April 25, 2019

Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4
Email: enev@sen.parl.gc.ca

Re: The Proposed Impact Assessment Act pursuant to Bill C-69

INTRODUCTION AND OVERVIEW

I am pleased to submit this brief to the Standing Senate Committee on Energy, the Environment and Natural Resources (the Committee) as part of your review of Bill C-69 – and the proposed Impact Assessment Act (IAA) in particular.

Briefly by way of background, I began my legal career in 2007 as legal counsel at Fisheries and Oceans Canada (FOC), where for almost six years my practice focused on the habitat protection provisions of the Fisheries Act and the department's environmental assessment (EA) responsibilities under both the original Canadian Environmental Assessment Act (CEAA) and the current Canadian Environmental Assessment Act, 2012 (CEAA, 2012). I joined the Faculty of Law at the University of Calgary in the summer of 2013, where my research and writing continues to focus on the federal environmental law regime, including EA, environmental monitoring, and adaptive management. I hold bachelor degrees in biology and law from the University of Saskatchewan, and a master of laws degree from the University of California at Berkeley.

Much has been said and written about Bill C69. In addition to this brief, I myself have written or co-written the following articles/blogs since Bill C-69 was passed in the House of Commons:


My own contributions have been spurred less by a desire to defend the Bill and more to simply set the record straight. That is the spirit that animated my remarks to the Committee on April 9, 2019 and that is at the core of this brief, which is organized as follows:

I. THE NATURE OF IMPACT ASSESSMENT
II. PAST, PRESENT, AND FUTURE OF CANADA’S ASSESSMENT REGIME
III. PRIVATIVE CLAUSES
IV. CONSIDERING ADVERSE EFFECTS
V. CONCLUDING REMARKS

I. THE NATURE OF IMPACT ASSESSMENT

As I indicated in my appearance before the Committee, it is important to always bear in mind the fundamental nature of Canada’s assessment regime, whether past, present, or future. Impact assessment is primarily about process – not substance. Substantive requirements may be found in related legislation (e.g., the *Metal and Diamond Mining Effluent Regulations* pursuant to the federal *Fisheries Act*), but environmental or impact assessment laws in and of themselves do not impose any – and this includes the IAA’s references to sustainability and climate change. The IAA merely requires the identification and consideration of such effects in decision-making, which decisions are then subject to political or democratic accountability. For example, one project may be considered as contributing to Canada achieving its climate change commitments while another project hindering them. In the end, either one or both may ultimately be deemed to be in the public interest. I make this point here because it is difficult, if not impossible, to square with opponents’ claims that Bill C-69 represents a “no pipelines bill” or a “no offshore oil bill”. If these projects are considered to be in the public interest, as their proponents’ claim, there is no basis for claiming that they cannot or will not proceed.

II. PAST, PRESENT, AND FUTURE OF CANADA’S ASSESSMENT REGIME

It is also important for the Committee to situate the IAA in its historical context – especially in light of alarmist claims with respect to the Bill’s potential impact on the natural resources sector (broadly defined). As Figure 1 illustrates, between 1995 and 2012 the federal government was carrying out several thousand EAs annually with no apparent adverse effects on economic growth.\(^1\) It now carries out roughly 70 per year, *i.e.* a 98% reduction.\(^2\)

**Figure 1: Environmental assessments burden under CEAA and CEAA, 2012**

---

\(^1\) See also [https://theconversation.com/cooling-the-rhetoric-on-canadas-environmental-assessment-efforts-113539](https://theconversation.com/cooling-the-rhetoric-on-canadas-environmental-assessment-efforts-113539)

\(^2\) During my appearance before the Committee on April 9, I indicated to Senator Carignan that I was in the process of analysing the economic impact of the roughly 70 projects currently undergoing federal assessment throughout Canada. Unfortunately, due to incompleteness and considerable inconsistency in the information provided with respect to each project on the CEAA Registry, this analysis cannot been completed at this time.
To be sure, I am not claiming that regulatory regimes have no impact on project economics but rather that such claims should be substantiated. In what way does the IAA make resource development uneconomical as compared to a fair assessment of the status quo? To date and to the best of my knowledge, this case has not been made out by any of the Bill’s detractors. In addition, such claims should be scrutinized bearing in mind the following findings recently made by the Smart Prosperity Institute:

- Evidence shows that the costs of complying with regulations are often overestimated;
- A review of the existing literature highlights the large net benefits (benefits significantly outweighing costs) of environmental regulations in most cases. The costs of regulations are more than offset by a broad range of economic, health, greenhouse gas… and other benefits;
- Estimates of anticipated costs made prior to the regulation’s implementation have sometimes been much greater – even double, and sometimes as much as 10 times greater (or more) – than the realised costs;

Finally on this point, as a “major project” regime the current CEAA, 2012 applies to only a fraction of the resource activity being carried out in Canada (Figure 2): 2 projects in Saskatchewan, 4 in Manitoba, 7 in Alberta. These include major oil and gas, mining, and hydro projects, as well as public works (e.g. highways). While some of these are obviously important projects, such as the Trans Mountain project, so were many under the previous CEAA regime, as are many of the thousands of projects that fall exclusively within provincial regulatory regimes. Although we do not currently have a project list in front of us, it is not unreasonable to expect similar coverage, given that the IAA is also clearly a “major project” regime. All of this further undermines opponents’ dire claims with respect to Canada’s natural resources sector.

Figure 2: Projects currently undergoing federal environmental assessment

---

4 See [https://www.ceaa.gc.ca/050/evaluations/?culture=en-CA](https://www.ceaa.gc.ca/050/evaluations/?culture=en-CA)
III. PRIVATIVE CLAUSES

Several parties, including the Canadian Association of Petroleum Producers (CAPP), have proposed the inclusion of a so-called “privative clause” to shield impact assessments from judicial scrutiny except with respect to questions of jurisdiction or law. As further set out below, this idea is both bad and misguided. In order to restore trust in Canada’s assessment regime, there needs to be greater potential for judicial scrutiny of impact assessments, not less.

As a starting point, it is useful to recall why we have a separation of powers in the first place: to ensure some level of control over government, to protect against arbitrary or otherwise unreasonable exercises of power. In short, to ensure the rule of law. This is reflected in the current sub 18.1(4) of the Federal Courts Act, which lays out the grounds for judicial review:

18.1(4) The Federal Court may grant relief…if it is satisfied that the federal board, commission or other tribunal

   a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
   b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
   c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
   d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
   e) acted, or failed to act, by reason of fraud or perjured evidence; or
   f) acted in any other way that was contrary to law.

A privative clause re-arranges the conventional separation of powers by restricting the scope of judicial supervision. The privative clause being proposed would purport to limit recourse to questions of jurisdiction or law, shielding any factual determinations from independent judicial scrutiny (in contrast to subpara 18.1(4)(d), above). There are at least three reasons that the Committee should reject such a clause here.

First, it is unnecessary. Canadian courts are already instructed through administrative law doctrine to defer to the factual determinations of government agencies and departments. So
long as these determinations are “reasonable” – generally accepted as a low standard – they will not be disturbed.\(^5\)

Second, privative clauses are often ineffective: lawyers are often effective at characterizing their client’s issues as matters of law rather than fact. It also bears noting that, currently, only NEB-assessed projects are subject to a privative clause under CEAA, 2012 and yet this has not prevented their litigation (see e.g. Northern Gateway, Bigstone, Trans Mountain Expansion). A privative clause would also do nothing to shield assessments from challenges on the basis that the government failed to adequately consult Indigenous peoples whose constitutionally protected rights (i.e. section 35 of the Constitution Act, 1982) may be impacted by a proposed project.

Thirdly and finally, such a clause is being proposed on the basis of a false premise. While there is evidence to suggest that litigation with respect to resource projects is on the rise overall,\(^6\) Figure 3 shows that there is no excess of CEAA-related litigation that would justify the inclusion of a privative clause: less than 7% of projects on the CEAA registry (currently 213 projects) are litigated pursuant to that legislation. Rather, what is clear is that it is generally the more controversial projects that are being litigated – something that a privative clause is unlikely to change.

**Figure 3: Projects on the CEAA Registry being litigated pursuant to CEAA/CEAA,2012**

On the other hand, shielding proponents’ and the bureaucracy’s factual assessments from any independent scrutiny whatsoever can only perpetuate – and perhaps worsen – the current lack

---


of scientific rigor in Canada’s EA process. That the science of environmental/impact assessment needs to be more rigorous was one of the more important themes to emerge in the context of the current reform process. The federal expert panel on environmental assessment processes concluded that “stronger guidelines and standards are needed to ensure that IA processes include rigorous scientific methods.”

Alternatives to a privative clause include a direct appeal or judicial review application to the Federal Court of Appeal rather than to the Federal Court of Canada in the first instance. This would shorten the period over which litigation occurs while having less of an impact on the rigour and scope of judicial supervision.

IV. CONSIDERING ADVERSE EFFECTS

Another key theme to emerge during the law reform process was that continued reliance on “significance” as the demarcating line between sustainable and unsustainable projects was ineffective; a project with numerous moderate adverse effects may be better than a project with numerous significant adverse effects, but neither necessarily contributes to sustainability.

The IAA does away with the concept of significance as the bright-line for determining whether a project should be presumptively approved or require further justification (“justified in the circumstances” under the current CEAA, 2012 regime), replacing it with a “public interest” test that includes five mandatory criteria (s 63):

(a) the extent to which the designated project contributes to sustainability;
(b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
(c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and
(e) 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.

My concern here is with subparagraph 63(1)(b), and specifically that by abandoning any categorization of adverse effects whatsoever, it may be very difficult for members of the public to understand whether a project is one that they support or one that they do not. There are infinite ways in which “the extent to which adverse effects…are adverse” could be described, some being very clear (e.g. “severe”), with others being potentially quite opaque (e.g. “somewhat adverse”). In addition to being opaque, the absence of any clear categories could result in inconsistent approaches across impact assessment reports.

---

Consequently, I recommend that the Act explicitly set out three or four categories of adverse effects: significant, moderate, minor, and no effect. The Agency or a review panel would have to slot adverse effects into one of these categories as part of its assessment, as would the Minister and Cabinet. Alternatively, the binary concept of significant/not significant could be retained for the purpose of describing adverse effects.

V. CONCLUDING REMARKS

By way of conclusion, I make the following two observations. The first is the dearth of empirical evidence informing not only this Committee’s review but really this entire law reform process since its inception in 2016. Expert and public opinion are obviously important but they are not a substitute for facts. This applies equally to environmental considerations as it does to economic ones (already discussed above). It is puzzling to me, for example, that the Committee never expressed any real interest in knowing about, let alone understanding, the potential environmental effects of the 2012 changes to Canada’s environmental assessment regime, and the 98% reduction in the number of assessments in particular. This omission is particularly glaring bearing in mind that the initial (and continued) framing for this reform exercise was to “restore lost protections.” Should Bill C-69 be passed and implemented, this Committee should ensure that any subsequent review of the regime includes an assessment of its actual performance, including the accuracy of impact predictions, the effectiveness of mitigation measures, and its suitability for managing cumulative effects on areas of federal jurisdiction.

Second, and as alluded to at the outset of my brief, it is difficult for me to overstate the level of misinformation generated and disseminated in relation to Bill C-69 after it was passed in the House of Commons in June of 2018. While polls indicate that Canadians are largely unaware or supportive of the proposed regime, I remain concerned that many of those opposed, including in my home province of Alberta, do not have an accurate understanding of the proposed regime. I therefore urge the Committee to include, as part of its report, a plain language overview of the legislation and what it does – and does not – do.

Thank you for your time and consideration.

Martin Z. Olszynski

---

9 As set out in the Liberal Party’s 2015 election campaign; see https://www.liberal.ca/realchange/environmental-assessments/
10 See https://abacusdata.ca/bill-c-69-is-not-a-highly-controversial-national-issue/