April 4, 2019

Senator Rosa Galvez, Chair
Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Galvez:

RE: BILL C-69, PART 1 – IMPACT ASSESSMENT ACT

A. Introduction

This is a submission to the Standing Senate Committee on Energy, the Environment, and Natural Resources (the “Committee”) on the Impact Assessment Act (“IAA”) in Part 1 of Bill C-69, as passed by the House of Commons on June 20, 2018. I will base my presentation to the Committee on April 9th, 2019 in Calgary on this submission.

I am an Albertan and I make this submission in support of the IAA provisions of Bill C-69. I support the IAA being passed as is, as it is a significant improvement over the Canadian Environmental Assessment Act 2012 (“CEAA 2012”). I suggest that amendments can be made on an “as needed” basis in due course. If the Committee determines to recommend amendments, it is my hope that amendments will strengthen the Bill to better ensure that Canadians regain their trust in federal impact assessments.

First I wish to introduce myself.

I am Professor Emerita in the Faculty of Law, University of Calgary. I retired in 2014, for health reasons, but remain active in the Faculty and in the Canadian Institute of Resources Law, where I am a Senior Research Fellow. I am also an Adjunct Professor in the Faculty of Environmental Design. My law teaching and research are mainly in natural resources, environmental, municipal, conservation and sustainability law. I have also taught legislative drafting for a number of years. I have been involved with legal and policy aspects of environmental impact assessment for decades. I have published many academic and general audience works and materials on impact assessment, in particular, federal impact assessment, and have taught and

presented at workshops and conferences on it. I served on the federal Regulatory Advisory Committee formed under the 1992 Canadian Environmental Assessment Act\(^2\) (“CEAA”) for numerous years including during 5 Year Review, and I have been a member of the RCEN Planning and Environmental Assessment Caucus since the middle 1990’s. I have been deeply engaged in the current federal assessment law reform process including by the Expert Panel commissioning an expert report from me on multi-jurisdictional environmental assessment and on other key matters.\(^3\) Throughout all of my years as an academic and advocate my goal has been to do what I can to help assure sustainability for present and future human generations, wildlife, and broader ecosystems. Impact assessment is key to achieving sustainability.

I make this submission as a citizen who studies legal and policy issues with respect to environmental and sustainability impact assessment. I strive to take a public interest perspective.

Part B sets out many of the ways the proposed IAA is an improvement over CEAA 2012 and supports the interests of some of its detractors, rather than undermines them. In Part C, I recommend some modest improvements, if the Committee decides to amend the Bill, bearing in mind that at this stage amendments likely will be limited, if the Bill is to succeed during this legislative session.

B. Why the Bill should not be “killed”

Here is why I believe that the Committee should support the IAA and not be unduly swayed by those who seek to undermine or “kill” it.

- Claims that Bill C-69 will radically change federal assessment simply are not accurate. The Bill is roundly based on CEAA 2012 (e.g. by retaining a major projects list and substitution) with just a few differences, which differences should improve the situation for industry and provinces. For example:
  - It adds a planning stage to assessment, which gives those with an interest in the project an opportunity to participate in its development, and gives government the opportunity to determine, given information derived at this stage, and the participation results, whether a full assessment is needed. The planning stage will

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\(^1\) SC 1992 c 37 (CEAA).

\(^2\) SC 1992 c 37 (CEAA).

offer better consultation opportunities than CEAA 2012 and result with fewer objections afterwards. It also should result in better projects, ones where community and Indigenous concerns and interests were addressed and community and Indigenous knowledge incorporated.

- It restores the public participation rights that were in CEAA 1992 and were taken away by the Omnibus Bill C-38 that resulted in CEAA 2012. Bill C-69 thereby helps to restore public trust in assessment processes and it recognizes that this is national legislation. Those with a genuine interest in a project should not be discriminated against because it does not affect them directly. This restoration will provide more legitimacy to assessments, and should result in less discontent with projects as every person had, at minimum, a right to have their views on it considered. There will be time limits on participation and therefore no opportunity for “endless” participation.

Open participation also will assist decision-makers in determining whether a project is in the public interest under sections 60-63. Without members of the public being welcome to contribute their views on a project, including those who are not directly affected, a public interest determination cannot be informatively made, and could be open to challenge, especially by those who were excluded from the process.

Claims that permitting public standing will somehow blow open a floodgate and result with a “huge influx of poorly informed, politically stacked and repetitive presentations” are unfounded, and frankly, disconcerting, and insulting to Canadians. For over 20 years the federal assessment regime was inclusive and thousands of projects were assessed and approved.

- The Bill removes the CEAA 1992 and CEAA 2012 vague, undefined, and largely discretionary “are there significant adverse environmental impacts that cannot be mitigated, and if so, is the project justified in the circumstances” tests to determine whether a project should go ahead by instead requiring that a public interest test be met that is determined in accordance with specific criteria (ss 60-63). Moreover the decision-maker must provide detailed reasons how the decision applies the explicit criteria (s 65). This reduces discretion and uncertainty and increases government accountability for its decisions, which should provide more certainty for proponents, the public, Indigenous communities, and investors, than currently is the case with CEAA 2012. Part C of this submission offers recommendations to further clarify the new test.

- The Bill enlarges the ambit of considerations in an assessment from largely environmental impacts, to environmental, economic, health, and social impacts. Proponents clearly benefit by the requirement that economic benefits be considered, something that did not exist before, except as limited secondary or Indigenous related socio-economic effects.

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4 Suits and Boots, 10 Reasons to Kill Bill C-69 in Canada’s Senate, online: <<https://suitsandboots.ca/10-reasons-to-kill-bill-c-69-in-canadas-senate/>>, (“Suits and Boots 10 Reasons”), Reason # 8.
Enlarging the ambit of considerations will make federal impact assessment more consistent with all of the provincial and territorial regimes, in that they require (or in the case of Prince Edward Island, could require) consideration of impacts other than environmental. Footnote 5 sets out the legislative provisions that demonstrate this. The fact that federal assessment under Bill C-69 will be more consistent with provincial and territorial assessment regimes should decrease the work of proponents, not increase it. Moreover, it will result in better sustainability in Canada with respect to ecological, social, health, and economic values, and not just environmental ones.

5 British Columbia assessments look at adverse environmental, economic, social, heritage or health effects (Environmental Assessment Act, SBC 2002, c 43, e.g s 10). The Alberta process looks at environmental, social, economic and cultural consequences (Environmental Protection and Enhancement Act, RSA 2000, c E-12, s 40). Saskatchewan’s Environmental Assessment Act, SS 1979-80, c E.10.1, governs environmental impact assessments in the province where “environment” means (s 2(e)) “(i) air, land and water; (ii) plant and animal life, including man; and (iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in subclauses (i) and (ii).” In Manitoba, environmental assessment is under The Environment Act, CCSM c E125, which defines “adverse effects” as “impairment of or damage to the environment, including a negative effect on human health or safety” (s 1(2)). Ontario assessments must consider impacts on air, land or water, plant and animal life, including human life, and social, economic and cultural conditions that influence the life of humans or a community. (Environmental Assessment Act, RSO 1990, c E.18, e.g ss 1(1) def. of “environment” and s 6.1). Quebec’s Regulation respecting the environmental impact assessment and review of certain projects, CQLR c Q-2, r 23.1 requires that assessments address the “main environmental, social and economic issues raised by the project” (s 5(3)). New Brunswick’s Clean Environment Act, RSNB 1973, c C6, defines “environment” for the purpose of environmental impact assessment (s 31.1) (a) air, water or soil, (b) plant and animal life including human life, and (c) the social, economic, cultural and aesthetic conditions that influence the life of humans or of a community insofar as they are related to the matters described in paragraph (a) or (b); and “environmental impact” means any change to the environment;(impact sur l’environnement) and “environmental impact assessment” means a process by which the environmental impact caused by or resulting from an undertaking is predicted and evaluated. Nova Scotia’s Environment Act, SNS 1994-95, requires environmental assessments to consider environmental effects defined as “(i) any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and (ii) any change to the undertaking that may be caused by the environment”. Prince Edward Island’s Environmental Protection Act, RSPEI 1988, c E-9, factors are largely discretion: s 9(3) states “An environmental assessment and environmental impact statement shall have such content as the Minister may direct”. Newfoundland and Labrador’s Environmental Protection Act, SNL 2002, c E-14.2 defines “environment” as “(i) air, land and water, (ii) plant and animal life, including human life, (iii) the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,” and defines “environmental effect” (which are subject of assessments) as “ a change in the present or future environment that would result from an undertaking; “ (ss 2(m) and (o)).

Regarding Territories: The Northwest Territories Mackenzie Valley Resource Management Act, SC 1998, c 25 assesses impacts on the environment, which means (s 111(1)) “any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources. The Yukon Environmental and Socio-economic Assessment Act, SC 2003, c 7 LC 2003, ch 7 establishes a process to assess environmental and socio-economic effects, which includes “effects on economies, health, culture, traditions, lifestyles and heritage resources” (s 2(1)). The Nunavut Planning and Project Assessment Act, SC 2013, c 14, s 88 states that “The purpose of screening a project is to determine whether the project has the potential to result in significant ecosystemic or socio-economic impacts ...”

As well, impact assessment related to Land Claim Agreements and Impact and Benefit Agreements generally are aimed in part at addressing social-economic matters. See, for example, Heidi Klein, John Donihee, and Gordon Stewart “Environmental Impact Assessment and Impact and Benefit Agreements: Creative Tension or Conflict “online << http://www.cberm.ca/naskapi/e-library-project/impact-and-benefit-agreements-ibas/>>."
By requiring the Agency or Review Board to take into account as an assessment factor the “intersection of sex and gender with other identity factors” (“GBA+”) the IAA will facilitate a proponent’s social licence to operate, and should lead to better more socially acceptable and equitable projects. There are government and other materials on how to take GBA+ into account with respect to the community where a project will operate, but, as set out in Part C, I recommend that there should be clear guidelines as to how this is to be done.

Contrary to what some critics of the Bill claim, Bill C-69 decreases the time limits for assessments from CEAA 2012. Here is part of a summary from Setting the Record Straight” Senate GRO document:

“PROJECT REVIEW TIMELINES

Some have argued that timelines will increase significantly, from the current four years to an additional eight to 10 months. This is false. Bill C-69 has shorter timelines than those that exist now under CEAA 2012. The timelines proposed in Bill C-69 are, in each of four categories of reviews, as follows:
• 300 days for impact assessments conducted by the IAA (down from the current 365 days);
• 300-600 days for impact assessments conducted by a joint panel (down from the current 720 days);
• 300-600 days for assessments conducted by an integrated panel (down from the current 720 days; and
• 300 days for reviews done by life cycle regulators, such as the Canadian Energy Regulator or the Canadian Nuclear Safety Commission (down from 450 days).”

Critics have claimed that the Bill does not sufficiently support and express industry and economic interests. I do not agree. The Bill is the result of nearly three years of consultation during which groups and members of all sectors of society had opportunity to, and did participate. In my opinion, the IAA was strongly influenced by the energy industry and provinces (e.g. the retention of substitution and of a major projects list, and shorter timelines). I would prefer to see a stronger Bill that more broadly reflects federal jurisdiction (e.g. CEAA 1992 – like triggers, with exclusions and streamlined class and model assessments for certain standard projects) but I support the Bill as it currently stands.

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6 On the contrary Suits and Boots states in 10 Reasons to Kill Bill C-69 in Canada’s Senate, online: supra note 4, Reason #2, “The Bill also contains a clause that will require new resource projects to be scrutinized according to the intersection of sex and gender and other identity factors.” Seriously.

7 The federal Government’s Department for Women and Gender Equality website contains excellent information that demystifies GBA+ and provides direction on how to apply it, primarily in government policies, programs, and initiatives. See Department for Women and Gender Equality, GBA+, <<https://cfc-swc.gc.ca/gba-acs/index-en.html>>. This information needs to be expanded to apply in federal assessment situations.

8 Setting the record straight on legislation to strengthen project reviews, November 10, 2018, online <<https://senate-gro.ca/news/setting-the-record-straight-on-legislation-to-strengthen-project-reviews/>>. The article itself includes further demonstration of the reduction in timelines.
C. Improving Bill C-69

Appreciating the traditional limited role of Senate in amending bills, and hoping that the Bill if amended, as amended, will be approved by the House of Commons, I have kept my recommendations to a minimum.

1. Incorporating roles for municipalities

I support Senator Éric Forest’s recommendations to enhance the role of municipalities in Bill C-69, and I would make a further recommendation to that end.

According to Statistics Canada, there are at least 5,162 urban or rural municipalities in Canada. Municipalities, urban and rural, are a level of government elected by and accountable to the people. They traverse landscapes in Canada, each with its own regulatory regime. Typically, they have a range of authority to regulate activities, projects, places and infrastructure that impact environment and environmental quality, and socio-economic and cultural matters. Their powers include over land use planning and zoning (setting out which uses are permitted in an area), local development, businesses, transportation and roads, waste and garbage control, collection, and disposal, recycling, landfills, local health and culture, and over their own infrastructure, energy use and demands, to identify a few. Municipalities may have their own environmental assessment processes that they require to be carried out for certain developments.

Key among their authorities is planning and zoning. In the past, municipal planning primarily concerned land use, e.g. focusing on land use zones, land development, transportation, waste and sewage, and so on. More recently, planning has expanded to encompass a range of interests beyond conventional land use. For examples municipalities may have a wetland policy, natural area conservation policies, forestry protection policies, and on the other hand, intensive industrial areas policies, etc. Especially relevant to Bill C-69, municipalities also have developed sustainability and climate change policies. For example, a 2008 commissioned report of the Canadian Federation of Municipalities (“FMC”) focuses on sustainable community planning in Canada, which the report defines as “A long term plan, developed in consultation with community members that provides direction for the community to realize sustainability objectives it has for the environmental, cultural, social and economic dimensions of its identity.”

Regarding climate change the FMC states that up to half of greenhouse gas emissions “are under the direct or indirect control or influence of municipal governments.” Numerous municipalities in Canada have developed or are developing climate change mitigation and/or adaptation plans.

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13 See, for example, D Guyadeen, L Thistlethwaite, & D Henstra, “Evaluating the quality of municipal climate change plans in Canada, Climatic Change (2019) 152: 121 << https://doi.org/10.1007/s10584-018-2312-1 >>, and
Municipalities bear the brunt of climate change impacts including emergency response, floods, droughts, transportation interruptions, resident health and so on. They similarly bear the brunt of accidents or mishaps related to industrial development within their boundaries.

Given all of the above, one might expect that impact assessment legislation would prominently incorporate municipalities and their interests, when projects are proposed that may affect them. Yet municipalities are not seen as front-line players with respect to projects that are being assessed federally. This role primarily is left to the federal and provincial/territorial governments, and affected Indigenous communities. Municipalities are left being with no more role than a member of the public in federal assessment.

**Recommendation:** The Bill be amended to require:

- Municipalities be given special status with respect to consultation requirements and “not be lumped in with “interested parties” or be treated like any other private landowner.” For only one of possible examples, section 12 could be amended as follows (amendment in italics):

  **Agency’s obligation — offer to consult**

  12 For the purpose of preparing for a possible impact assessment of a designated project, the Agency must offer to consult with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project, and any Indigenous group, and any municipality, that may be affected by the carrying out of the designated project.

- Municipalities that may be affected by the project should be included in the initial project description that proponents must prepare and submit to the Impact Assessment Agency under section 10(1) and regulations prescribed under paragraph 112(a).

- The IAA should require that municipalities be informed of “notices, reports and invitations for public comment.”

- Municipalities should be included in the definition of “jurisdiction” at least for the purposes of sections 93, 94 and 22(1)(o) and (r) so that existing relevant municipal plans and policies may be a factor for the purposes of section 22, and so that municipalities and their plans and policies may figure into IAA regional plans and regional planning functions. Consideration, at least for the future, (e.g. statutory review), should be given to recognize municipalities as jurisdictions for the purposes of cooperative assessment.

2. **Sections 22 and 63**

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14 Senate Debate, supra note 9.
15 Ibid.
16 Ibid.
The Bill is an improvement over CEAA 2012 in that it adds important assessment factors under section 22 and sets out specific decision factors under section 63 to determine whether a project may go ahead, that is, to determine whether it is in the public interest. In my view there could be questions regarding the application of each section and the relationship between them. Clarification of these likely could be dealt with through regulation or Agency guidelines, but the Committee might consider clarification in the IAA itself.

Regarding section 22, the section reads that the “impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors.” Assessments on their own do not take anything into account, so I assume this means that the Impact Assessment Agency (“Agency”) or the review panel must see that these factors, as scoped, are part of the impact assessment and are taken into account. However the Bill does not provide for how a factor is to be taken into account. Is information that is put forward during an assessment that falls under a factor (a “factor specimen” e.g. a particular public comment) just to be described but not evaluated in any way? If just described, then how is the Agency or review panel to determine whether a factor specimen is more or less relevant for the purposes of the assessment and the report? Is the Agency or review panel’s function just to list all factor specimens? If so, given the potential magnitude of information and evidence, this does not seem particularly helpful for the Minister or Cabinet in carrying out sections 60-63 obligations. As well, it seems a bit degrading to the Agency or review panel in the end to be essentially a transcriber. Additionally, philosophically, and as a matter of statutory interpretation, it seems to be difficult, if not impossible, for a factor specimen to be taken into account unless it relates to some objective or reason as to why or how it is to be taken into account. I suggest that the most logical and helpful way for a factor to be taken into account is with respect to whether, given all factors, all factor specimens, and the relationships among them, a project is in the public interest.

Therefore I suggest the Committee consider the following amendment:

Recommendation: Section 22 of the IAA be amended to read:

“The Agency or review panel conducting the impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account, for the purpose of assisting the Minister or Governor in Council in carrying out duties under sections 60-61, the following factors …”

There also should be clear Agency guidelines to assist the Agency or review panel in fulfilling its obligations under section 22.

Section 63, a vast improvement over the CEAA 2012 process, could also use clarification. Although section 63 lists important criteria, there may be some uncertainty regarding how the criteria are to be applied in making a judgment that a project is or is not in the public interest. For example consider criterion (a), which is “the extent to which the designated project contributes to sustainability.” The legislation does not instruct as to whether greater contribution to sustainability indicates that a project more, or less, in the public interest. Although it may seem obvious that a greater contribution makes a project more in the public interest (with respect to that criterion) the legislation does not say it. I suggest at least that the Agency promulgate guidelines on how the decision factors relate to each other and relate to a public interest determination.
The relationship between section 22 and 63 also could be clarified. Different factors are used in assessing a process from determining whether it is in the public interest. This is fine in principle since these two activities are distinct. Nevertheless there should be clarity as to how they relate to each other, and in particular, how the Agency or review panel report relates to application of the section 63 factors.

Section 60 states that:

“After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must
(a) determine if the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63, in the public interest;
or
(b) refer to the Governor in Council the matter of whether these effects are, in light of the factors referred to in section 63, in the public interest.” [Emphasis added].

Sections 61 and 62 use the same language as section 60 with respect to Cabinet.

Note that in sections 60-62 only adverse effects (direct and incidental) in federal jurisdiction are considered and these are considered only in light of the section 63 factors. I am not sure what “in light of” means, but nevertheless, surely to make a sustainability determination (s 63(a)) both positive and adverse effects must be considered.

Section 63 states that the public interest determination “must be based on the report with respect to the impact assessment and a consideration of the following factors.” Why are the words different from in light of, used in sections 60-62? There is a statutory interpretation presumption that the same words used in a statute in different provisions have the same meaning and different words have different meaning. As in light of and a consideration of are different, the presumption is that they have a different meaning. I recommend that any confusion or uncertainty because of the difference in wording be avoided.

**Recommendation:**
I suggest combined with is better than in light of or a consideration of. Accordingly, the Minister or Cabinet bases the public interest determination on information from the whole report (summarizing the twenty-six section 22 factors) combined with a special analysis of five of those factors that are key, and form specific criteria under section 63. Accordingly the following changes would be required:

**Minister’s decision**
60 (1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must
(a) determine if the adverse effects and positive effects within federal jurisdiction — and the adverse and positive direct or incidental effects — that are indicated in the report are, in light of combined with the factors referred to in section 63, in the public interest; …

[Same changes to be made to sections 61 and 62 and changes to section 28(3) to ensure both adverse and positive effects are identified in the report.]

Factors Public Interest
63 The Minister’s determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council’s determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of combined with the following factors: …

3. Statutory Review, and Quality Assurance
Section 167 of the IAA stipulates a ten year comprehensive review of the Act. Given the considerable interest in the changes to the current regime, I recommend this be changed to a five year comprehensive review. As well, I recommend that the Agency carry out a Quality Assurance program (under IAA s 155(b)) to track implementation of the Act17 to better improve the legislation and to assist with its review.

4. Reinstating the original wording of section 22(f)
Section 22(f) limits the factor of alternatives to the project to those that “are technically and economically feasible and directly related to the designated project.” The underlined words were added by the House of Commons at Third Reading and did not exist in the original Bill. Although the underlined words are in current and previous versions of the CEAA with respect to the factors of mitigation measures and alternative means of carrying out the project the House of Commons addition to 22(f) is the first time they have been applied to alternatives to the project itself.18 It does not take a lot of analysis to see that the addition renders section 22(f) at worst, devoid of meaning, or at best, uncertain as to what it could possibly mean. It is important that a reasonable range of alternatives, including the “null alternative” to the project remains as a factor consideration and the House amendment seemingly removes this possibility.

Recommendation:
The wording of section 22(f) be changed to reflect that in the original Bill so that it reads “(f) alternatives to the designated project”.

5. Clear and binding regulations and guidance
Finally, I urge the Committee to identify provisions that would be best implemented with the aid of regulations or guidance and to ensure that the Bill contains sufficient powers to effect this. For example, section 22(s) requires that an assessment take into account the “the intersection of sex and gender with other identity” (GBA+ factors). As mentioned earlier, I welcome this factor, but I recommend that the Committee consider an amendment to add “in accordance with Agency

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18 E.g. CEAA 1992, SC 1992, c 37, s 151(2).
Guidelines” to guide the implantation of this assessment factor, or at least that the Agency commit to promulgating such guidelines. Note that section 114(1)(a) of the IAA authorizes the Agency to “issue guidelines and codes of practice respecting the application of this Act”.

I wish the Committee the best in its hearings and deliberations. If there are any questions regarding this submission, please do not hesitate to contact me.

Yours truly,

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