Dear Senators,

The attached briefing note reviews the available packages of proposed Senate amendments concerning the Impact Assessment Act in Bill C-69.

The review centres on particular sets of amendments and notes questions or limitations. Because the amendments are evolving and the end result package is not known, the review does not provide an overall analysis.

The following general conclusions are nonetheless evident:

1. While some of the proposed amendments could strengthen the Act, many amendments – not only those of the Conservative Senators – appear to ignore the lessons from experience with CEAA 2012 that led to the current reform initiative.

2. The most worrisome proposed amendments would weaken the law to serve immediate proponent interests and political ambitions while undermining the potential for process credibility and lasting gains in the public interest. Among these are amendments that would block attention to the most important issues in project assessments (e.g., through narrow scoping and weakened decision considerations, including for sustainability and climate change), and undermine prospects for process credibility (e.g., through more authority for the regulatory bodies, and decisions that consider all positive effects but only significant adverse effects).

3. There is also remarkable tension between amendments to enhance “certainty” and amendments that would turn many requirements into options (from “must” to “may”), leave unfettered discretionary choices for the Agency, review panels or Minister, and rely on the unpredictable products of undefined strategic and regional assessment processes.

4. Concentrating extraordinary power in the Impact Assessment Agency while also restricting judicial reviews seems also to be unduly risky.

5. Some possibly well-intentioned amendments are undermined by specific wording (e.g., the re-introduction of significance tests is proposed in a way that would sacrifice attention to the real world of more and less adverse or positive effects that we need to understand if we are to make good decisions and deliver projects that contribute to lasting wellbeing).

Whether and to what extent the Senate’s amendments result in an assessment law that will be a step backward even from the current CEAA 2012 is now an open question.

Along with many other long-time participants in Canadian assessment process design and application, I will look forward to seeing eventual new legislation that is less regrettable than the gloomy prospects represented by most of the amendments reviewed here.

Sincerely,
Briefing note on amendments Bill C-69 proposed by Senators as of 9 May 2019, with particular attention to amendments related to the Impact Assessment Act

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14 May 2019

The following notes are based on a time-constrained review of the packages of amendments to Bill C-69 proposed by Senators on the Standing Senate Committee on Energy and Environment and others participating in the Independent Senators Group. Their two packages are

- ISG volume 1 (7 May 2019)
- ISG volume 2 (8 May 2019)

Less detailed notes are then provided concerning the available amendment packages from

- four individual senators on the Energy and Environment Committee: Senator Carignan (6 May 2019), Senator Cordy (6 May 2019), Senator Mitchell (6 May 2019), and Senator McCallum (7 May 2019)
- the Conservative Senators (9 May 2019)

It is likely that some of these amendments have been adjusted, consolidated or withdrawn. New ones may have been added. The ones reviewed, however, probably represent the main themes, inclinations, favoured approaches and underlying understandings (and misunderstandings) of their proponents.

The review centres on proposed amendments that seem to have most potential for positive or adverse effects on the value of the assessment legislation. The reporting is meant to be neutral. Where comments are provided, they are presented in italics or square brackets.

The notes below follow roughly the ordering of amendments in the packages, which typically follow the order of clauses in the Bill. However, where appropriate, amendments addressing the same core issue are reported together. Amendment numbers are included along with relevant sections of the Impact Assessment Act (IAA). The page references are to the volumes of proposed amendments, not to the pages of the IAA.

Amendments proposed by the Independent Senators Group
- Volume 1 (7 May 2019) and Volume 2 (8 May 2019)

1. Emphasis on economic objectives
ISG proposes a commitment to economic objectives including providing “certainty” to investors (ISGv1, pages 1-2, amendment ISG-1.02 re IAA, s.1, the preamble; and pages 5-6, amendment ISG-1.09 re IAA, s.6(1), re purposes).
Note: While references to seeking “certainty” for investors and other proponent-related interests are common in lobbying submissions, the media and other loosely phrased discussions, actual certainty in the assessment process is not possible. It would require all impact predictions, evaluations and consequential decisions to be known from the outset. Greater clarity of requirements and expectations may be feasible. Certainty is not, and should probably not be entrenched in law that is to be taken seriously.

The Conservative Senators propose a more temperate version “to improve investor confidence,” etc. (amendment CPC-1.10), though it too raises questions about the rationale for a special status for investors. For investors and all other participants in assessments, the relevant purpose of the Act should be to help to deliver greater clarity about what will be judged to be in the lasting public interest.

2. Acceptance of pre-approval project activities
ISG (ISGv1 pages 7-8, amendment ISG-1.12 re IAA, s.8, re permitted project-related activities) appears to propose allowing any activities approved by the relevant Indigenous rights holder.

Note: It is not clear how far this permission may extend towards allowing a proponent simply to undertake the project without an assessment. Nor it is clear what happens when two or more Indigenous rights holders are involved.

3. Assignment of assessment-related responsibilities and decisions to the Agency
ISG, in many separate proposed amendments, would move Ministerial responsibilities and decisions to the Agency. The proposed changes cover powers concerning

(i) suspending and extending time limits (ISGv1 pages 9-10, amendment ISG-1.13 re IAA s.9(5); ISGv1 pages 29-30, amendment ISG-1.18c re IAA s.18(6); ISGv1 pages 25-26, amendment ISG-1.18a re IAA s.19(3) on information gathering; ISGv1 pages 41-42, amendment ISG-1.24b re IAA s. 28(9)) and so on including the major time limits provisions (ISGv1 pages 47-56, amendments ISG-1.28-30b re IAA s.37);

(ii) adding to and scoping factors to be considered in particular cases, including panel reviews (ISGv1 pages 33-34 amendment ISG-1.21 re IAA s.22(1)(t) and s.22(2));

(iii) requiring additional information (ISGv1 pages 45-46, amendment ISG-1.27b re IAA s.35); and

(iv) appointing review panel members (ISGv1 pages 57-58, 61-64, 71-72, and 119-122, amendments ISG-1.33a, 133c, 134a, 135b and 6.94b&c, re IAA s.41(1), 42.(c), 44(1) 46(1), 47(1). and.46.1).

As well, the ISG proposes to preclude Ministerial direction of the Agency staff or panels concerning recommendations or decisions under the Act (ISGv1 pages 109-110, re IAA s.153(2)).
Note: The amendments are evidently intended to reduce the risk of partisan political influence in assessment decisions making and strengthen the role of the Agency, which should be closer to the case evidence. Elected authorities would retain ultimate decision making authority, subject to whatever mandatory considerations remain after other amendments (see below).

The proposed amendments concerning Agency responsibilities and authority would consolidate considerable power in one body. The changes could be positive if the Agency is able to establish and maintain a high level of capacity and integrity, plus determination to stand up to the inevitably continuing political pressures and to influence from interests subject to assessment requirements. Given the likelihood of some weaknesses on these fronts, a robust process for judicial appeal will be crucial.

4. Interpreting meaningful public participation
ISG proposes several amendments to empower the Agency to determine the appropriate manner for ensuring “opportunity to participate meaningfully” (ISGv1 pages 15-16, amendment ISG-1.14a re IAA s.11 re the planning phase; ISGv1 pages 35-36, amendment ISG-1.22 re IAA s.27 re Agency led assessments; ISGv1 pages 95-96, amendment ISG-1.56 re IAA s.99 re strategic and regional assessments). ISG proposes similar powers for review panels for their proceedings (ISGv1 pages 77-78, amendment ISG-1.36 re IAA s.51(1)(c)).

Note: These proposed amendments accept long-established practices, including by review panels (in contrast to efforts to restrict participation under the Canadian Environmental Assessment Act, 2012). However, for process predictability and consistency, these amendments ought to be accompanied by a foundation of regulatory direction on the pre-requisites for meaningful public participation. There is a deep repository of available, broadly accepted guidance, including from the Multi-Interest Advisory Committee and the earlier Regulatory Advisory Committee under the original federal assessment legislation.

5. Early planning products and the notice of commencement
ISG proposes to clarify modestly what the Agency must provide with the notice of commencement, including information required from the proponent (ISGv1 pages 19-20, amendment ISG-1.17a re IAA s.18(1)) and the scope of factors in s.22 specified in the tailored guidelines for the case (ISGv1 pages 23-24, amendment ISG-1.17c re IAA s.18(1.1)).

Note: The requirement in the amendment probably changes little, but is worth specifying. Unfortunately, the amendment does not preclude the possibility that factors in s.22 could be open to elimination by “scoping out.” Such elimination is proposed by the Conservative Senators. See below.
6. Evaluation of effects and determination of “significance”

ISG proposes to reintroduce the determination of “significance” in impact evaluations that characterised the Canadian Environmental Assessment Act 1995 and 2012 but is not included in the IAA as it now stands. The IAA currently refers to “the extent to which effects are adverse” and also considers positive effects.

In ISG’s volume 1 amendments package, the proposals reintroduce a “significance” evaluation – “whether any effects are significant” – to complement evaluation of “the extent to which effects are adverse” (ISGv1 pages 37-38, amendment ISG-1.23 re IAA s.28(3); and pages 43-44, amendment ISG-1.27a re IAA s.33(2) on substituted assessment reports).

However, in its volume 2 amendments, ISG proposes a suite of amendments that would move the IAA back much more fully to a “significance” test, distinguishing simply between adverse effects that are “significant” and adverse effects that are “not significant.” Only the latter would have consequences for judgments about whether or not the project is in the public interest.

The main specific ISG “significance” amendments are those that would

(i) change the second and fourth purposes of the Act from protection against adverse environmental, health, social and economic effects in areas of federal jurisdiction to protection only against “significant” adverse direct and incidental effects in these areas (ISGv2, pages 1-4, amendment ISG-1.09a&c re IAA s.6(1)(b&d));

(ii) change the basis for a federal decision from determination of whether the adverse effects of the project “are not significant, or, if significant, are in the public interest” (ISGv2 pages 5-6, amendment ISG-1.13 re IAA s.8(b); pages 25-26, amendment ISG-1.41b re IAA s.60(1); pages 29-30, amendment ISG-1.41d re IAA s.61; pages 31-32, amendment ISG-1.42a re IAA s.62 concerning the Governor in Council’s responsibility in decision making, and pages 37-40, amendments ISG-1.42e&1.43a re IAA s.64(1) and 64(2));

(iii) change the evaluation of adverse effects in assessment reports from “the extent to which” adverse direct and incidental effects are adverse, to “the extent to which those effects are significant” (ISGv2 pages 15-16, amendment ISG-1.23b re IAA s.28(3); pages 17-18, amendment ISG-1.27aa re IAA s.33(2); pages 21-22, amendment ISG-1.37 re IAA.51(1)(d)(ii); and pages 23-24, amendment ISG-1.41a re IAA s.59(2)); and

(iv) change one of the five core considerations for decision making from determining “the extent to which the adverse effects … indicated in the assessment report in respect of the designated project are adverse” to “the extent to which” they are “described as

\[1\]  The notion that adverse effects may be in the public interest seems simply wrong. The idea, presumably, is that a designated project may be in the public interest and merit approval even if it will have some adverse effects. An amendment to clarify that would be beneficial.
‘significant’” in the impact assessment report (ISGv2, pages 33-34, amendment ISG-1.42c re IAA s.63(b)).

Note: There is a long and vexed but illuminating history of litigation (especially in the US) and encyclopaedic analysis (especially by David Lawrence) about how to determine significance. “Significance” evaluations nevertheless remain highly inconsistent, in part because there is almost never scientifically identifiable line between significant and non-significant effects.² Mostly “significance” is a matter of valuing in light of evidence that is specific to the case and its context. Moreover, wherever the line of significance is placed for particular adverse effects, there are likely to be less-than-significant adverse effects that merit serious attention in assessments and project decisions (e.g., because they would, taken together, represent highly worrisome adverse consequences, or merely because adverse effects are generally undesirable should be avoided where this is feasible and does not result in other more undesirable consequences).

Retention of the broader “extent to which” phrase, as initially proposed in the volume 1 amendments, could discourage simplistic reliance on significance evaluations. The ISG volume 2 amendments would appear to have the effect of dismissing “non-significant” adverse effects as essentially irrelevant for decision making purposes. The limited focus on significant adverse effects is not matched by a similar narrowing of the consideration to be given to positive effects. The effect would be to encourage unjustifiably loaded comparison of all positive effects against only the significant adverse effects.

7. Influence of regulatory bodies
ISG proposes a variety of amendments that are generally aimed at strengthening the voices of the energy and nuclear regulatory agencies in assessments relevant to their regulatory roles. This include proposals concerning regulatory body appointees as review panel members and chairs.

One set of amendments would have the Canadian Nuclear Safety Commission (CNSC) members of review panels appointed solely on the recommendation of the President of the CNSC (ISGv1 pages 65-66, amendment ISG-1.34c re IAA s.44(3)) and would allow the CNSC President to be appointed to a review panel, presumably on his or her own recommendation, and to chair the panel (ISGv1 pages 67-68, amendment ISG-1.34d re IAA s.44 (3&4)).

ISG proposes the same approach to appointments to review panels by and including the lead commissioner of Canadian Energy Regulator (ISGv1 pages 73-76, amendment 1.35d re IAA s.47(3&4)).

² A complex ecological or socio-ecological system subject to stresses may be pushed over a threshold to relatively rapid and severe change. A common example is the collapse of the northwest Atlantic cod fishery. Such thresholds may define a line of sorts between slowly worsening and severely disturbing effects. But typically these thresholds are easier to identify in retrospect.
ISG proposes that review panels may also be chaired by members of Canada-Nova Scotia and Canada-Newfoundland and Labrador Offshore Petroleum Boards (IGS, pages 123-132 amendment ISG-6.94c&d, and 7.95a, c&d).

Finally, an associated amendment would have important cases referred to the Governor in Council by the minister responsible for the relevant regulatory body as well as by the minister responsible for the assessment process (ISGv2, pages 27-28, amendment ISG-1.41c re IAA s.61).

Note: Close relations between regulators and those regulated is a commonly described phenomenon in the scholarly literature on regulatory governance, though certainly some jurisdictions and regulators do better than others in establishing and maintaining impartiality. The Canadian federal record is at best uneven. We can see the results in the sharp contrast between proponents support for granting more influence and authority to the regulatory bodies and opposition from those with experience as intervenors before these bodies.

The practical significance of the last amendment reported above may involve expectations that referrals from two ministers would deliver more approval-oriented case briefings to the Governor in Council.

8. Contents of assessment reports
ISG proposes to specify that assessment reports from the “Agency must make recommendations to assist the Minster in establishing conditions” (ISGv1 pages 79-80, amendment ISG-1.39 re new IAA s.55(1)).

Note: The proposal is positive but falls short of clarifying an obligation for Agency and review panel reports to ensure and provide the analyses and recommendations needed to support decision making on all of the section 63 considerations.

9. Decisions on proposed projects
ISG proposes to specify that Ministerial and Cabinet decisions on assessed projects must consider the positive and adverse consequences to environment, health, social or economic conditions indicated in the assessment report, as well as the five section 63 factors (ISGv1 pages 83-84, amendment ISG-1.42 re IAA s.63).

Note: The proposed amendment would mostly reiterate the Act’s definition of effects. It might, however, provide some useful correction of the ISG amendments that would focus decision making on “significant” adverse effects. See point 6, above.

Despite the requirement in s.63(a) to consider contributions to sustainability, this proposed addition, like the rest of the IAA and proposed amendments, fails to remind proponents, reviewers and decision makers that consideration of sustainability entails attention to long term and lasting consequences.
10. Judicial review
ISG identifies seven core “determinations, decisions and reports” under the IAA, and proposes to make them “final and conclusive.” It also proposes to limit applications for their review by the Federal Court of Appeal to within 30 days of the document’s release and to request Court disposition of these cases “without delay” (ISGv1 pages 89-92, amendment ISG-1.48 re new IAA s.74.1 and 74.2).

Note: This amendment seems to be aimed at reducing the potential for judicial reviews to delay initiation of approved projects. Generally, such delays are better avoided by steps to enhance the evident impartiality and credibility of the process than by efforts to restrict openings for judicial review. One lesson of experience with CEAA 2012, especially in the Northern Gateway and TransMountain cases, is that those unhappy with a process will find other ways of gaining an effective voice.

11. Ministerial designation of physical activities
ISG proposes to allow the Minister to designate a physical activity or a class of physical activities only after considering related regional or strategic assessments (ISGv1 pages 101-102, amendment ISG-1.62b re IAA s.112.1(2)).

Note: The proposal is not clear about whether the intent is to allow designations only where a related regional or strategic assessment has been completed. However, that intent is clear in the case of the amendment re s.63(e) concerning climate change (see point 13, below). In both cases the amendment depends on the availability of suitably broad and detailed guidance from credible regional and strategic assessments.

Unfortunately, no regional or strategic assessments currently exist and few will be available soon. Moreover, the Act currently provides no process details that would establish grounds for expecting that regional or strategic assessments under the IAA will be rigorous or credible, or that they would produce anything more than reports (versus clear guidance in detailed policies or plans).

If consideration of a relevant strategic or regional assessment is meant to be a prerequisite for a Ministerial designation, the effective result of this amendment would be to eliminate Ministerial designations.

12. Mandatory review of the legislation
ISG proposes to reduce the period before mandatory review of the Act to 5 years from 10 (ISGv1 pages 115-116, amendment ISG-1.85 re IAA s.167).

Note: Given the level of controversy surrounding the current deliberations, the earlier date seems appropriate.

13. Project implications for climate change commitments
ISG proposes to replace the IAA’s requirements for assessments and assessment decision makers to consider the extent to which project effects will “hinder or contribute to the
Government of Canada’s ability to meet … its commitments in regard to climate change” with a requirement only to consider climate commitments described in a relevant strategic assessment completed before the project notice of commencement (ISGv2 pages 11-12, amendment ISG-1.20 re IAA s.22(1)(i) and pages 35-36, amendment ISG-1.42d re IAA s.63(e)).

As well, ISG proposes to empower the Minister to deem a completed strategic assessment conducted by a committee established by the Minister or by the Agency as authorized by the minister to be a strategic assessment conducted under IAA s.95(1) (IGSv2 pages 47-48, amendment ISG-1.55 re IAA s.95).

Note: An initiative is now underway within the government to develop a “strategic assessment of climate change.” That initiative – an internal review with narrow terms of reference, general inattention to implications of Canada’s actual climate change commitments, and no meaningful participation – is not under the IAA and appears not to meet even the vague requirements for strategic assessments set out in the Act.

The second proposed amendment reported above is presumably intended to provide authority for the adoption of what emerges from that initiative. The result would eliminate the current s.63(e) consideration and its associated value as a vehicle for efforts to meet Canada’s climate change commitments

14. Role of strategic and regional assessments
ISG proposes more generally to restrict project-level consideration of regional and strategic assessment findings to those from regional and strategic assessments completed prior to the notice of commencement of the project assessment that the findings might inform (ISGv2 pages 13-14, amendment ISG-1.21a re IAA s.22(1)(p) re factors to consider).

Note: A longstanding concern of many assessment participants – proponents as well as non-proponent intervenors – has been the inadequacy of current processes for addressing the biggest issues in project assessments. These issues include how to deal with major cumulative effects, broad alternatives and important policy issues involving a proposed project. One reason for instituting credible and law-based regional and strategic assessments has been to address these big issues. The IAA now includes very rudimentary and tentative steps towards regional and strategic assessments. Until they are established as rigorous public processes that produce credible and workable guidance, giving them an authoritative role in project assessments will be premature. They may provide some useful information (e.g. about existing and potential cumulative effects in a region) and guidance on possible responses. But until regional and strategic assessments are rigorous and credible, the big issues raised in project assessments should be addressed in those project assessments.

The proposed amendment is useful insofar as it would impose some limitation of unjustified reliance on regional and strategic assessments. However, it begs questions about how strategic and regional issues are to be addressed in project assessments. Some proposed changes appear to reflect an assumption (explicit in CAPP and CEPA
proposals) that consideration of strategic issues is not appropriate in project assessments. In many cases, however, the most important project level assessment issues have been strategic ones and failure to address them credibly has contributed greatly to low project assessment process credibility. Also, any limitation of scope for considerations of strategic issues in project assessments would reduce proponent interest in pushing for strong regional and strategic assessments.

Meanwhile, reliance on existing strategic and regional assessments is questionable so long as the Act remains vague about the nature of the processes and potential products involved. See points 11 and 13 above.

Amendments proposed by individual Senators:

Senator Carignan (6 May 2019) has proposed amendments that would
• protect provincial jurisdictional powers (amendments CC-1.09a&b and CC-1.21, CC-142c, CC-1.51, and CC-10.102) and encourage attention to municipal interests (amendments CC-1.10).

• require assessment info and study requirements “commensurate with the nature and complexity of the project” [no mention of potential for adverse effects] (amendment CC-1.17).

• preclude federal assessment if a province requests no assessment (even if the project is only partly in the province) and says it has assessment authority (p.13, amendment CC-1.19).

• introduce a new factor in s.22 on “the project’s impact, on a global level, on the environment and climate change” (amendment CC-1.20) [which seems well-intended, but may undermine more specific attention to Canada’s commitments]

• adjust the s.22(1)(d) factor for consideration, which concerns “the purpose of, need for and economic impacts of the designated project” (p.17, amendment CC-1.20)

• specify contributions to sustainability in c.63(a) to refer “in particular with respect to the economy, the environment and social welfare.” (amendment CC-1.42a) [health is not mentioned] plus the line from his proposed amendment CC-1.20 about impact on a global level (amendment CC-1.42b)

Senator Cordy (6 May 2019) has proposed amendments that would
• avoid appointing panel chairs from the roster from offshore boards (amendments JC-6.94 and JC-7.95) [contrasting with proposed IGS amendments ISG-6.94c&d, and 7.95a, c&d]

Senator Mitchell (6 May 2019) has proposed amendments that would
• strengthen roles of regulatory bodies (amendments GM-1.34, 1.35, 6.94, 7.95, and 8.95)
Senator McCallum (7 May 2019) has proposed amendments that would
• strengthen assessment attention to the duty to consult (amendment MJM-1.12); rights and knowledge of indigenous peoples, in particular Indigenous women (amendments MJM-1.13, 1.19 and 1.55); UNDRIP (amendment MJM-1.16, 1.20a, 1.42); just transition in efforts to meet our climate change commitments (amendment MJM-1.20b); and agreements with Indigenous governing bodies (amendment MJM-59.303).

Notes on amendments proposed by the Conservative Senators concerning the Impact Assessment Act (9 May 2019)

The Conservative Senators’ amendments would
• generally place a heavy emphasis on economic objectives and assumed prerequisites such as investor confidence (e.g. CPC amendment 1.10 re IAA s.6(1) re purposes)

• undermine the process for Ministerial designation of a physical activity by

(i) limiting the power to cases where the activity may cause adverse effects by excluding consideration of “direct or incidental effects outside federal jurisdiction,” allowing consideration only of “significant adverse effects” and these significant effects only if they are “complex and may require a complex set of mitigation measures”; or are novel or their severity or needed mitigation measures are “unknown” or involve “unique or exceptional circumstances” (CPC amendments 1.13a&b re IAA s.9(1));

(ii) making Ministerial consideration of effects on Indigenous rights optional (CPC amendment 1.13c re IAA s.9(2));

(iii) reducing the time limit for a Minister’s response to a designation request from 90 to 30 days (CPC amendment 1.13d re IAA s.9(4)); and

(iv) limiting the time for designation to within 60 days of the proponent filing a regulatory application to a provincial authority (existing clause includes only federal authorities) (CPC amendment 1.134a re IAA s.9(7))

• allow offshore boards (instead of the Agency) responsibility to assess relevant non-panel designated projects (CPC amendments 1.19a&b re IAA s.21(1));

• eliminate the early planning phase requirement for the proponent to provide information on how it will respond to identified project issues (CPC amendment 1.15 re IAA s.15) but also expect

(i) the scope of the designated project, the scope of the assessment including the factors to be considered, and the information to be required from the proponent to be determined in the notice of assessment (CPC amendment 1.17a re IAA s.18); and
(ii) an early determination by Environment Finance and Natural Resources ministers on whether the project is “inconsistent with Government of Canada policy” (CPC amendment 1.16c re IAA s.17(1))

• make optional (“the Agency may consider”) the listed factors for decision making on whether an assessment is required (CPC amendment 1.16a re IAA s.16(2));

• make optional most of the listed factors for consideration in assessments (CPC amendment 1.21a re IAA s.22(2)) and permit scoping that covers only some of the factors for consideration in IAA s.22 (CPC amendment 1.17a&b re IAA s.18(1));

• eliminate entirely consideration of “alternatives to” a proposed project (CPC amendments 1.19c and 1.20 re IAA s.22(1)(f));

• reduce consideration of gender equity and identity effects to “consistency with” published Agency policy on this (CPC amendment 1.19c, re IAA s.22(1)(s));

• eliminate consideration of “the extent to which the designated project contributes to sustainability” and replace it with consideration of “consistency with” any relevant published Agency policy on sustainability identified through regulation (CPC amendment 1.19c re IAA s.22(1) and 1.42b&c re IAA s.63(a)) [CPC amendment 1.19c also includes an incomprehensible clause about “the extent to which the designated project contributes to the environmental, health, social and economic effects” and CPC amendment 1.42c would reiterate consideration of the project’s economic and social effects]

Note: Here and below, the term “consistency with” could allow a binary yes/no finding. In any event, determining alignment with general policy components, would fall well short of specific prediction and evaluation of the extent of various positive and/or adverse project effects to inform decision making. In contrast, “extent of contribution” entails detailed evaluation that would necessarily centre on the specifics of the case and its context as well as application of general principles.

• eliminate consideration of “the extent to which the designated project contributes to hindering or contributing to” meeting Canada’s environmental obligations and to meeting Canada’s commitments with regard to climate change replace these required considerations and instead require only consideration of “consistency with” the results of any completed regional or strategic assessments (CPC amendment 1.19c re IAA s.22(1)(i)) and, only at the decision making level, consideration of relevant federal legislation (CPC amendment 1.42d re IAA s.63(e));

• constrain the mandates of regional and strategic assessments but also rely on them for key considerations, in particular through amendments to

(i) emphasize narrow purposes for regional assessments – purposes to “include” providing baseline environmental information and information to reduce the scope of project assessment studies and “expedite assessments” (so baseline as existing conditions...
and stresses; no other purposes noted – nothing on implications of the existing conditions and stresses or how best to manage them) (CPCC amendment 1.54 re IAA s.94) and to emphasize purpose of strategic assessment to narrow and expedite project assessments (CPC amendment 1.55 re IAA s.95);

(ii) restrict consideration of strategic and regional assessments to ones completed before the project’s notice of commencement (CPC amendment 1.19c re IAA s.22(1)(p) and 1.24 re IAA s.28);

(iii) allow the Agency or review panel to determine what weight of attention is to be given the strategic or regional assessment (CPC amendment 1.21b re IAA s.22(new 3)); but also

(iv) require decision makers to consider only “consistency with” applicable strategic and regional assessments (CPC amendment 1.42d re IAA s.63(e))

Note: No regional or strategic assessments currently exist. Few will be available soon and none is to apply unless it is in place before notice of project assessment commencement. Also the Act currently provides no process details that would establish grounds for expecting any regional or strategic assessments that are undertaken to be rigorous or credible, or that they would produce anything more than reports (versus policies or plans). The effective result is to eliminate consideration of “the extent to which the designated project contributes to hindering or contributing to meeting Canada’s environmental obligations and commitments with regard to climate change and any other matters dependent on strategic or regional assessment findings.

• re-establish the “directly affected” and “relevant information and expertise” criteria to limit public participation (CPC amendments 1.22b and 1.37c, re IAA s.27 and 51);

• set shorter assessment timelines; overall 510 days (CPC amendment 1.29 re IAA s.37(1)) and restrict time for Ministerial or Governor in Council decisions (CPC amendment 1.42a re IAA s.62)

• eliminate the requirement for review panels for uranium mines and mills (CPC amendments 1.31, 1.34a&b and 135a re IAA s.43 and following);

• shift review panel chairs and majority of positions from the Agency roster to the regulatory agencies: for the Canadian Nuclear Safety Commission case review panels to have chair from the CNSC roster (CPC amendment 1.34c re IAA s.44(4)), for the Canadian Energy Regulator case (CPC amendment 1.35b re IAA s.47(4))

• assign determination of what is needed for meaningful participation to the Agency or review panel (re panels CPC amendment 1.36b re IAA s.51(1)(c)) [without reference to any standard basic requirements and expectations for predictability and consistency];
• restrict Agency and review panel recommendations on conditions to address only adverse effects within federal jurisdiction [no mention of addressing indirect effects or positive enhancements] (CPC amendment 1.37b re IAA s.51(1)(d));

• reduce mitigation measures and follow-up measures from mandatory to optional (CPC amendment 1.43b re s.64(4));

• eliminate the possibility of extending the decision timeline for the Governor in Council (CPC amendment 1.44 re IAA s.65(6)) [in contrast to the proposed amendment to the CERAct, which would allow extensions if requested by the proponent – see below]

Notes: Overall, the Conservative Senators’ proposed amendments would
• avoid serious consideration of major issues by requiring reliance on strategic and regional assessments that do not currently exist, are likely to be few, lack credibly rigorous processes and are to be given constrained mandates
• narrow the scope of assessments, including by eliminating attention to “alternatives to” and making most remaining considerations optional
• eliminate assessment of project specific contributions to sustainability in favour of consistency with established general policies if any
• similarly eliminate consideration of the project implications for hindering or contributing to meeting Canada’s environmental obligations and climate change commitments in favour of in favour consistency with established general policies
• reduce the possible scope of conditions of approval
• make mitigation and follow-up requirements optional
• reduce potential application of the Act through Ministerial designation
• increase the roles of regulatory agencies without attention to impartiality questions
• shorten timelines and limit public participation to those who are “directly affected” or “expert.”

Related amendments proposed by the Conservative Senators concerning the Canadian Energy Regulator (CER) Act (6 May 2019)

Related amendments concerning the CER Act include ones that would
• make establishing meaningful participation processes optional (“Regulator may establish processes”) and also add again the directly affected and relevant information and expertise considerations (CPC amendment 10.126 re CERA s.74)

• in pipeline cases, make the list of factors to be considered illustrative and optional: “may include” (CPC amendment 49.291 re CERA s.183(2)

Note: CERA s.183(2) re pipelines does not include attention to contribution to sustainability; does include climate change commitments clause but later limits that to consideration only of established policy (CPC amendment 10-173c). Like other amendments to make considerations optional, it appears to contradict the frequent invocation of needs for “certainty.”
• eliminate reference to “health, social and economic effects,” limit gender equity plus
considerations to Regulators’ policy, narrow attention to Indigenous rights to matters
directly related to the effects of the project and “current use of land and resources for
traditional purposes,” and involve only climate considerations set out in completed
strategic or regional assessments (CPC amendment 10-173c re CERA s.183)

• apparently allow only the proponent to request and provide justification of extension of
the timeline for Governor in Council decision (CPC amendment 10-177 re CERA s.186).

• rely on strategic and regional assessments that are likely to be few, narrowly mandated
and established without legislated provisions for adequate process or useful products (see
above re amendments to the IAA (see, for example, CPC amendment 10.173c re CERA
s.183).

**Note on related amendments proposed by the Conservative Senators concerning the
Navigation Protection Act (6 May 2019)**

The proposed amendments would
• make various changes to eliminate consideration of potential future navigation uses
(e.g., CPC amendments 62.306a&b).

*Note: Eliminating requirements to look ahead is surely a recipe for future regret.*