PRESENTATION TO THE STANDING SENATE COMMITTEE ON ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES

SUPPLEMENTARY EVIDENCE

REGARDING

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

PRESENTED BY

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Calgary, Alberta

Introduction

Unfortunately, some of the time made available to our joint panel in its presentation to the Committee on April 4, 2019 was compromised by certain decisions and events that were out of our control. On April 9, 2019, in response to a request from our panel to re-appear before the Senate Standing Committee, we were informed that the Members of the Subcommittee on Agenda and Procedure had declined our request for a re-appearance. However, the Committee allowed our panel to submit additional evidence in writing.

Hence, this Supplementary Evidence is intended to accompany our more detailed written brief delivered to the Committee on April 4, 2019. This Supplementary Evidence is presented jointly on behalf of Mr. Rowland Harrison, Q.C., Mr. Dennis McConaghy and Ron Wallace, Ph.D.

We hereby submit these replies to questions raised at the Senate Committee hearing for further information and elaboration of the Committee.

Replies

- In response to questions on the validity of the contention that the NEB has lost the "trust and confidence" of the Canadian people thereby legitimizing the entire *Bill C-69* initiative:

    - No objective adjudication was ever made to validate that contention.

    - The opposition of the Canadian ENGO movement towards the NEB for having approved Northern Gateway and TransMountain pipeline proposals, notwithstanding multiple conditions, were arguably directly appropriated by the Trudeau government. This assumption led to the commitment in the 2015 Liberal policy position to transform the Canadian regulatory system.

    - Evidence put forward in the NEB Modernization Panel Review carried out in 2017 stands at odds with this basic unsubstantiated contention.

    - It is noteworthy that Ministers are generally obliged to take into account the polls referred to by Senator Mitchell. Polls often reflect public sentiments that influence how governments make policies. Independent regulators, and judicial appointees, are established to provide a deliberate separation of powers in determinations of national interest or of the law – free from external influence. *Bill C-69* will effectively deliver the regulatory system back into the hands of politicians who chiefly make determinations driven by political, or ideological, interests.

- At the committee hearing, Senator Mitchell took exception to our proposition that *Bill C-69* is so fundamentally flawed that only by standing down on the legislation and restarting efforts to redesign it would it be possible to enter into a genuine process of effective regulatory reform. We would add some additional points to our discussion at the Committee hearing:

    - No regulatory process can work if necessary and sufficient policy clarifications do not currently exist. A regulatory approval system cannot be the forum for policy formulation. The onus must be on governments to provide that sufficient policy clarification.

    - The question of future growth in the Canadian hydrocarbon industry has become a visceral question. Definitions of the broad Canadian public interest should be set by our elected politicians. *Bill C-69* would have each proposal for hydrocarbon pipeline infrastructure become an open ended exploration of climate tests and other special considerations from sustainability, ranging from gender issues through to aboriginal grievances.

    - The Canadian federal government should clarify if hydrocarbon production growth is fundamentally in the public interest, or not. If not, then the federal government should be explicit and accept the social and economic consequences. If the converse is true then the government should first clarify how, if at all, it is to be constrained by other government policies, ranging from climate to UNDRIP.

    - If such clarification were provided, then regulators could discharge their basic function to set appropriate conditions on the construction and operation of infrastructure whose alignment with the public interest would already have been determined. *The resolution of policy issues should not, indeed cannot, be delegated to Regulators.*

    - The fundamental flaw of *Bill C-69* is that it does not eliminate political considerations from the regulatory process, but perpetuates the dysfunctional elements of the current regulatory system. This is disheartening because it is clear that the architects of *Bill C-69* have designed legislation that compounds previous difficulties while introducing factors that have no place in a regulatory process.

    - We judge *Bill C-69* to be, quite simply, unworkable. If, in the case of major pipeline applications, the legislation does not provide a clear regulatory ‘roadmap’ in which an applicant could proceed with any certainty to a Certificate of Public Convenience and Necessity (CPCN).

- Senator Mitchell apparently interpreted our joint position as being an argument to maintain the "status quo" on Canadian energy regulation. *We submit that it would be erroneous to conflate our concerns about Bill C-69 with any position that would abandon attempts at better regulation.* The Senator also debated our interpretation of s. 17(1) of the proposed Act. In reply, we took pains to argue that what s. 17(1) does *not do* is to provide an early policy statement that a project is in the public interest. Such a course of action would have the effect to remove political concerns from the regulatory process.

- We took pains to draw the attention of Senator Mitchell to the economic consequences that were unfolding due, at least in part, to this government's approaches to energy policy and regulation. We also emphasized our concerns that *Bill C-69* would leave decision-making to the sole discretion of the Minister of Environment and/or Cabinet so that final regulatory approvals would only occur, in the absence of policy direction, at the end of costly, lengthy hearings and reviews:

    - *"In 2018 alone, 37 projects, as reported by the C.D. Howe Institute, with an investment value of $77 billion, were cancelled in Canada. Planned energy sector investment dropped by $100 billion, a figure that represents about 4.5 per cent of the Canadian GDP."*

    - *Hansard, February 14, 2018: The Minister of ECCC is quoted as saying:*
      "The final decision on major projects <u>will rest with me</u> or with the federal cabinet, because our government is ultimately accountable to Canadians for the decisions we make in the national interest."

Thank you for the invitation to submit this supplementary information to complete our testimony to the Committee.

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