Submission to the Standing Senate Committee on Energy, the Environment and Natural Resources

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

Submitted by: Independent Contractors and Businesses Association

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Vancouver, British Columbia
Introduction

The Independent Contractors and Businesses Association (ICBA) is pleased to make this submission to the Standing Senate Committee on Energy, Environment and Natural Resources on Bill C-69.

By way of background, ICBA has been the leading voice of British Columbia’s construction industry for 43 years, representing more than 2,100 members and clients who collectively employ over 50,000 people. ICBA advocates for its members in support of a vibrant construction industry, responsible resource development, and a growing economy for the benefit of all British Columbians.

On behalf of our broad membership, our organization undertakes public policy development; delivers apprenticeship and professional training; and provides individual group and retirement benefits programs. Our members are either non-union or non-affiliated union contractors and, taken together, these two segments account for nearly 85 percent of BC’s construction industry workforce.

Overarching Context for Bill C-69

Bill C-69, if passed into law, will substantially change the policy framework for evaluating many Canadian natural resource, energy and infrastructure projects. When applied, the legislation will determine whether major projects advance in a timely fashion, and thus has far-reaching consequences for the livelihood of communities and Indigenous Nations throughout our country.

Construction industry work and employment opportunities are often derived from large scale growth-catalyst projects that generate activity which cascades throughout the economy. Each and every day, 250,000 British Columbians wake up, put on a hard hat and literally build our province and our country. These hard-working men and women count on major natural resource, energy and infrastructure project development to earn a living, while governments and citizens-at-large benefit from the tax revenue generated to pay for health, education and social programs.

Over the past decade, ICBA has become increasingly alarmed at the inability of proponents to get major resource, energy and infrastructure projects permitted and approved in a timely fashion. Our nation’s regulatory processes have become increasingly cumbersome, which has led to foregone investment in Canada and the loss of talent, opportunity and thousands of well-paid family-supporting jobs.

A recent review by the World Economic Forum of global competitiveness found that while Canada places 12th overall for competitiveness among 140 countries examined, it ranks 53rd overall for regulatory
burden. As a consequence, since 2014, outbound flows of foreign direct investment have been significantly higher than inbound flows. Among the main reasons for this concerning trend is the precipitous decline in Canadian oil and gas industry capital expenditures due largely to “costly regulatory delays” in the energy sector. This is perhaps not surprising when one considers the litany of major projects – particularly within Canada’s energy sector -- which have fallen by the way-side in recent years.

Ground zero for the difficulties in major project development in recent years is the acute challenges in permitting major linear infrastructure in Canada, especially pipeline projects in the energy sector. While Canada is truly gifted with enormous oil and natural gas reserves that are in demand globally, we can’t get these resources to market in a timely fashion. This is due to complex and cumbersome regulatory processes which place seemingly endless demands on project proponents. Instead of fixing these problems, Bill C-69 essentially “doubles down” and will entrench regulatory grid-lock. As ICBA stated in our submission to the Standing House of Commons Committee on Environment and Sustainable Development:

...in Bill C-69 we have policy that seems to assume that companies, both Canadian and international, seeking to invest capital can be taken for granted; that their financial resources are ‘bottomless’; that their patience with our country’s regulators is infinite; and, that they have no choice but to place their investment capital in Canada.

Legislators are manifestly wrong to assume or take anything for granted in today’s highly competitive international marketplace.

As a country, in the past we succeeded in attracting substantial foreign direct investment to open up our oil and natural gas resources for development. Between 2005 and 2015 a substantial $226.8 billion was invested in Canada’s oil sands industry predicated on being able to get the resource to global markets, something that in recent years has proven extremely challenging. The result; we are taking steep discounts for our world-class oil resource because we are captive to the United States market and we cannot build pipeline capacity to the west coast in a timely fashion. In the face of burdensome and time-consuming regulatory processes, we are adding more complexity in Bill C-69 and related legislation.

Regrettably, Canada is earning a reputation internationally for not being able to “get to yes”; a country where we simply cannot get major growth-enabling projects built. We encourage members of the Standing Senate Committee to think about this as you review the core deficiencies of Bill C-69. We respectfully suggest that you consider the consequences to Canadians of not getting this legislation right. We also ask that you be mindful that economic activity generated by major resource, energy and infrastructure projects cascades through the Canadian economy to thousands of citizens employed in other goods and service-producing sectors such as construction, retail, restaurants, and manufacturing, among others.

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3 See: ICBA Submission to the House of Commons Standing Committee on Environment and Sustainable Development, Re: Bill C-69, An Act to enact the Impact Assessment Act and to make consequential amendments to other Acts, p. 2.
4 For example, in addition to the cumbersome policy framework in Bill C-69, there is Bill C-48 which bans tankers on the North Coast of BC and is currently under review by the Standing Senate Committee on Transport and Communications. Through this ill-conceived legislation the federal government is proposing to foreclose future opportunities to export Canada’s oil resources to Asian markets by effectively blocking future pipeline development on BC’s North Coast.
Summary – Bill C-69’s Core Deficiencies

Together with many other industry associations you have or will hear from, ICBA is seeking workable solutions to the challenges within Bill C-69. We have seven general concerns with the Bill which are distilled below. Beyond these, we wish to associate ourselves with the detailed submissions and recommendations made by both the Canadian Energy Pipelines Association and the Canadian Association of Petroleum Producers. ICBA commends both associations for their detailed work, analysis, and leadership in proposing a package of workable solutions to the significant problems within Bill C-69. We endorse these measures, and encourage this Committee to recommend adoption of them as a complete package to fix Bill C-69.

Our summary of Bill C-69’s areas of core deficiency follows:

1) Factors – Impact Assessment: Absent from Bill C-69 is explicit reference to economic effects of a project as an express consideration. Economic considerations should be added to sections 22 and section 63 of Bill C-69 by defining “sustainability” to explicitly include environmental, health, social and economic concerns. Absent such clarity, the interpretation of Bill C-69 will likely be weighted solely to environmental and social (i.e. non-economic) factors.

We also suggest that section 22 of Bill C-69 be streamlined to pare down the set of factors that must be considered in an Impact Assessment. We note with considerable concern that section 22 contains a number of factors which are superfluous to impact assessment per se, yet may be legitimate public policy issues for consideration by government elsewhere. For example, consideration of “climate and energy policy”; “alternatives to a designated project”; or “the intersection of gender and other identity factors” are legitimate public policy matters but their inclusion in Bill C-69 unduly complicates already challenging assessment processes and, in our view, should be handled elsewhere within the government’s public policy agenda.

2) Early Planning Phase: the addition of an early planning phase makes sense so long as the process establishes clear milestones during the 180-day prescribed period. In the absence of this, we are concerned that Bill C-69 may actually increase – rather than decrease – timelines. We also note most major project proponents engage “early and often” with Indigenous communities and other relevant stakeholders as a matter of best practice, risk identification and mitigation, and to determine how best to share benefits from project advancement. It is imperative that early planning increase certainty, and not be a government-enabled means for stakeholders to slow down early-stage project proposals.

On a related note, the Standing Senate Committee should take note of the collateral implications the federal government’s commitment to apply principles of the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) may have for major project advancement if Bill C-69 is passed into law. From a broader public policy perspective, we question the need for the federal government to implement UNDRIP given that, under Section 35 of the Constitution Act, 1982 and extensive case law, there is a robust duty to consult and accommodate Indigenous Nations. Insertion of UNDRIP into law and policy may increase uncertainty in major project development.
while UNDRIP provisions are adjudicated juxtaposed to now well-established legal principles regarding the duty to consult and accommodate.

3) **Public Participation and Potential Politicization of the Process:** the lack of a “standing test” in Bill C-69 opens up the impact assessment process to causes and concerns which do not have a direct interest in the merits of a given project. In our view, public participation ought to be scoped to interested parties who can speak knowledgeably about the environmental, scientific and technical merits of a given project or local interests who are directly affected. In the absence of a standing test, the impact assessment process will be rife with interest group politics, rather than clear evaluation of project merits and local impacts.

4) **Ministerial Discretion:** Throughout Bill C-69 there are a number of places where the Minister of Environment has discretion over the impact assessment process. Inevitably, increased exercise of Ministerial and Cabinet discretion will occur as interest group politics takes hold due in large measure to the absence of a standing test. In our view, it is critically important that the Impact Assessment Act limit Ministerial and Cabinet discretion and that the process be governed by a procedurally fair, independent, quasi-judicial regulatory process. We also question whether the Minister of Environment alone is the appropriate final arbiter of major project approvals. If it’s a core policy objective of Bill C-69 to truly balance the environment and the economy as the government purports, why is the Minister Natural Resources (or another suitable economic Minister) not involved in the final decision-making process?

5) **Project List:** Absent in the consideration of Bill C-69 is a project list to which this legislation would apply. This is a critical consideration, given that many *in situ* projects are already covered under provincial environmental assessment legislation and should generally be excluded from coverage of this legislation. Not having a clearly defined project list for consideration during the past and current deliberations in both Houses of Parliament leaves a large gap when examining the application of Bill C-69, it generates uncertainty within the investment community, and heightens the prospect of future litigation.

6) **Certainty, Predictability and Process Timelines:** when introduced, the federal government suggested that Bill C-69 would lead to clear, certain and timely reviews. We are concerned the Bill in practice will actually lead to more delays and less timely approvals. The lack of a standing test for public participation, the extensive opportunities for time-outs and extensions, and the dramatic increase in the number of factors that must be taken into consideration leads us to conclude that Bill C-69 will lead to more delays, deferrals, and general uncertainty. Worthy of note, is this is out-of-step with recent trends towards more timely approvals in the United States. Given ongoing challenges with getting critical nation building pipeline infrastructure permitted and approved – especially the Trans Mountain Pipeline – we concur with the recommendations of the Canadian Energy Pipeline Association calling for: 1) The Minister or the Governor in Council to provide reasons when an extension is granted and; 2) That an impact assessment take no more than a 730-day timeline unless the proponent seeks an extension.
7) **Life Cycle Regulation**: We note that Bill C-69 includes the replacement of the National Energy Board with a new Canadian Energy Regulator. Shifting many functions of the previous National Energy Board to the new Impact Assessment Agency may be reasonable for some major resource projects. However, we support the concerns put forward by the Canadian Energy Pipeline Association with respect to the institutional knowledge and longstanding expertise of the National Energy Board as a “life-cycle” regulator for linear projects which built up significant technical expertise over its 60-year history of overseeing the planning, approval, construction, operations, maintenance and abandonment of pipeline infrastructure. If it is not possible to restore the full mandate of the National Energy Board in the new Canadian Energy Regulator, then we urge that all three (3) member panels be required to have two (2) members from Canadian Energy Regulator and only one from the new Impact Assessment Agency as recommended by Canadian Energy Pipeline Association.

**Conclusions and Recommendations**

ICBA appreciates the opportunity to provide the Standing Senate Committee with our input as you undertake your study of Bill C-69.

Canada’s energy sector directly employs over 425,000 men and women and is the single largest source of private sector investment in the country. In recent years, though, Canada’s energy sector is being hollowed out – Canada is losing investment, jobs and talent. As a result of poor public policy – including Bill C-69 (and Bill C-48) – capital that should be committed to projects in Canada is instead being deployed in other jurisdictions providing opportunities and growth for our competitors, particularly the United States.

The cascading consequences of this legislation, if left unamended, will extend in a very negative way to small and medium sized businesses -- including our members -- who provide goods and services required by major projects. The flaws with Bill C-69 are many but overarchingly deal with the following matters: definitional ambiguity; indeterminate timelines; layering on of more out-of-scope social considerations in the assessment process; and, opening the process to interest group politics, including those who may have trivial, frivolous or vexatious views on a major project proposal.

We also note that the federal government has failed to backstop Bill C-69 with a clear long-term vision of responsible resource development in Canada. This is very concerning when judged against our country’s staggering resource endowment that should be leveraged to provide significant, sustainable, shared prosperity for all Canadians.

Canada is fundamentally a small, open market, trade-dependent economy. This means that the public policy choices government takes matter – and they matter a great deal. We urge the Standing Senate Committee to adopt the package of amendments in their entirely proposed by the Canadian Energy Pipeline Association and the Canadian Association of Petroleum Producers. Failure to do so will have significant implications for Canada’s long-term prosperity by continuing the endemic uncertainty in
Canada’s regulatory processes which are judged increasingly by international investors as unwelcoming and are evidenced by substantial net outflows of capital investment in recent years.

Thank you for the opportunity to provide our submissions on Bill C-69. We are pleased to answer any questions.

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