April 1, 2015

Environmental Damages under Bill C-46 (Pipeline Safety Act)

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Legislation Commented On: *Bill C-46: An Act to Amend the National Energy Board Act and the Canada Oil and Gas Operations Act*

Yesterday, I had the opportunity to appear before the House of Commons Standing Committee on Natural Resources in the context of its study of Bill C-46, referred to as the *Pipeline Safety Act*, which amends the *National Energy Board Act,* RSC 1985 c N-7 and the *Canada Oil and Gas Operations Act,* RSC 1985 c 0-7. Below are my speaking notes in slightly modified form. Interested readers are also referred to the Library of Parliament's *Legislative Summary of Bill C-46*; you will also find commentary on the Bill here and here.

INTRODUCTION

Thank you Mr. Chair and members of the Committee. The focus of my presentation today is on what are commonly referred to as the "environmental damages" provisions of Bill C-46. My comments are divided into three parts. I will begin with a brief primer with respect to environmental damages: what they are and how they are assessed. I will then describe their role and treatment under Bill C-46. Finally, I make two recommendations for improvement.

I. A PRIMER ON ENVIRONMENTAL DAMAGES AND THEIR ASSESSMENT

Most simply, "environmental damages" can be understood as the financial compensation awarded for the loss or impairment of some public environmental asset and the services that it provides, *e.g.* a tract of forest (as in the Supreme Court of Canada's decision in *Canadian Forest Products v. British Columbia*, [2004] 2 SCR 74, which opened the door for governments to sue for such damages) or a coastal area (such as Prince William Sound following the *Exxon Valdez* oil spill, or the Gulf of Mexico following the *Deepwater Horizon* blowout).

Environmental and resource economists divide such harms into the loss of two kinds of values: "use value" and "non-use value." Referring to an Environment Canada (EC) publication, the Library of Parliament's *Legislative Summary of Bill C-46* defines these as follows (p 23, footnote 17):

> Use values are associated with direct use of the environment such as fishing and swimming in a lake, hiking in a forest – or commercial uses such as logging or farming. Non-use values are related to the knowledge of the continued existence

> of the environment…or the need to leave environmental resources to future generations.

As Committee members might imagine, environmental damages assessment (EDA) can be a complex and difficult task. Various scientific disciplines (*e.g.* ecology, toxicology, hydrology) are applied to first determine the extent of harm done, while economics, and the techniques of environmental valuation in particular, are then used to convert this harm into monetary terms.

II. ENVIRONMENTAL DAMAGES UNDER BILL C-46

There are actually two different roles for environmental damages within Bill C-46: they play a role in sentencing and in civil liability. As to sentencing, where an operator commits an *offence* under the *NEB Act*, the new section 132 (clause 37, pp 35-36) directs a sentencing judge to consider the "damage or risk of damage to the environment," which subsection 132(4) defines as including "the loss of use value and non-use value." Through this amendment, the *NEB Act* joins the ranks of ten other federal environmental laws with similar sentencing provisions. Although light on details, this wording has the benefit of being both simple and comprehensive.

The other environmental damages provisions, which are decidedly more opaque, are found in the context of civil liability. New subsection 48.12(1) (clause 16, pp 6 – 7) refers to three heads of damages for spills:

> (a) all actual loss or damage incurred by any person as a result of [a spill] …
> (b) the costs and expenses incurred [for clean up];
> *(c)* all *loss of non-use value relating to a public resource* that is affected by the release…

In other words, "environmental damages" are not actually referred to in this part of the Bill. Rather, their availability – at least partially – is implied by the reference in subpara (c) to "all loss of *non-use values relating to a public resource*." Use values are not explicitly referred to, although as I will explain some of these could be caught by subpara (a). Two other relevant provisions are subs 48.12(9) and subs 48.13(5). The former states that only federal and provincial governments may sue for the loss of non-use values. The latter states that the NEB is not required to consider the potential loss of non-use values when determining the financial resources operators will be required to maintain for the purposes of absolute liability.

III. RECOMMENDATIONS

My first recommendation is that the third category of loss under civil liability be amended to refer simply to "environmental damages" (*e.g.* "<u>all environmental damages resulting from</u> the release…"), coupled with an additional subsection defining "environmental damages" as defined in the sentencing provisions. This would not only simplify this section and ensure its comprehensiveness, it is also necessary to correct what appears to be an error in the current Bill.

As the Committee is probably aware, the wording for this provision was borrowed almost *verbatim* from Bill C-22 (the *Energy Safety and Security Act* (*ESSA*)), which amended the *Canada Oil and Gas Operations Act* along similar lines. That legislation, however, already had some spill-related provisions, and a definition of "actual loss or damage" in particular: "includes loss of income, including future income, and, with respect to any Aboriginal peoples of Canada, includes loss of hunting, fishing and gathering opportunities" (subsection 24(3)). On my reading

of Bill C-46 this definition, which admittedly would capture *some* use values, has not been brought over to the *NEB Act*. Even if this definition were to be brought over, however, I submit that there would still be a significant gap. I can provide some examples after my presentation if the Committee is interested.

My second recommendation is that the Governor in Council should be required within a certain time frame – or at least authorized – to make regulations setting out a process for EDA. Further, reliance on this process should result in a rebuttable presumption of validity in any action for such damages, whether in court or before the Pipelines Claim Tribunal (established in another part of the Bill). My reasons for this recommendation are as follows.

First, and as noted above, EDA is a difficult and complex exercise; regulations would bring certainty to all parties and reduce needless litigation costs around the assessment and quantification of environmental harm. It is for these very reasons that the equivalent American legislation, the *Comprehensive Environmental Response, Compensation, and Liability Act* (*CERCLA)* and the *Oil Pollution Act*, contain such provisions and that processes have been prescribed for what is there referred to as Natural Resources Damages Assessment (NRDA). Simply put, such regulations represent the "gold standard" in this context.

My second reason tracks the preventative spirit of the Bill. As I noted previously, there are now ten federal laws with some kind of environmental damages provisions, and it has been ten years since governments can sue for such damages at common law. And yet, I am not aware of a single case where the federal Crown has actually sought to do so. Perhaps some future government witnesses could shed light on this state of affairs. Whatever the case, this reality greatly undermines the deterrent effect that statutory liability regimes like that found in Bill C-46 are intended to create. The making of regulations, which ideally would be made applicable to all federal EDA regimes, should go some way in remedying this.

Thank you for your time.