BILL C-69

An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts

Brief presented to the

STANDING SENATE COMMITTEE ON ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES

by

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INTRODUCTORY NOTES

- This brief deals exclusively with sections 60 and following of the Impact Assessment Act, under the portion of the bill titled “Decision-Making”.

- The views expressed in this brief are solely those of the undersigned.

- This brief is based on an article published in December 2017, in the VertigO electronic journal of the Institute of Environmental Sciences of the Université du Québec à Montréal. The exact reference is as follows:

Conceptual Gaps in the Relevant Provisions of the Current Act

Deciding whether or not to authorize a project and determining the conditions for carrying it out are largely influenced by the logical framework and methodological approaches applied at the decision-making stage. Bill C-69, *An Act to enact the Impact Assessment Act*, which replaces the *Canadian Environmental Assessment Act* (CEAA), provides an opportunity to address this issue.

Section 52(2) of the CEAA states that:

> If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

The term “circumstances” refers to all other considerations (economic, political, etc.) that could lead to the decision to approve a project despite its adverse effects on the environment.

The wording of section 52(2) is inspired by utilitarian logic. Commonly used in the economic sciences, it consists of testing the proportionality between the advantages (e.g., economic spin-offs) and disadvantages (e.g., impacts on an ecosystem). Applied to project impact assessment, this utility calculation involves performing a complete aggregation of the results by assessment criterion to determine the overall impact of each project variation. Operationally, numerical coding is used, which enables a summation of various measurement units, specific to each assessment criterion (length, time, temperature, etc.).

The main advantage of this method is that it gives a simple, unambiguous answer to a complex problem. The variation selected is the one that obtains the best overall score. However, the utilitarian logic applied to project impact assessments has several weaknesses.

First, it relies on the postulate that all assessment criteria are comparable when in fact the criteria used to assess a project’s impacts on a community’s economic situation are simply not the same as those assessing the impacts on maintaining an ecosystem’s balance in a given area.

Furthermore, the compensatory logic underlying the utility calculation and its operational translation, consisting of using an average index, can lead to paradoxical results from the point of view of environmental protection.
One project variation that has both significant benefits (economic spin-offs) and drawbacks (local environmental impacts) may be preferred over another variation with less significant but better distributed benefits and drawbacks.

The issue then is to what extent the redrafting of the decision-making provisions in sections 60 and following of Bill C-69 causes a change in this regard.

**Bill C-69: A cure for the current Act’s shortcomings?**

Section 60, which deals with the decision of the Minister (and, where applicable, the Governor in Council) refers to the concept of “public interest”, described in section 63. Among the elements to be considered in determining public interest, the decision-maker must establish to what extent the project contributes to “sustainability”, as defined in section 2. Although section 63 refers to the concept of “sustainability”, its current wording is ambiguous.

Interpreted according to the definition of “sustainability”, section 63 would mean that a project must contribute to “... the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations” (section 2). However, it is difficult to understand how a project with significant adverse environmental effects, despite the taking of all the mitigation and compensation measures set out in the impact assessment report, could contribute to the “ability to protect the environment” unless the ability to protect the environment refers to the mitigation and compensation measures rather than to the project itself, which would mean that achieving the goal of sustainability is an obligation of means rather than an obligation of result.

We believe that the application of the concept of sustainability requires a change of logic: “In the abundant literature which, in the wake of the WCED [World Commission on Environment and Development] report, aims either to define with greater precision the meaning [of the concept of sustainable development], or to pinpoint its implications more accurately in practical terms, or to identify the conditions for putting this type of development into effect, it is possible today to make out a convergence of views on the general meaning attributed to this expression [...] that is: [...] to meet the needs of current and future generations and, in order to do so, ensure that the necessary ecological, social and economic conditions are maintained.”

This redrafting of development goals refers instead to a rationalist logic where its application to solving social problems can translate to an a priori expression of the principles and standards against which the planned actions are assessed. Consequently, for the project to be considered “sustainable” or to “foster sustainability”, it must be

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viable in light of the previously stated principles and standards.

The operational translation of this logic is demonstrated in operational research known as “outranking synthesis methods”. The basic idea of these methods is that action $a_i$ outranks action $a_k$ when:

- action $a_i$ is at least as good as another ($a_k$) according to most criteria; and
- there is no criterion according to which $a_i$ is much worse than $a_k$.\(^2\)

The outranking method instead draws on the principle of the (social, economic and environmental) criteria’s incommensurability, which is reflected concretely in the fact that a project’s good economic performance cannot “compensate” for a poor environmental one. This is done by performing a complete aggregation of the results. Consequently, the best variation is not the one that obtains the best overall score by performing a complete aggregation of the results of all the impact assessment criteria, but the one that performs well on all the criteria.

**Proposal to amend section 63(a) and other suggestions**

In our opinion, a rationalist logic is more compatible with sustainable development than a utilitarian logic. Accordingly, we suggest rewording section 63(a) as follows:

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 include a consideration of the following factors:

(a) the extent to which the designated project meets *a priori* the criteria for its sustainability in all social, economic and environmental and areas;

Furthermore, section 63 should be supported by regulations setting out the impact analysis process. The method commonly used in impact assessment, an “assessment method focusing on the significance of individual setting components”, does not offer a means of aggregating the results to find out the overall impact of each project variation to facilitate comparisons with a stake-based multicriteria analysis grid, leaving the decision-maker alone at decision-making time.

Without more accurate information on the project’s stakes and a method for identifying the possible trade-offs between its social, economic and environmental considerations, as well as the interests of the parties involved, the decision is essentially based on a limited number of considerations and the balance of power within Cabinet. In a report

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published by the Law Reform Commission of Canada, Schrecker (1984) points out the following:

As a general policy priority, controlling environmental hazards may be at a distinct disadvantage in intra-governmental conflicts. At best, the ministers or officials of other departments may view this as an unwelcome competitor for legislative time and limited administrative resources. And departments with responsibilities for promoting industry, regional development, or natural resource exploitation may find concerns with hazard reduction irrelevant, or even antithetical to their principal objectives and those of their major client groups.

Decision aid tools, including those belonging to the class of outranking synthesis methods mentioned above, have been successfully applied to project impact assessments and strategic environmental assessments of policies, plans and programs in terms of sectoral or land development. For example, one of these methods was applied as part of a strategic environmental assessment pilot project for the development of a land-use plan incorporating Indigenous values.

The Groupe d’études et de recherche en analyse des décisions (GERAD) at the Université de Montréal and the Groupe d’études interdisciplinaires en géographie et en environnement régional (GEIGER) at the Université du Québec à Montréal (UQAM), under the direction of Professor Jean-Philippe Waaub, have developed expertise over the last 25 years in applying decision aid tools to environmental assessments, including specific project impact assessments and strategic environmental assessments. This expertise could be helpful in developing new regulations. These proposals are substantiated in the article referred to in the introductory notes and attached hereto.

I am available to answer any questions the Committee may have and provide additional explanations in support of this brief.

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