless.

- **Making 20 factors mandatory considerations in every case, regardless of relevance, means having to collect evidence on each of these 20 factors.** This is an extremely inefficient waste of time. All of them should be discretionary, not mandatory. Changing the word “must” in section 22 to “may” is the single most useful change you could make.
• **Internal inconsistency.** Section 63 gives the Cabinet 5 “must consider” factors, while section 22 gives the Impact Assessment Agency (IAA) 20 “must consider” factors. There is no obvious reason why those who decide must consider only 5 factors while those who hear must consider 20. This inconsistency is puzzling because C-69 requires the Cabinet to base its decision on both its own 5 factors and on the IAA’s report, which must consider 20 factors. Logic would suggest that if only 5 considerations are essential to actual decision-making by the Cabinet then those should be the same 5 considerations essential for the Agency’s hearing. The easiest way to fix this is simply to repeat in section 22 the same 5 considerations as in section 63 (although some of the 5 factors are also badly worded and need re-drafting).

• **The judicial decisions governing the Crown’s duty of consultation of First Nations (FNs) are inconsistent and unpredictable.** Cases are decided on a case-by-case basis, so the law is whatever the next court decision says it is. Unless the decision-making power is restored to the hearing agency, I can think of only one way to bring some much needed clarity to this area of law: a **reference case**. The government should draft a law setting out its proposed scope and limits of consultation and accommodation under various circumstances (such as a conflict among FNs supporting and opposing a proposed project). It should present this draft law to the Supreme Court of Canada (SCC) in a reference case. The SCC would then give its opinion on the validity of various parts of this proposed law. This would help both FNs and the Crown.

• **Although I have focused on pipelines, C-69 covers a lot more, such as interprovincial and international electricity transmission lines.** These, too, always face strong opposition. Large scale non-emitting electricity generation (nuclear or wind) cannot be situated in urban areas, thus requiring new transmission lines to where the power will be used. As the scale of such generation increases and grid connection becomes more important, transmission lines will be longer. Some will be North-South to facilitate exports and imports. An assessment law biased against new projects can therefore retard the widespread use of non-emitting generation.
WHY RETAIN THE WORST MISTAKE OF THE 2012 ACT?

The main reason for C-69 was to fix what had been broken by the 2012 Act, so as to restore public confidence in the assessment process. But the worst mistake in that Act is preserved in C-69. That is to separate the hearing process from the decision-making process and to politicize the latter. If public trust in the assessment process is important, the more evidence-based and the less political it is the more trustworthy it is. Politics routinely involves extensive lobbying and secrecy; public hearings do not.

For decades the NEB heard and decided applications for approval. This politically independent decision was made outside the regular government department, at arm’s length from politics. The 2012 Act took decision-making power away from the NEB and put it into the Cabinet. The NEB became just the hearing arm of the Cabinet. This was wrong, for two reasons.

First, it politicized what should be an evidence-based, arm’s length decision. No one will believe that Cabinet members have either the time or the expertise to review thousands of pages of scientific, engineering, economic and sociological evidence from the hearing. Cabinet decisions on pipelines are political, opaque and unpersuasive. The decision may also depend on which political party is in power and the political pressures they face at the time.

The economic hardship that will eventually be caused by C-69, telling investors that Canada is no longer open for business, cannot be helpful to any government. If C-69 is to be useful Parliament will have to fix it. The Senate should help it to do so.

Second, the 2012 Act violated the age-old principle that whoever hears shall decide/whoever decides shall hear. Under both the 2012 Act and C-69, those who hear the evidence decide nothing, while those who hear nothing decide everything. (Unless the decision is overruled by the court.) Only in politics would this be considered rational.

Understandably, politicians will be reluctant to give up this political power. However, if the government wants the impact assessment process to regain the credibility it had before the 2012 Act, re-uniting hearing and decision-making will make a big difference.
If you push the decision-making up to the apex of the government hierarchy you can’t leave the consultation with FNs at the bottom. Parliament should not change the locus of decision-making without changing the locus of consultation.

The usual reason given for putting the decision-making power into the Cabinet is “we don’t want public servants making this decision”. But these are special public servants. They are experts working independently of normal political control. They have done the work: heard the witnesses, read the thousands of pages of written expert and other evidence and analyzed it carefully. If the Cabinet wants to make the decision they have to do the necessary work.

Of course, the Ministers have neither the time nor the knowledge to do the work. They probably won’t even read the entirety of the hundreds of pages in the NEB’s or IAA’s report. A civil servant in the Privy Council Office will probably prepare a brief summary of the report, and a staff member in the PMO will probably prepare a political analysis, with polling information about the popularity of the proposed project in various parts of the country. The Cabinet will read and discuss these reports for a few hours, calculate where the votes will lie, and then make its collective decision. Another civil servant will draft the Cabinet’s reasons for decision for release to the public. Is that really a more trustworthy way to make the decision?

Both the 2012 Act and C-69 appear to have forgotten why governments created environmental regulators in the first place: to depoliticize environmental assessment decisions by placing them at arm’s length from politicians. Sooner or later that lesson will have to be relearned. Why not now?

If the Agency’s decision is wrong in policy the Cabinet can overrule it, without having to make the decision in the first place. A useful analogy is found in the CRTC’s decision-making process. An appeal from a CRTC decision lies to the Cabinet on a question of policy (not law). C-69 could also permit an appeal to the Cabinet on a question of policy. That would provide a degree of political oversight, without the currently routine, indispensable politicization. If, as in most cases, the regulator’s decision will be reasonable, the Cabinet will not have to do anything. Only in rare cases should it have to overrule. That system worked well for decades. The new, politicized system has not worked well since it was created in 2012.
CONCLUSION

There isn’t time today to go into the detailed analysis in the two blog posts I have hyperlinked above. However, I can provide some broad categories of desirable amendments to C-69.

1. Reunite the hearing process and the decision-making process (i) to restore the integrity of consultation with FNs and (ii) to restore transparency to the project assessment process. Assign the decision to whoever hears the evidence, subject to an appeal to the Cabinet on an issue of policy.

2. The scope of the assessment should be limited to the scope of reliable and necessary evidence that can be heard within a reasonable time. Fix the hearing bloat created by section 22’s requirement for 20 mandatory considerations. Legislating a time limit doesn’t do this. C-69 can reasonably be interpreted as requiring assessment of the effects of the effects of the effects. Don’t compel anyone to hear speculative evidence about unpredictable future effects all over the planet. Cut the workload to make the hearing manageable.

3. Remove some of the obvious and unnecessary litigation triggers, to improve finality of decision-making. Many of these triggers are key terms that are likely to influence the outcome of the decision, but are undefined or given useless definitions. Writing into law key expressions without meaningful definitions is to enact the law of unintended consequences. If you can’t define a key term in a law you are writing, you don’t know what you mean. If you don’t know what you mean, why expect others to know what you mean? It amounts to saying “I don’t know what I want the law to mean, so let’s just toss it out there and see what happens.”

4. Remove legislated bias in requirements to consider negative effects only, rather than comparing negative and positive effects.

5. Remove an obvious litigation trigger and barrier to transparency in section 119, which permits Indigenous parties to present secret evidence, both in the hearing and to the Minister, both before and after the hearing. Amending this is necessary to improve confidence in the integrity of the impact assessment process.
6. Consider adding a new requirement that all licensed projects will comply with all applicable federal and provincial laws as a condition of licence. This would eliminating the need to hear and determine issues like gender-based analysis raised in section 22 (1) (n). GBA+ is rendered unnecessary in C-69 by other, well-settled laws (such as the prohibitions against: sexual assault, sexual harassment and discrimination on the basis of sex or gender identity).

7. The preamble and the purpose clause of C-69 both raise unrealistic expectations that cannot be met. Two obvious examples are reconciliation with FNs and greater transparency in decision-making. Either delete these professed purposes or amend C-69 to make it possible to achieve them.

ABOUT ME

• Special Assistant in a federal cabinet minister’s office, involved in drafting various laws being enacted or amended
• General Counsel, Public Interest Advocacy Center, 1976-1989, represented consumer, environmental, civil liberties and First Nations groups in administrative tribunal and court proceedings across Canada, including several cases before the Supreme Court of Canada. Hearings included, e.g., electricity generation, transmission and distribution; mining in the Yukon and Labrador; oil pipelines; uranium mining in Saskatchewan; and nuclear energy.
• Retained by federal and provincial governments to draft various laws and to train public servants and NGOs in environmental assessments. Wrote a manual for the Government of Ontario on how NGOs could present their case before the Environmental Assessment Board, which was translated into Cree and Ojibway.
• Joined the Toronto environmental law group of a national law firm in 1989. Was appointed to the Ontario Government’s task forces that created the Environmental Bill of Rights and the Class Proceedings Act. Acted as counsel in a number of high profile environmental matters including: representing
Walkerton in the $2 billion class-action seeking compensation for death, illness and property damage caused by contaminated water; assessment of Manitoba Hydro’s Conawapa generation/transmission project; appointed as legal advisor to Canada’s Nuclear Waste Management Organization when that organization was being created.

- Adjunct faculty member at 4 law schools, taught environmental advocacy, and legal drafting; held the Chair in Natural Resources Law for one term at Calgary;
- Author of Effective Advocacy Before Administrative Tribunals, and over 90 published articles on various law-related subjects.
- Currently, author of a blog on law-related subjects.