PEMBINA PIPELINE CORPORATION

SUBMISSION TO THE SENATE COMMITTEE ENERGY, ENVIRONMENT AND NATURAL RESOURCES – BILL C-69

APRIL 9, 2019

CALGARY, ALBERTA
Introduction

Pembina Pipeline Corporation (“Pembina”) would like to share some perspectives on *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 – Bill C-69* (“the Bill or Bill C-69”), with the Senate Energy, the Environment and Natural Resources Committee that are specific to our project and operational experiences in Canada.

Pembina is a Calgary-based transportation and midstream service provider that has been serving North America’s energy industry of over 65 years. Pembina owns an integrated system of pipelines that transport various hydrocarbon liquids and natural gas products produced primarily in western Canada. The Company also owns gas gathering and processing facilities and an oil and natural gas liquids infrastructure and logistics business. Pembina’s integrated assets and commercial operations along the hydrocarbon value chain allow it to offer a full spectrum of midstream and marketing services to the energy sector. This means we work with a wide variety of customers, from small independent producers to large multi-nationals.

Pembina has been critical of the Bill since it was first introduced in the House of Commons in February 2018. The proposed legislation is promised to be more streamlined and science-based than the previous assessment structure of the National Energy Board, but this is not the case; to the contrary, it will likely make environmental assessments take even longer and be even more subjective.

In fact, the Federal Government’s approach to Bill C-69, has far-reaching and negative implications for the legislative, regulatory and policy frameworks that govern infrastructure projects and will result in a competitive disadvantage for Canadian companies. This will also affect Indigenous communities who derive substantial benefits from the development of energy resources. This is contradictory to economic reconciliation and means a reduction in earnings, profits and royalties from Indigenous lands.

The Canadian Energy Pipeline Association noted in a parliamentary submission on Bill C-69, “It is difficult to imagine that a new major pipeline could be built in Canada under the Impact Assessment Act.”

One area of grave concern for us is the degree of to which the government’s policy objectives have been integrated into a bill which should instead be focused on a clear and rationale process which is free of political bias. The politicization of the proposed rules governing project approvals will lead to lengthy delays, uncertainty and a high likelihood that no large infrastructure projects in our industry will ever gain approval; this legislation ties Canada’s hands behind its back in a world where investment dollars have many options. The integration of largely unclear criteria on gender, indigenous consent and climate change in a process that can be extended indefinitely to accommodate hearing from anyone who claims to be a stakeholder, is a recipe for disaster.

Here’s why:

- Politicization of the assessment process;
- Indigenous consent;
- Removal of the standing test;
• Lack of a project list; and
• Competitiveness.

We explain our concerns in greater detail below.

**Politicization of the Assessment Process**

It has long been a complaint that the environmental assessment process, which we argue should be science-based and fact driven, has become overly politicized. Bill C-69, in its current form, allows the environment minister, with the approval of cabinet, to delay or put on hold the approval process for projects undergoing environmental assessments, or squash projects that the minister deems to be against the public interest. Further, the federal cabinet also has considerable discretion over the outcomes of environmental assessments. This is at odds with the government’s promise during the 2015 election campaign to “end the practice of having federal ministers interfere in the environmental assessment process.” Rather than fixing the problem, the draft legislation serves to exacerbate the problem.

From an economic perspective consider the following, NEB regulated pipelines most often only attract single digit rates of return. If you add these marginal returns to upfront costs of engineering, customer development, uncertainty of years of regulatory process, unlimited interventions from people who may or may not be unimpacted, and with whatever government of the day deciding on the project fate at the end of all this there is no ‘prize’ or rate of return worth pursuing.

Consider most of these projects will span the election cycles of municipal, provincial and federal governments. What are the chances the politics of the day align? We need an entirely a-political regulator who can transcend this risk for the same reason our judiciary needs to be independent.

Furthermore, the pipeline regulatory review process is not the venue to debate broader public policy issues, which are integrated into the Bill. Take for example the issue of Indigenous reconciliation; one with a broad constitutional, social and economic implications. While Bill C-69 may set certain standards for example with respect to consultation or impacts and benefit agreements during the assessment process, it cannot be used to pursue broader policy objectives which are open to interpretation and poorly defined.

**Indigenous Consent**

Pembina acknowledges the Federal government’s mandate of reconciliation with Canada’s Indigenous peoples. We understand that implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is one of the pillars for achieving reconciliation and the objectives of Bill C-262 which is requires the Federal government to take all measures necessary to ensure that the laws of Canada are in harmony with UNDRIP.

Both federal and provincial governments have a duty to consult with First Nations. The proposed legislation mandates a new role for the Impact Assessment Agency in this consultation process. Currently, the majority of Crown consultation is undertaken by the provinces in provincial jurisdictions
and is designed to accommodate the local environmental, economic and social circumstances of Indigenous communities. We believe that alignment between the federal and provincial governments relating to their respective duty to consult will provide greater process certainty for both Indigenous communities and project proponents. We respectfully suggest that the federal government should not spend resources duplicating provincial processes, thereby creating yet another unique consultation process.

In section 5 of the government publication, Better Rules for Major Project Reviews (Handbook), Figure 2 – it refers to “early and inclusive opportunities for engagement and participation at every stage, ... with the aim of securing free, prior and informed consent through processes based on mutual respect and dialogue.” The principle of free, prior and informed consent was designed to protect the rights of indigenous and tribal peoples in jurisdictions where governance is weak and indigenous rights are absent, abrogated or ignored. In Canada, the rights of indigenous peoples are constitutionally protected, albeit that they are being renegotiated to reflect contemporary thinking on the nature and extent of these rights. Such revision reflects the need for reconciliation of the Crown’s view and indigenous views of these rights, and the need for restitution of past wrongs. To introduce a piece of legislation that presupposes how these rights should be represented without proper consultation, and when the approach to implementation of UNDRIP has not been negotiated, undermines the objective of consensual participation.

Additionally, for this early engagement to be successful, it is imperative that a strong foundation is established ahead of time which ensures adequate, sustainable capacity and resources within indigenous communities, effective education regarding regulatory processes and the roles of all parties, a clear understanding of whom to consult with, the associated rights that may potentially be impacted and the compilation of regional traditional knowledge studies. Bill C-69 does not explain the way in which early engagement consultations will be carried out, the role of the project proponent, or how the feedback received would be incorporated into the assessment.

With respect to traditional knowledge it is evident that capacity, resources and the existing repository of traditional knowledge within indigenous communities varies significantly across Canada. Primarily due to a lack of funding, many indigenous communities have not established a traditional knowledge baseline and do not have any repository of this information; this makes it difficult for proponents to incorporate essential information in a timely manner. Pembina would encourage the “Crown” to address this issue urgently. Further, we recommend that the timelines for providing traditional knowledge within the Impact Assessment process be clearly defined to avoid extended delay for proponents and Indigenous communities during the project approval process.

**Removal of the Standing Test**

The Bill adds a new phase before the review itself commences—a “planning phase for a possible impact assessment of a designated project, which includes requirements to cooperate with and consult certain persons and entities and requirements with respect to public participation.”

A concern for industry and the economy is that the Impact Assessment Act removes the “standing” test that is used in the current regulatory process. The current test requires a person be directly affected or
have relevant information and expertise. Bill C-69 instead references “meaningful public participation” and does not define the specifics of the term. This will make it more difficult for the regulator to weigh the opinions and specific concerns of people that are directly impacted by the project, such as landowners and indigenous groups over someone who may oppose any project development within Canada based on general and ideological preferences.

Further, it signals the government’s receptiveness to constituencies hostile to projects. The federal government says the Bill establishes principles and markers that will guide decisions, in reality, it will simply make environmental assessment—an inherently arbitrary, subjective and political process—even more so, creating a process to legitimize discretionary decisions divorced from substantive legal criteria. Without a standing test, the door will be thrown open to intervention from participants who live far away from the proposed project and who are unlikely to have economic interests or be impacted in any substantive way.

Throughout the industry consultation process that lead to Bill C-69, we have advocated for a regulatory process that offered public participation opportunities that are inclusive, but also recognized the need to maintain procedural fairness and use of science and fact-based evidence as opposed to opinions on undefined or ill-defined government policies. Our position was, and remains, that the standing requirements are reasonable for more formal participation opportunities such as intervenor status.

As is, the proposed process will have substantial administrative costs along with significant delays, associated with, the potential need to accommodate and hear from thousands of people. Many such intervenors may not be directly impacted by the project, but may be organized politically to oppose it, perhaps on ideological grounds. The regime proposed by the Bill allows for never-ending intervention through the hearing process, creating a degree of uncertainty which would be fatal for large projects. Investors will find the risk of an interminable approvals process unacceptable. Bill C-69 will make decisions like rejection of the Trans Mountain Expansion more likely, creating greater regulatory uncertainty and litigation risk which will increase capital flight from Canada.

**Lack of a Project List**

We support maintaining a Project List to provide process certainty, to focus assessment on major projects, and to concentrate on those projects that clearly impact areas of federal jurisdiction. Therefore, it is almost unfathomable that the federal government is pushing forward with Bill C-69 in the absence of a Project List. This situation makes commenting on the true implications of Bill C-69 similar to throwing darts in the dark hoping to hit the intended target.

The Project List established under CEAA 2012 eliminated much of the uncertainty associated with triggering an impact assessment under CEAA 1992; a positive development for industry. The existing Project List includes pipeline projects that are longer than 40 km. Those projects require a federal environmental assessment under CEAA 2012; however, such assessments are currently delegated to the National Energy Board.

For the Project List to continue to avoid duplication and achieve clarity, certainty and predictability, it must be based on objective and measurable criteria. There must also be clearly understood thresholds
so that project proponents will know, up front, whether their project will be reviewed under the proposed Impact Assessment Act or will be reviewed by the proposed Canadian Energy Regulator ("CER") under the Canadian Energy Regulator Act.

However, if the federal government should determine that there will be federally regulated pipeline projects on the Project List, only the very largest of those projects should be captured. We argue that this should be the case because the Impact Assessment Act, as proposed, requires pipeline projects, for instance, to be evaluated by joint review panels; this is the highest of all standards and exceeds all previous standards of assessment in Canada and internationally. The process that will be used for designated projects will make it costly, take a substantial amount of time and create significant risk for linear energy infrastructure projects. Ultimately the proposed process under Bill-C 69 will be extremely challenging and with a high risk of a negative outcome for project proponents after a very lengthy and expensive process.

**Competitiveness**

Competitiveness remains a significant issue for Canadian businesses. In the last two years, we have seen new policies impacting our ability for Canada’s oil and gas sector to compete globally, including: an Oil Tanker Moratorium (Bill C-48), federal regulations to disproportionately reduce methane emissions in the oil and gas sector, clean fuel standards, climate change policy and associated levies and a lack of clarity on implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Any one of these on their own has the potential to hurt the competitiveness of Canadian business. As a consequence, institutional investors are now viewing Canada as a high-risk investment jurisdiction.

Additionally, at a time when the energy sector is reeling from delays and set-backs in building new pipeline infrastructure, including most recently, the delays resulting from the Federal Court of Appeal decision that quashed the Trans Mountain certificate, we believe that now is not the time to add additional litigation risk into the equation. Replacing the existing project review and assessment process, that has been tested and interpreted by the courts, will add additional layers of risk and uncertainty.

To mitigate this risk, judicial review of decisions should be limited to questions of law or jurisdiction, and should not create an opportunity to re-assess matters of fact.

Bill C-69 will result in no new major pipeline or energy investments projects within Canada. Simply said, it renders future pipelines as poor investments that will not attract capital. This will be evidenced when we witness the returns the Federal Government realizes on their Trans Mountain Pipeline investment.

From an economic perspective consider, NEB regulated pipelines most often only attract single digit rates of return. If you add these marginal returns to upfront costs of engineering, customer development, uncertainty of years of regulatory process, unlimited interventions from people who may well be unimpacted, and with the government of the day deciding on the project fate, then at the end there is no ‘prize’ worth pursuing.

Almost 51%. That’s how much value the oil and gas index has declined since 2014, and since special interest groups began targeting the approval process for major pipelines as a means of preventing oil and gas development. This politicization of the approval process has made it impossible to gain approval for major pipeline projects.
Over $30 billion. That’s the amount Canada’s energy industry has seen evaporate due to key pipeline projects being cancelled or stalled, (Northern Gateway, Energy East and Trans Mountain Expansion). While this loss in value to Canadians is a result of many factors, the fact is the US oil and gas sector has flourished due to timely project approvals process, and world market access, while our Canadian sector is in decline due to lack of pipeline capacity and pipeline egress. It’s not about the price of oil, it’s about policy.

This policy difference can be seen through a comparison between the meteoric growth in investment in oil and gas infrastructure in the US and the equally rapid decline in Canada which has created a crisis for the Canadian energy industry.

- While Canada is experiencing egress constraints, the US has seen its crude oil exports increase nearly 10x over the past 5 years and exports are expected to increase a further 55% over the next three years (4 mmbpd up from 2.6 mmbpd), which will be accommodated by ~6 mmbpd of incremental pipeline capacity aimed at the US Gulf Coast
- Prior to the AB government curtailment intervention, pipeline egress issues were estimated to cost Alberta’s upstream industry $15 - $39 billion in royalty-applicable earnings as a result of the widening of commodity differentials. This does not include the cost of lost corporate or individual income tax revenue
  
  Source: Scotiabank Equity Research; JP Morgan; EIA

Bloomberg (STENRS Index) indicates, Canadian energy companies have lost a total of $175 billion in equity value (market capitalization). To put this into perspective:

- That is similar to Canada’s largest bank the Royal Bank of Canada, which has a market capitalization of ~$150 billion.
- It is equivalent to saving SNC-Lavalin or Bombardier 30 times over since each have a $6 billion market capitalization.
- It is greater than all three of Canada’s largest communications companies combined (Bell, Rogers and Telus have a combined market capitalization of $120 billion).

A recent study by the Fraser Institute titled, “Canadian Foreign Direct Investment: Recent Patterns and Interpretation,” showed from 1990 to 2014, Canada’s level of Foreign investment was markedly higher than the United States and OECD. However, that trend has dramatically changed, and from 2014 to 2017, Canada’s level of foreign investment has declined while it increased substantially in the United States and OECD. For example, the amount invested abroad by Canadians is up more than 73%, while the amount invested in Canada by foreign investment is down 55%.

The Upstream Oil & Gas sector is the largest private investor in Canada yet it is now placed in a vulnerable and negative position:

- In 2014 the Upstream Oil & Gas sector invested $80 billion; this was 2.5x larger than the next closest sector at the time, which was the utilities sector at $31 billion of investments. You would need to combine the spending from Utilities, Transportation and Warehousing and Manufacturing to reach the same level of capital spending as the Oil & Gas sector.
• For 2019, the Upstream Oil & Gas sector is forecasted to invest $37 billion, down over 50% from the height of 2014; however, the sector is still poised to remain the single largest private investor in Canada.

• Despite the significant decline in capital spending, the Upstream Oil & Gas sector has invested a cumulative $245 billion between 2014-2018; this is $100 billion more than the next closest two industries – Utilities at $150 billion and Transportation and Warehousing at $145 billion of cumulative investments.

Source: Stats Canada

Sadly, while Canada has amongst the finest geology on the globe, and development of its resources is led by incredibly experienced leadership teams, nobody wants to invest here. Canada’s competitiveness in the oil and gas sector continues to drop.

The “2018 Global Petroleum Survey,” which evaluated 80 jurisdictions, showed 9 of the top 10 jurisdictions for oil and gas competitiveness where in the United States. Alberta ranked 43rd and British Columbia ranked 58th. The United States remains the most attractive region for investment globally, followed by Europe. Canada is the fourth most attractive region in the world for investment.

Under the proposed changes, the Federal government will require Canadian hydrocarbon products to meet a higher environmental standard than equivalent fuels that are imported into Canada, by imposing a requirement for the evaluation of upstream, downstream and end-use GHG emissions on project proponents. One of the most offensive aspects, is that our Country, and our fellow citizens in other Provinces, import oil from Saudi Arabia and other Countries that are condemned by our federal government, while they essentially create rules which favour imports from these jurisdictions over the supply of our own ethical oil.

Fossil fuels imported into Canada are not subject to any such assessment or the associated cost burden of meeting these requirements. Venezuelan crude oil for example does not undergo such scrutiny and yet increases emissions due to the transportation of oil via tankers through the St. Lawrence Seaway. Our fiscal, environmental, social, ethical and human rights provisions and practices are among the very best in the world. This is a claim that cannot be made for the jurisdictions that we prefer to import our fuels from in preference to buying Canadian product; this should make no sense to those that so vociferously oppose the development of Canadian hydrocarbons.

Our sector has stalled, and all three major Canadian pipeline companies Pembina, Enbridge and TransCanada have invested most of their capital through projects or acquisitions in the US over the last few years. Without intervention this will continue, and Canada will lose capital, jobs, tax-base, and any economic spin-off.

Conclusion

In conclusion, without the clarity of a predictable and timely project approvals process, Canada’s energy resources will not be developed because investors will not accept the capital risk; they will look elsewhere. In this case, Canada and the world will forego the opportunity provided by the substitution
of cleaner Canadian fuels developed in perhaps the strongest governance regime in the world and the economic, social and environmental benefits that this brings for Canadians and others.

Bill C-69 will lead to stagnation of exports, resulting in continued pressure on local commodity prices, erosion of industry credit capability, and flight of capital. Combined, this will permanently impair the Canadian energy business and the broader economy since we can no longer compete with the rest of the world.