Progressive Contractors Association of Canada

Submission to the

Standing Senate Committee on Energy, the Environment and Natural Resources

Re: 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

April 11, 2018

office 780 466 3819
fax 780 466 5410
1024 Parsons Road SW
Edmonton, Alberta
T6X 0J4

www.pcac.ca
Hon. Rosa Galvez  
Chair  
Standing Committee on Energy, the Environment and Natural Resources  
Senate of Canada  
Ottawa, ON  
K1A 0A4  
Email: rosa.galvez@sen.parl.gc.ca

Re. C-69

Dear Senator Galvez,

I wish to submit the following comments to the Standing Committee on behalf of the Progressive Contractors Association of Canada.

The Progressive Contractors Association of Canada (PCA) represents almost 100 companies who employ more than 25,000 skilled construction workers and are leaders in industrial, commercial, institutional and heavy civil construction and maintenance. PCA members are the builders of Canada's natural resource industries, roads and bridges, pipelines, water and wastewater treatment facilities, schools, hospitals and the commercial buildings that form the backbone of our economy.

Our members’ employees work hard to build our communities, supporting the national and local economies while also providing for their families. We live in our local communities. We want a clean environment supported by sustainable economic development. We want fairness for Indigenous people (many of whom we represent). But our workers need jobs, and jobs come from projects; projects require investment; and investment comes from companies who have confidence that government processes for project assessment and approval will be fair, timely, transparent and predictable.

To this extent, we support the purpose of Bill C-69 (the bill) as stated in the bill’s preamble. In particular, we concur that an impact and regulatory system should inspire trust and safeguard the environment, health and safety; that it should further reconciliation with Indigenous peoples; that it should be characterized by transparent process, early engagement and inclusive participation and result in wide social benefit. In particular, we note the following paragraph from the bill’s preamble:

...the Government of Canada is committed to enhancing Canada’s global competitiveness by building a system that enables decisions to be made in a predictable and timely manner, providing certainty for investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs for Canadians.

Our employers and workers could not ask for more.
Unfortunately, the bill as written will fail to achieve many of these objectives. Indeed, in many ways it will almost certainly achieve the opposite. The impact assessment process will be lengthy and unpredictable, with subjective standards and increased opportunities for politically motivated intervention and dilatory litigation. The PCA echoes the concerns already expressed by many other witnesses that the bill will provide great uncertainty for investors and shareholders, will discourage innovation and investment and will reduce job opportunities for Canadians across the country but especially in Western Canada. As the C.D. Howe Institute notes, the investment climate for resource projects is already grim: the amount of planned investment in major resource-related projects in Canada declined by $100 billion between 2017 and 2018. Passage of Bill C-69 in its present form will make a challenging situation worse, driving out even more projects and even more jobs.

Ensure Timely Decisions

Reasonable and predictable timelines for approval are essential prerequisites for attracting capital intensive investments. The bill adopts fixed timelines: 180 days for the planning phase, 300 days for an impact assessment and 600 days for review panel assessments. However, at least two significant dangers make realizing these timelines very optimistic.

First, the bill gives significant discretion to the Minister and to the Governor in Council (that is, the federal Cabinet) to extend or suspend time limits at various points in the process. In fact, there are 27 such provisions in the bill. Generally, the minister may extend a time limit once; however, Cabinet may extend the time limit “any number of times” (e.g. s. 18(4)).

Second, the bill significantly increases the likelihood of litigation which will bog down projects in the courts and cause significant delay. Take, for example, the 20 subsections set out in section 23 which the Impact Assessment Agency or a review panel “must take into account” in considering a project. The first of these is: “changes to the environment or to health, social or economic conditions.” Note, however, that section 2 defines “environment” as “the components of the Earth” including (a) “land, water and air,” (b) “all organic and inorganic matter and living organisms, and (c) “the interacting natural systems” that include (a) and (b). But this is in no way limited to Canada. So in the single word “environment” the bill introduces almost limitless considerations.

Similar questions of scope and definition arise throughout the bill. What exactly is meant by “sustainability” or by “the intersection of sex and gender with other identity factors”? The preamble to Part 1 of the bill affirms the government’s commitment to implement the United Nations Declaration on Indigenous Peoples; so when UNDRIP declares an Indigenous right to “free, prior and informed consent,” what does that mean in the Canadian context? This is Disneyworld for lawyers. And frankly, if an interest group opposed to a pipeline cannot find some way under this bill to use litigation as a delay tactic, then they aren’t trying.


Whatever the regulator decides on these issues will end up being tested in court.

Ironically, while opening up avenues for legal challenge on a multitude of new fronts, the bill does nothing to address the one issue where court challenges against the current assessment process have tended to be successful: the question of what constitutes adequate consultation and accommodation of Indigenous people. The CEAA assessment regime has generally held up well in litigation. The three projects quashed by courts since 2012—Seismic testing in Baffin Bay and Davis Strait, Northern Gateway and Trans Mountain Pipeline—have all involved the duty to consult as opposed to the content of the environmental assessment only. Yet the bill provides no new process for meeting the court determined obligation for consultation. So this too will continue to be worked out through litigation.

Recommendations:

- Where possible add definitions to clarify the meaning of terms, e.g. “sustainability” in order to reduce (if not eliminate) the likelihood of court challenge;
- Reduce the Minister’s discretion to extend time limits by requiring that she give written justification to the proponent.

Promote Regulatory Certainty

In addition to timing, there are many other ways in which the bill reduces regulatory certainty and predictability.

Loss of Assessment Jurisprudence

Established in 1959, the National Energy Board (NEB) is a court of record with responsibility for regulating pipelines, energy development and trade across the entire life-cycle of projects, and is recognized internationally for its regulatory expertise. By repealing the National Energy Board Act and replacing the NEB with the new Canadian Energy Regulator, the accumulated jurisprudence associated with decades of NEB decisions will be lost. The meaning of all the new terminology and processes established in the bill will need to be tested in court, inviting expensive and time-consuming litigation.

Recommendation:

- Introduce legislative improvements to bring features of the bill into the National Energy Board Act rather than creating a new Canadian Energy Regulator.

Standing: the bill does away with the requirement that participants have standing on the issue. Participation in assessments is no longer limited to “interested parties” as in the CEAA. Instead, C-69 mandates meaningful public participation but imposes no test to determine limits. Therefore, could become debate about broad public policy questions or swamped with politically motivated interventions from individuals and groups with only an ideological interest in the project. Further, demands from

---

3 Bishop and Sprague, 21-22.
intervenors to make in person submissions has the potential to significantly increase the length of hearings.

Recommendation:
• Limit the right to participate in hearings to “interested parties.”
• Explicitly stipulate that the regulator has the right to conclusively determine the manner in which intervenors will be permitted to participate (e.g. in person appearance, written submission, etc).

No more one-stop shopping

One of the great benefits of CEAA (2012) is that it minimizes duplication of regulatory assessment. If the Minister believes that an environmental assessment conducted by any other province or agency is an “appropriate substitute,” then the Minister must approve the substitution of that process for the federal assessment. C-69 maintains the ability for the Minister to substitute another process for a federal assessment. However, this is a hollow provision since the bill states at s. 33(1)(a) that another process can only be substituted if it includes consideration of the 20 subsections listed in s. 22(1). While it is possible that someday another process will mandate this entire list of considerations, that will not happen in the near future. This is another blow against efficiency and in favour of duplication and delay.

Recommendation:
• Reinstate the obligation on the Minister to approve an “appropriate substitute” process, without reference to subsection 22(1).

Political Discretion instead of Independent Decision-Making

Instead of empowering an independent regulator who can make objective decisions based on evidence, the bill gives significant discretionary power to the Minister of the Environment and to the federal cabinet. For example:

• The Minister may unilaterally designate any project for assessment because it may cause “adverse effects” or because of “public concerns” (s. 9(1));
• If, before the end of the planning stage, the Minister decides that a project has “unacceptable environmental effects,” then the Minister may simply veto further consideration of the project (s. 17(1));

In this way the bill empowers the Minister, a single political actor with a political agenda, to make decisions on the fate of projects based on his or her own opinion or public opinion. This does not promote certainty and confidence in the objectivity of the process.

One of the most problematic innovations relates to the new “public interest” test (s. 63). Currently assessments must determine whether a project has the likelihood of “significant adverse environmental consequences.” Bill C-69 is much broader, stipulating that any adverse effects, not just significant ones, will require a “public interest” assessment. In other words, any amount of adverse effect to the environment or
to health, social or economic conditions (as defined in s. 2) is grounds for denying the project. This assessment will not be made by the regulator, but by the Minister or the Cabinet who must consider the five factors set out in s. 63. These include the extent to which the project contributes to sustainability as well as Canada’s environmental obligations and climate change commitments. How, exactly, should sustainability be understood? And how should environmental obligations and climate change commitments be considered when they are so often aspirational, politically motivated and subject to change? In its submission, the Canadian Bar Association (CBA) observed that “the contextual application” of these factors “appears elusive” since there are no thresholds for weighing “adverse” impacts or any objective measurement for how these factors impact the public interest. The CBA uses the following words to describe this situation: “subjective,” “discretion,” “uncertainty and inconsistency.”

Alarmingly, combining a high level of ministerial and cabinet discretion with a subjective public interest test at the very end of the process means a high potential for politicization of assessments. Instead of the government determining its broad policy framework at the beginning of the process and allowing proponents to develop projects within the policy framework, this bill does the opposite. After proponents have invested significant time, effort and money into advancing a proposal, the bill leaves ministers to judge projects at the end based on their policy and political assessment. This effectively means leaving ministers to decide broad questions of public policy such as environmental obligations and climate change commitments at the very end of the process. This could not be further removed from the commitment to enhancing competitiveness and increasing investor confidence affirmed in the preamble.

At the very least, the Impact Assessment Agency needs to be given the powers of an independent quasi-judicial agency separate from the Ministry of the Environment. Further, the agency should be given the ability to make recommendations on projects and not just to submit an assessment report to the Minister. As Martha Hall Findlay and Maria Orenstein, believe that “a clear recommendation [from the agency] is important, not least because it is more difficult to override politically.”

Recommendation:

- Reinstate the “significant adverse impact” test for determining the public interest;
- Make the regulatory agency an independent, quasi-judicial agency with power to make project recommendations and not just assessments.

Conclusion

In its submission the Canadian Energy Pipeline Association issued a *cri de coeur*:

It is difficult to imagine that a new major pipeline could be built in Canada under the Impact Assessment Act. We are concerned that the government has effectively frustrated Regulatory

---


5 Hall Findlay and Orenstein, 15.
Reform in order to advance their climate change agenda and has baked broad policy subject matters into an otherwise technical decision-making process.\(^6\)

Our members share this sense of frustration and discouragement. We are very concerned at the impact that these changes will have on investment, economic development, productivity and, ultimately, employment. While we have no illusions that our recommendations will fix the many problems, we hope that they would help to mitigate some of the significant adverse effects of the legislation on the Canadian economic environment. We offer them for your consideration.

Sincerely,

Paul de Jong  
President, Progressive Contractors Association of Canada (PCA)  
Edmonton, Alberta
