Ecojustice is Canada’s largest environmental law charity. Our mission is to use the power of the law to defend nature, combat climate change, and fight for a healthy environment for all. To that end, lawyers from Ecojustice appear before courts and tribunals across the country at every level.

In 2018, Ecojustice opened its first office on the Atlantic coast – specifically, in Halifax, Nova Scotia. Ecojustice’s lawyers in Halifax work specifically on environmental issues affecting Canada’s east coast. Among other things, we continue to work to address the federal and provincial environmental assessment issues surrounding the Northern Pulp kraft pulp mill in Pictou, Nova Scotia.

The Atlantic Premiers wrote to Prime Minister Justin Trudeau in late February of this year to express a number of concerns with respect to Bill C-69.\(^1\) We anticipate that many of the concerns that will be expressed to the Committee during its time in Atlantic Canada will mirror those outlined by the Premiers. We have therefore styled our brief as a response to the Premiers’ remarks.

Overall, the Premiers argue that Bill C-69 in its current form will deter economic growth by reducing major project certainty and investment confidence. In fact, Bill C-69 does the opposite. As we will explain below, the Bill provides greater certainty and transparency by outlining the factors that must be considered when evaluating a project, and by mandating that the decision-maker provide reasons. The Bill additionally provides greater balance in the assessment process by requiring consideration of both positive and negative factors, and preserves the credibility of the impact assessment process by providing for meaningful public consultation.

The Premiers call for the Impact Assessment Act (“IAA”) to require a closer relationship between the Impact Assessment Agency and lifecycle regulators. A relationship of that nature would

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\(^1\) Letter from the Council of Atlantic Premiers to The Honourable Justin Trudeau, dated February 27, 2019.
undermine the transparency and credibility of the impact assessment process. In fact, as explained below, we echo the call made by various Atlantic Canada-based ENGOs to remove the amending provisions from Bill C-69 that would require members of the Offshore Petroleum Boards to participate in impact assessments of projects in the Atlantic offshore.

We urge the Committee to (1) recommend removal of all provisions under the heading “Amendments to the Impact Assessment Act”; and (2) recommend timely passage of Bill C-69, as amended.

(1) Bill C-69 does not expand the decision-maker’s discretionary powers

The Atlantic Premiers expressed concern that Bill C-69 “introduces considerable discretion into decision-making […].” With respect, this is inaccurate. Bill C-69 not expand the discretionary powers available to the Minister from what exists today under the Canadian Environmental Assessment Act, 2012 (“CEAA 2012”) – and in fact, it imposes additional constraints on that discretion.

For instance, under CEAA 2012, the Minister is tasked with making a highly discretionary determination as to whether a project’s negative effects will be “significant.” Cabinet then decides, without being required to provide reasons, whether any such effects are “justified in the circumstances.”

In contrast, under the IAA, the decision-maker (either the Minister or Cabinet, as the case may be) must decide whether a project is in the public interest. The decision-maker’s discretion in making this determination is constrained by the requirement to consider five factors: 2 (1) sustainability; (2) whether the project helps or hinders Canada’s ability to meet environmental obligations; (3) how negative any adverse effects actually are; (4) mitigation; and (5) effects on Indigenous rights. Far from introducing additional discretion, this new decision-making framework provides greater certainty and clarity about whether and how projects can be approved.

In addition, the IAA increases transparency and accountability by requiring the decision-maker to publicly explain its decision. Every decision made by the Minister or by Cabinet must be explained in an official Decision Statement posted on the Impact Assessment Agency’s website.

(2) Bill C-69 should not be amended to exclude projects from its purview

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2 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, 1st Sess, 42nd Parl, 2018, cl 1, paras 60(1), 62, 63.
3 Ibid, cl 1, paras 65, 66.
In their letter to Prime Minister Trudeau, the Atlantic Premiers proposed that Bill C-69 should be amended to “ensure that the assessment process is calibrated to exclude short-term projects and activities with proven mitigation strategies such as offshore exploration wells.” This proposal is premature, because it ignores a key aspect of the federal environmental assessment regime’s design.

Under CEAA 2012, the projects subject to federal environmental assessment are found in the Regulations Designating Physical Activities, SOR/2012-147 (commonly referred to as the “project list”). The proposal for the environmental assessment regime under Bill C-69 is the same – meaning the projects subject to environmental assessment under the IAA will not be identified in the Act itself, but in a regulation made under the Act.

The Ministry of the Environment and Climate Change has confirmed that the “project list” regulation will be updated in consultation with stakeholders. The Atlantic Premiers will have the opportunity at that time to provide their input with respect to the categories of projects that should or should not be designated for federal environmental assessment.

(3) Public participation is vital to Bill C-69’s operation

The Atlantic Premiers further proposed amendments to ensure that the nature and scope of public participation during the environmental assessment process is “clearly established” and “not left ambiguous and subject to challenge.” Amendments of that nature are unnecessary and would undermine public confidence in the environmental assessment process.

It is important to note that the “standing test” used under CEAA 2012 to restrict public participation was only applied during hearings for projects regulated by the National Energy Board. However, the majority of environmental assessments conducted under CEAA 2012 are managed by the Canadian Environmental Assessment Agency (“CEAA”). Assessments managed by CEAA are open to participation by any member of the public.

Under Bill C-69, the standing test will not apply to any environmental assessment process. However, the Impact Assessment Agency and Review panels conducting environmental assessments will have access to a range of public engagement tools, including in-person hearings, open houses, online engagement, and others, to manage public participation. Participation will also be required to fall within statutorily-mandated timelines. These well-established methods of managing public participation will provide ample certainty for proponents and investors.

5 See, for example, Bill C-69, supra note 2, cl 1, paras 11, 27, 31(2), 51(1), 69(1).
6 Ibid.
Further, public participation is vital to maintaining public confidence in the environmental assessment process. Unduly limiting public participation through standing tests or other similar mechanisms risks undermining public trust and discrediting the process as a whole.

(4) Bill C-69 already mandates consideration of a project’s positive impacts

The Atlantic Premiers suggested that Bill C-69 should allow a project’s positive impacts, including its economic impacts, to be considered in environmental assessments. This was, in fact, recommended by the Expert Panel for the Review of Environmental Assessment Processes (“Expert Panel”), and this approach has been incorporated into the IAA itself.

The IAA’s purposes include ensuring that impact assessments take into account all effects, both positive and negative. The IAA mandates that the decision-maker consider the positive and negative consequences of changes to the environment, and to health, social, or economic conditions, when determining whether a project is in the public interest. As a result, it provides a well-balanced framework through which to evaluate projects in a holistic manner. No amendments to the Bill are necessary to ensure consideration of a project’s benefits.

(5) Regulators should remain at arms-length from the authority conducting the impact assessment

The Atlantic Premiers called for Bill C-69 to be amended to “[r]equire cooperation between the impact assessment agency and lifecycle regulators (i.e. the Offshore Petroleum Boards, the Canadian Energy Regulator, and the Canadian Nuclear Safety Commission) in assessments for projects regulated by those regulators […]” This is contrary to the recommendations made by the Expert Panel and would undermine the independence and accountability of the authority conducting the impact assessment. Unfortunately, the IAA as currently drafted already mandates the participation of members of these lifecycle regulators in the impact assessment process.

Of particular concern in the Atlantic Provinces are a series of provisions under the title “Amendments to the Impact Assessment Act.” These amendments are dedicated to the Offshore Petroleum Boards. As a result of these amendments, the Petroleum Boards will have a much more significant role to play in impact assessments of projects that fall within their regulatory purview. In a nutshell, all federal impact assessments for designated projects in the Atlantic offshore will be conducted by a review panel with a minimum of five members, at least two of which must be members of, or associated with, the Petroleum Boards. Importantly, there is no provision to prevent a member of the Petroleum Boards from chairing the review panel.

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8 Bill C-69, supra note 2, cl 1, para 6(1)(c).
9 Ibid, cl 1, para 22(1)(a).
10 Expert Panel Report, supra note 7 at 50-51.
11 Bill C-69, cl 1, Amendments to the Impact Assessment Act.
Although a detailed critique of these provisions is outside the scope of this brief, we echo the comments made by the East Coast Environmental Law Association, the Ecology Action Centre, and others. The provisions mandating the participation of Petroleum Board members or associates in impact assessments of offshore projects in the Atlantic should be removed from Bill C-69. Otherwise, the close relationship between the Petroleum Boards and the impact assessment bodies will undermine the independence and credibility of the impact assessment process.

Conclusion

The concerns expressed by the Atlantic Premiers are largely unfounded, and do not require amendment of the IAA. In fact, the IAA as currently drafted introduces greater certainty, transparency, and accountability into the impact assessment process. Unfortunately, certain provisions of the IAA also undermine the independence of the impact assessment process by mandating a close relationship between the Impact Assessment Agency and lifetime regulators such as the Offshore Petroleum Boards.

We call on the Senate Committee to (1) recommend removal of all provisions under the heading “Amendments to the Impact Assessment Act,” and (2) recommend timely passage of Bill C-69, as amended.

Sincerely,

James Gunvaldsen Klaassen Sarah McDonald
Barrister & Solicitor Barrister & Solicitor