SUBMISSION TO SENATE STANDING COMMITTEE ON ENERGY, THE ENVIRONMENT, AND NATURAL RESOURCES

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Submission from

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This is a submission in my personal capacity.

SUBMISSION ON BILL C-69

There are many aspects about Bill C-69 that one could discuss. However, I will focus in on one such aspect.

One claim often made about Bill C-69 is that it will achieve a better regulatory system in terms of meeting the federal government’s duty to consult obligations in situations where that duty is pertinent. In this submission, I raise some questions about that at a general level, raising questions about a key rationale for Bill C-69. I also raise various issues as to possible clarifications and amendments that might be necessary if any adopted form of Bill C-69 is to perform at an even minimally acceptable level on this issue.

By way of background/reminder, the duty to consult doctrine in its modern form is a proactive requirement on the Crown (whether in its federal or provincial aspects) to consult with Indigenous communities whose asserted section 35 Aboriginal or treaty rights could be affected by a government administrative decision, such as the granting of an approval under various parts of the legislation contained within Bill C-69. The modern form of this doctrine, which establishes an actual proactive requirement on the Crown, has developed principally in case law since the Supreme Court of Canada’s decision in Haida Nation in 2004.

There has been extensive further case law on the doctrine that details various aspects of it. I discuss those at length in my past writings, which have often been cited in judicial decisions on the issues: see eg Dwight Newman, The Duty to Consult: New Relationships with Aboriginal Peoples (Saskatoon: Purich, 2009); Dwight Newman, Revisiting the Duty to Consult Aboriginal Peoples (Saskatoon: Purich, 2014); Dwight Newman, “The Section 35 Duty to Consult”, in Oliver/Macklem/des Rosiers (eds), The Oxford Handbook of the Canadian Constitution (Oxford: Oxford University Press, 2017).

Bill C-69 abolishes particular regulatory bodies that have been the subject of significant case law under the duty to consult doctrine. In particular, issues about how the duty to consult interacts with decisions of the National Energy Board, in addition to being the subject of analysis in major appellate decisions from lower courts, have been the subject of detailed attention from the Supreme Court of Canada. The 2017 Clyde River and Chipewas of the Thames cases saw the Court explain how National Energy Board decisions could meet duty to consult requirements, with contrasting holdings that there had been a failure to do so in Clyde River and successful consultation in Chipewas of the Thames. See Hamlet of Clyde River v. Petroleum Geo-Services Inc., 2017 SCC 40 and Chipewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41.

In creating new bodies in place of existing bodies, Bill C-69 gives up the benefit of that past judicial interpretation of how the duty to consult interfaces with those bodies. While some aspects may transfer over to the new bodies established under the ERA dimensions of Bill C-69, knowing that with certainty and
knowing how they transfer over may require further litigation up to the Supreme Court of Canada, thus creating a number of further years of uncertainty on aspects of these issues.

Admittedly, such a consequence is always part of any legal reform to major regulatory bodies. The question that remains is whether the new bodies better achieve Canada’s successful compliance with its duty to consult obligations in the course of project decisions. Unfortunately, I think there are reasons to question this at a general level, notably because of the legislation’s complex dimensions on what it says about consultation. In particular, there is a significant degree of inconsistency within the legislation on the particular legal terms chosen to reflect the intended engagement with Indigenous communities.

The new IAA would say that the body it establishes must “take in account” impacts on Indigenous rights as well as considering impacts on Indigenous cultures, amid a much longer list of matters to consider in the context of an Agency decision: IAA, ss. 22(1)(c) and 22(1)(l). But an assessment by the Agency has no particular rules that refer to consultation (IAA, ss. 25-29). In the context of a review panel being struck, there is similarly to be consideration of effects on Indigenous rights (s. 36(2)(d)) but again with no particular process enabling such consideration (s. 51).

All of this language, notably, contrasts with the purpose statement within the IAA, which refers to promoting communication and cooperation with Indigenous peoples and ensuring respect for their rights: 6(f) and 6(g).

How the operative sections will be interpreted is open to significant uncertainty. A court could give them a large reading to try to fulfill the s. 6 purposes. Or it could give them a limited scope precisely because they contain different language than that contained in s. 6, with a seeming intent to limit what is done in respect of consultation. The IAA Agency and review panels may not even have statutory power to take the steps necessary in respect of consultation. Quite frankly, in contrast to more elaborate claims for Bill C-69, the provisions on the IAA lend themselves to significant confusion on whether the duty to consult will be met.

The ERA provisions within Bill C-69 are also problematic in respect of meeting the duty to consult. While there is to be consideration of effects on the rights of Indigenous peoples (s. 183(2)(e)), there is no particular procedure for consultation with potentially affected Indigenous communities. There is a general procedure for members of “the public” to make representations (s. 183(3)), but it is by no means clear that this provides a mechanism for consultation with Indigenous communities. The term “the public” is used in a variety of ways within Bill C-69, adding to the confusion.

It is admittedly clear that the ERA will not generally look for Indigenous consent. That will be required, and subject to various sorts of overrides, only in respect of certain lands, as detailed within ss. 317-18. One result of those provisions being there is almost certainly that the s. 183 aspects will be read in restricted ways since s. 183 contains much more limited language.

The challenge, though, is that nothing in the ERA makes obvious how consultation would take place or any expectations around it. There are mechanisms for general public input, but those could even be read as excluding other mechanisms of consultation since, on such an argument, other mechanisms were deliberately not included in the text.

The present text of Bill C-69 may actually create more problems on the duty to consult. In abandoning the case law that has developed by carrying out major reforms, it takes on legal risks. Those may be unavoidable if there is to be a major legal reform. But the claims that this legal reform improve consultation processes have seemingly very little substance to them. The actual provisions in the Bill have what verges on no reference to consultation and may actually exclude mechanisms for consultation. If the Bill is to proceed in anything like its present form, my submission is that Parliament must get the drafters in to
explain the exact interactions between the sections referenced and ought to make amendments to clarify that the various bodies created may take steps to carry out their duty to consult obligations. Failing to do so may actually lead to the Bill creating rather than resolving problems in this context.

The Bill’s tendencies to create regulatory uncertainty are by no means confined to this issue. But I have focused on one part. The duty to consult aspects of Bill C-69 are highly unresolved within the present statutory text and do not live up to claims made about the Bill; in their present form, they expand regulatory uncertainty, which will have negative effects for various parties, including not only proponents but also Indigenous communities.

I hope this submission will be of assistance to the Committee in its analysis of Bill C-69.