Brief on Bill C-69

Presented by Louis-Gilles Francoeur
(See appended CV.)
April 5, 2017

1. Making adjustments to two major concepts

Viabilité or *durabilité*

The French word *durabilité* used in Bill C-69 to render the English term "sustainability" should be replaced by either *viabilité* or *soutenabilité.*

The word "sustainability" connotes the idea that there are limits that we must respect in the way we develop our society and its economy. The French term *durabilité* does not immediately convey the notion that such limits exist. It also adds the ambiguous idea that development may last and even become an end in itself. However, as the UN's World Commission on Environment and Development (the Brundtland Commission), which developed the concept of "sustainable development", explained in its historic 1987 report, we must regulate current development by setting limits that ensure the continued existence of the living species and ecosystems on which the future of humanity depends.

"Sustainable development" should have been rendered in French as *développement viable* or even *développement soutenable*, the term used in the Brundtland Commission report, to reproduce more clearly the implicit idea of the limits that must govern the development of our societies. In its report on the future of Canada's economy, published two years earlier, the Royal Commission on the Economic Union and Development Prospects for Canada, chaired by the Honourable Donald S. Macdonald, also proposed that the development of our economy be governed by stricter environmental control rules that would preserve the ecosystems that future generations would need to ensure their own development.

As Bill C-69 is likely to become an act that will be authoritative across the country for years, if not decades, it is important that the term Parliament uses to convey the concept of "sustainable development" have the same meaning and scope in French.

This kind of clarification would be consistent with the bill's requirements respecting cumulative effects and regional and strategic environmental assessments. The objective of any strategic environmental assessment is to identify long-term effects, that is to say, to anticipate effects that unacceptably exceed thresholds in order to prevent irreversible damage. Theoretically, this exercise ultimately helps determine the viability of an initiative or policy. The idea that we should not go beyond thresholds, that there is a limit we should not exceed, is even more essential in the regional environmental assessments for which the bill paves the way. In short, we want to discover from this type of research whether any segments of the habitat, or even entire ecosystems or species, are particularly vulnerable in a given region in order to determine in advance whether we should avoid implementing projects that may exceed key thresholds or thresholds for the survival of significant links in our biodiversity. This would increase consistency between the concept of viability and the identification of cumulative effects which is sought by this bill.

The concept of environment

The term "environment" is given various meanings in the bill, a situation that should be rectified based on a vision more consistent with what the environmental sciences have taught us over a half-century of development. It is used, in some contexts, as a synonym for the ecological aspect of projects and, in others, in a more general way to mean ecological, social and economic aspects as a whole.

For example, the bill provides that the aim of a particular provision is to control "environmental, social and economic" effects. In that example, the "environmental" effects in question are in fact ecological effects; thus, the term's meaning is limited. The same limited meaning is intended where the bill provides that the work of the panels, for example, should include environmental, social, economic, indigenous and gender factors.

The environment, in reality, comprises much more than the ecological aspect.

In 1992, the Supreme Court of Canada adopted the concept of the environment in its broader sense in *Friends of the Oldman River Society v. Canada (Minister of Transport)*. The manner in which the highest court in the land defined the environment in that case has since applied to all of Canada's institutions: "*The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.*"

The Court of Appeal of Quebec relied on this integrated, comprehensive view of the environment, which is corroborated by the environmental sciences, in its 1993 *Bellefleur* decision, and other courts elsewhere in the country have employed it as well. The *Bellefleur* judgement states: [Translation] "*Where necessary, one might add that the role of the public today is all the more important as the very notion of the environment has expanded from a purely biophysical idea to one that is both biophysical and human (in the social, economic and cultural sense).*"

Replace here the term "biophysical", which does not have this meaning in French, with the term "ecological" and you will see that the environment has been a generic concept, in the law since 1992 and in science since the 1970s, comprising three parts, the ecological, social and economic aspects.

Environmental, social and economic aspects thus cannot be viewed as being on the same level since the environmental aspect is the sum of the other two. Doing so puts the whole and its parts on the same footing. This unfortunately is a common conceptual error, but one inconsistent with the state of environmental science. More than any other, the distinguished, internationally renowned researcher Pierre Dansereau has explained in his work that the environment forms a whole of which human beings are an integral part and that every human environment interrelates closely with living species and the physical setting on which they depend.

In enacting a major update to Quebec's Environment Quality Act last year, the National Assembly clearly outlined this contemporary, integrated and comprehensive vision in its preamble. The act "*affirms the collective and public interest character of the environment, which is inseparable from its ecological, social and economic dimensions*."

This kind of clarification would obviously be appropriate in a federal bill consistent with the current state of science and Canadian law. It would also stand as an interpretive clause for all Canadian courts.

It should be noted here that each of the three principal aspects of the environment consists of several components. The ecological aspect embraces the physical substrate—water, air and earth—as well as living plant and animal species, including the human species. The social aspect includes different values and cultures, including those of indigenous people, traditions and even the delicate matter of gender. From a conceptual standpoint, it is therefore redundant to say the least, if not incorrect, to put social, indigenous and gender issues on the same list since these last two are integral parts of the social component. It would be fair to state in the bill that we want to highlight or assess the social effects of projects on aboriginal communities and gender issues.

2. Biodiversity and climate change

Bill C-69 rightly attaches considerable importance to the effects major projects have on climate change, as a result of both the impact that major phenomenon has on Canadian society and Canada's international commitments. However, one gets the impression from reading the many clauses of the bill that Canada's equally important commitments to protecting biodiversity are being passed over in silence or simply ignored, whereas they should be put on the same footing in the bill. From a legal standpoint, failure to name them means different levels of importance are being attached to them: as the courts might claim, Parliament omits nothing without intent.

Paragraph 63(*e*) of Bill C-69, for example, states the factors that the Minister or the Governor in Council must consider in determining whether a designated project is in the public interest. The government must take into account "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations

and its commitments in respect of climate change." It is understood that the government's "obligations" include complying with its own acts, regulations and official policies. As for its "commitments", the text of the bill should clearly include the government's commitments in respect of climate change and protection of biodiversity. There is no reason to favour one of the two major environmental treaties that Canada joined following the Rio Summit in 1992, particularly since scientists contend that the current decline in biodiversity is an even more critical problem in some respects than climate change, particularly because technology does not afford us as many adaptation solutions.

In conclusion, every mention of climate change in the bill should be linked to an expression of the need to protect biodiversity so that the environmental assessments of project proponents and the analyses and reports of the Canadian agency and the environmental assessment panels attach equal priority to both problems.

3. Modes of participation

Public hearings have become more popular as the number of projects and public debates on their environmental issues has increased, and the fact that they have become more acutely focused and institutionalized has resulted in an evolving civilizing process because they have fostered, in some instances, vigorous exchanges of ideas, and even ideological confrontation, in a relatively regulated setting in which all parties can admit that decisions will ultimately be made in a rigorous, fair and scientific manner with a constant eye to the public interest. The various hearing formats have emerged from direct participation mechanisms established in the wake of the American Revolution. In his treatise on democracy in America, Alexis de Tocqueville viewed direct participation as an improvement over European-style representative democracy. De Tocqueville saw it as a new democratic tool enabling the American people, between elections, to express their views on issues that concerned them where they lived. By compelling economic and technocratic elites to come and explain themselves before these direct democratic bodies, public hearings, according to De Tocqueville, would neutralize those rarely accountable social forces that share the same frames of reference, culture and, in some instances, interests.

Today this socio-political heritage helps us determine key points we can use to establish basic rules for what should be considered a true ethics of public consultation. It is helpful to state a few of those rules in order to get a clearer idea of some of the bill's weak points.

While it is correct to say that the rules of public consultation may vary with the subject matter concerned, it is essential that the rules governing the review of a project or policy be known to everyone in advance so that a climate of trust can be established based on the predictability of that exercise. This is why, if the panels are to be allowed genuine flexibility in reviewing files, it is equally essential that the bill provide for regulations to be made specifying the principal terms and conditions governing future public hearings. Those regulations should determine the specific terms and conditions that will apply to the public assessment of projects or to more general debates on strategic and regional environmental assessments. The bill does confer full authority on the government to supplement the provisions of its bill by regulatory means, but it seems essential that the adoption of terms and conditions governing project hearings be made mandatory.

Furthermore, the mere canvassing of the opinions of participants at a hearing does not constitute genuine consultation. Citizens are not really consulted or respected if they have had access to only a portion of the documentation on a project when they write their briefs, have not had the necessary time to analyze the mass of documents filed by a project's proponent, are forced to file a brief even though they have not obtained or found answers to the questions they continue to ask and are unfamiliar with the rules for analyzing and integrating the facts and opinions submitted to a panel. If they express uninformed opinions on the facts because they have not obtained answers to all their questions, the views of those citizens will carry less weight with a panel, which will reduce the political weight they are entitled to bring to bear on the report and decision-making.

The format accepted and applied to nearly 350 major projects in Quebec over more than 40 years should be considered and even adopted because it can solve this problem. In Quebec, a public hearing on the assessment of major projects is conducted in two parts, the first being the impact

study provided by the neutral organization responsible for the consultation to prevent this information exercise from becoming a marketing or self-justification session.

In the first part of a hearing, the public put questions directly to the project promoter or to the experts the inquiry commission has invited to clarify the matter. Unlike conventional commissions of inquiry, in which the commission's counsel asks the questions, it is the audience that asks the questions in this case. Participants put all their questions to the commission chair. If the latter accepts the question and directs it to the promoter or to another resource person, the participant's question then becomes that of the commission, which supports it with all the authority provided under the *Act respecting public inquiry commissions*, which includes the authority to compel a person to answer and, if necessary, produce relevant documents. Of course, the commission has its own agenda and questions, but it combines them with those of the participants.

Participants thus see the file expand before their eyes throughout the exercise, which is all the more essential since it is in this phase of the hearing that the facts of the case are established to serve as a basis for the analyses presented in the briefs and final report. The process also becomes a collective and dynamic way of taking ownership of the issue: every participant learns from the questions and from the answers obtained by others. Citizens rarely alter the questions they prepare in advance based on what they collectively learn during the process. Because the file gradually expands during this part of the hearing, the opinions of many participants often evolve along the way. Ultimately, the quality of the briefs submitted and heard by the commissioners during the second part of the hearing is clearly better and more effectively advances the first objective of the consultation, which is to provide the public decision-maker with the best possible information as a result of the public's participation in a freer setting than in the case of quasi-judicial reviews.

The most basic requirement in conducting a credible consultation exercise is that the conditions of the hearing encourage public trust. In addition to a clear and fair procedure, the method for appointing commissioners, which is the basis of their independence, is definitely the most important. A hearing must be put under the responsibility of a neutral and impartial adjudicator, and the conditions of his or her appointment must guarantee that person's independence, a rule that is valid for all commissioners.

The appointment process provided for by Bill C-69 does not afford all the guarantees or appearance of this independence. It is not enough for panel chairpersons and panel members to be independent of a project initiator. They must also be clear of any possibility of collusion, complicity, partiality, even cultural in nature, or political partisanship. It is not an affront to any government to acknowledge that they have specific ideas about major projects, that they often rely on them more or less overtly or that ministers support them, in some instances publicly, while the hearings are still under way. One thing is certain: the public often operates on the principle that the government is theoretically in favour of major projects, and that undermines the credibility of panel assessments from the outset. It is essential in creating a climate of trust with the public that the independence of panel members not only be genuine, but that it also appear to be above all suspicion. That is why, in Quebec, it is the president of the Bureau d'audiences publiques sur l'environnement (BAPE) who appoints commissioners, not the Minister of the Environment. The former selects, from a pool of permanent commissioners and a list of additional commissioners, those he or she considers best suited to conducting a public consultation and preparing a report of faultless credibility.

To depoliticize panel appointments completely, why not consider either assigning this task to an authority independent of the Minister of the Environment, such as the Environment Commissioner, who reports instead to the Auditor General, to ensure that future assessment panels are entirely credible, including in the energy and nuclear fields, where symbiosis with the industry is still a cause for concern for many? There are enough high-ranking scientists and citizens recognized for their rigour and integrity for an independent authority such as the Environment Commissioner to be able to draw up lists of potential panel members capable of conducting any technical debate. On the other hand, it is still essential that the panels not be the prerogative or monopoly of experts from the sector under review, but that they consist mostly of individuals who are disciplined and versatile generalists capable of addressing technical, social and economic issues based on a comprehensive approach. Don't we rely on judges to rule on

government authorizations on issues that, in many instances, are eminently technical, even though our judges are, in those respects, generalists?

4. Cumulative effects, regional and strategic assessments

Regional environmental studies (RES) and strategic environmental studies (SES) are the cornerstone of every cumulative effects analysis. The status of a place must be established beforehand to determine in advance the actual effects of a project, which will be assessed differently depending whether the place is already in the process of exceeding a threshold of irreversibility. Should strategic environmental studies, which are designed to identify the future effects of a government policy or strategy, also be based on a detailed profile of a given situation that can be projected into the future? Since it has become clear that the analysis of individual projects cannot give government decision-makers a clear idea of the overall effects of their decisions, the advance in this field proposed in the bill is a major step toward better decision-making.

However, the proposed model relies to an excessive degree on arbitrary ministerial thinking. The minister is not required to direct that an RES be conducted on a policy or strategy of one of his or her colleagues, even if that strategy or policy would clearly have effects on biodiversity or GHG emissions levels, which should affect tax policy first of all. A minister has the same discretion regarding an SES that the public may demand but that the minister may also deny, although he or she will have to justify that decision. A basic rule should be instituted to clarify that any government policy, plan or program likely to have effects on the environment should undergo an RES. SESes should also be made mandatory, at least when requested by a province, given the importance of such a request, and for all public requests where there is a possibility that thresholds of irreversibility are being exceeded, whether they concern plant or animal species or even rare ecosystems, the objective being to apply the principles of prevention, and indeed precaution, in a rigorous manner.

We must establish rules here that trigger this type of in-depth review, which is universally viewed as necessary. Leaving the decision whether to implement these initiatives to an expert panel may stimulate thinking but not necessarily action, as may be seen in the protection of certain species at risk, where government in some instances takes a long time to implement the recommendations of those experts.

Clear rules should also be established on public consultation in this area. The studies conducted, either RESes or SESes, should be subject to advance public consultation regarding their objectives. Local knowledge, indigenous or otherwise, as well as the opinions of experts, should serve as a basis for guiding studies on the status of a region. Similarly, the public should be asked which issues the SES should analyze before the studies for which the initiator of a government policy or strategy will be responsible begin. It is natural for a policy initiator or project initiator to outline the benefits of that policy or project as well as its negative effects. This kind of consultation, conducted before scientific studies are carried out and analyzed by the initiator, should be the responsibility of an authority that is as independent as the panel ultimately responsible for consulting the public and reporting to government. Furthermore, a pre-consultation conducted before the directive dictating the content of the impact study of a major project is established should not always be limited to a consultation involving briefs or electronic consultation. The exchange of ideas and the collective learning process that a public hearing constitutes are generally more productive, particularly because they open the door to media coverage, another form of the public's right to be involved in the issues that concern it. Public decision-makers aiming for the best possible decision should not be deprived of this more dynamic social involvement.

Lastly, it is important to agree on legal rules, which are currently lacking in the bill, stating what should be done when the cumulative effects analysis and results of an RES or SES indicate that thresholds of irreversibility are being exceeded with respect to biodiversity or that effects likely to compromise Canada's climate change commitments are foreseeable. It seems to me that the future act should compel the government not to exceed those thresholds except in a national emergency. The concept of national interest seems too broad a reason here because it has often been used to justify the consolidation of private interests, significant interests, yes, but private. No type of interest of this kind should take precedence over the eminently public interest of future generations of Canadians or over the even greater interest involved in protecting the

planet's biological capital. If ordinary Canadians are not assured that these extensive studies, and their requested involvement in them, will result in tangible solutions, the entire preventive apparatus initiated by Bill C-69 will amount to a timid opening of a door that a serious environmental protection policy will command be opened wide by the introduction of clear guidelines.

Louis-Gilles Francoeur holds a B.A. in Political Science and has completed the coursework for an M.A. in that field at the Université de Montréal. He also holds a B.A. from the University of Ottawa and an undergraduate degree in philosophy from the Université St-Paul in that same city. Mr. Francoeur began his career as a journalist with the daily *Le Droit* in 1965, subsequently joining Radio-Canada. Following a stint in the Public Service of Canada, he worked at *Le Devoir* for nearly four decades, focusing mainly on environmental journalism as an environmental reporter-columnist and on natural resources management for 30 years. Mr. Francoeur has also held the position of environmental analyst for various public affairs programs on radio and television.

In 2012, Mr. Francoeur was appointed member and Vice-President of Quebec's Bureau d'audiences publiques sur l'environnement (BAPE). He has chaired several commissions of inquiry on major projects, including the generic inquiry into the uranium industry in Quebec.

Mr. Francoeur has received many environmental awards during his career and was named to Quebec's Cercle des Phénix de l'environnement in 2000.