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Your Concerns Have Been Noted: Citizen Participation in Pipeline Regulatory Processes Under the Proposed *Impact Assessment Act*

By: Kristen van de Biezenbos

Bill Commented On: [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*

This post continues the [Natural Resources, Energy, and Environmental Law](#) group's series on the proposed legislative changes in Bill C-69 by examining the provisions pertaining to citizen participation in the pipeline review processes outlined in the *Impact Assessment Act (IAA)* and comparing them to the existing provisions in the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#), (*CEAA, 2012*). This post also considers whether the proposed provisions put forth in the *IAA* effectively address some of the concerns raised about the lack of meaningful citizen participation in pipeline review processes under the existing regime.

In 1969, urban planner Sherry Arnstein considered how ordinary citizens, or “have nots”, can achieve political power through participation in land use projects. In her influential piece, “A Ladder of Citizen Participation”, Arnstein examined different levels of citizen participation and their corresponding impacts on land use regulations and created a typology of process—her “ladder” (Sherry Arnstein, “A Ladder of Citizen Participation” (1969) 35 *J of the Am Planning Ass'n* 216). At the bottom of the ladder is non-participation, which is appropriate when the goal is to win citizen support for a project through public relations or some other indirect means. At the top of the ladder is full participation of citizens in decision-making, which can result in citizens either acting as partners or taking full control of project planning. The middle rungs of the ladder are measures like information and consultation, which Arnstein refers to as tokenism. While such measures may ensure that citizen voices are heard, they don't always ensure that citizen concerns will be actually be addressed.

How does citizen participation factor into interprovincial and international oil and gas pipeline decisions? People who live near these projects may believe that they are being asked to bear the burdens of potential oil spills or gas leaks while receiving little or no benefit. Participation is one way to address this perceived imbalance. Although regulators are not always able to give participants precisely what they ask for, by knowing and understanding citizen concerns about a project, regulators and reviewing panels are able to include measures to address these concerns in their recommendations. But including citizens in regulatory processes can be tricky, as the regulator must decide who may participate and what the level of participation should be to effectively distribute costs and benefits—or, in many cases, whether the concerns of citizens can be addressed through some kind of compensation, monetary or otherwise. To the extent that regulators and members of specific hearing panels might like to use participatory processes in a

way that lines up with Arnstein’s vision—that is, as a way to distribute costs and benefits of pipeline projects more equitably—the sheer number of people who might like to participate in the hearings, the time in which the regulators must make their decisions, and the number of other factors that must be considered often make it difficult to really make participation in these processes “meaningful.”

The purpose of this post is not to consider the legal and political theories on the importance of citizen participation in depth (for that, I would recommend my colleague Al Lucas’ chapter in Barrera-Hernandez et al, eds, *Sharing the Costs and Benefits of Energy and Resource Activity*, (Oxford University Press, 2016) 339), but rather to compare the provisions on citizen participation in the *CEAA, 2012* with the proposed provisions in the *IAA* and to contemplate whether the changes in the latter suggest that the government is trying to give more power over pipeline-related decisions to citizens (or not). This post does not address Indigenous participation or engagement (covered in David Wright’s [ABlawg post](#)).

Community Participation Under *CEAA, 2012*

One of the stated purposes of the *CEAA, 2012* is to provide for “meaningful” public participation. Under s 24 of the *CEAA, 2012*, when review panels or the National Energy Board (NEB) consider pipeline proposals, they are tasked with “ensur[ing] that the public is provided with an opportunity to participate in the environmental assessment”. Citizen participation appears again among the factors to be considered in carrying out an environmental assessment. For most reviews, the factor to be considered is “comments from the public”. However, in the case of hearings undertaken by the NEB, the factor is “comments...from any interested party” (s 19(1)(c) of the *CEAA, 2012*; this term also appears in s 55.2 of the *National Energy Board Act, RSC 1985, c N-7 (NEBA)*).

“Interested party” is defined as a person who is “directly affected by the project” or “has relevant information or expertise” (*CEAA, 2012*, s 2(2)). The requirements of either “direct affect” or “information or expertise” certainly include the pipeline company proposing the project, and probably the landowners whose property is within the proposed pipeline route, but it leaves out quite a lot of people who nevertheless feel that they will be impacted by the project in some material way. Ultimately, this ambiguity created a standing problem that led to litigation. In *Forest Ethics Advocacy Association v National Energy Board*, [2014 FCA 245 \(CanLII\)](#), the Federal Court of Appeal made it clear that when the NEB determines that a citizen does not qualify as an interested party, that decision will generally be upheld under the reasonableness standard. In the (perhaps somewhat dismissive) words of Justice Stratas, “Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board’s task of regulating the construction and operation of oil and gas pipelines” (at para 76).

Still, the standing requirements for participation in NEB hearings have been [criticized](#) for violating citizens’ right to free expression (this argument was also raised in *Forest Ethics*, but it wasn’t considered, as the petitioners did not raise it in a timely fashion) and unfairly allowing the NEB to exclude certain viewpoints. These arguments may be particularly compelling for citizens whose concerns relate to climate change or other environmental issues that are beyond the

physical footprint of the pipeline. Although excluding these concerns was consistent with the position of the NEB panel and the Federal Court of Appeal in *Forest Ethics* that such considerations are outside the scope of the regulator's mandate (though the NEB panel assembled for the proposed Energy East project did propose looking at these issues), this limited scope of citizen participation before the NEB has [been interpreted by some](#) as one more signal that the law favours economics above environmental concerns. On the other hand, the requirement that persons appearing before the NEB fit the agency's definition of "interested party" is *intended* to exclude the general public—and arguably for good reason. Pipelines have become highly political, and inviting anyone and everyone to regulatory hearings on the projects can reasonably be expected to create delays while offering no real benefit to the people who are bearing the more direct burdens of the proposed pipeline project.

It should be noted that members of the general public are still permitted to comment on pipeline proposals under the *CEAA, 2012*, but they aren't permitted to be part of the NEB hearings. This likely puts broad citizen participation somewhere in the "manipulation" rungs of Arnstein's ladder, since five minutes at a microphone is barely participation at all. This might be the right place for "come one, come all" participation, since so many people giving their views undermines the ability of participation to create meaningful impacts, as benefits can't possibly be provided to every member of the public by a reviewing panel, nor does every member of the public bear the burden. Arguably, the larger problem with citizen participation under the *CEAA, 2012* is that even the participation process for "interested persons" permitted to speak at NEB hearings is still in the "tokenism" category of Arnstein's ladder, where participation is taking place but panel members are not really sure what to do with the concerns they are hearing about. As a result, project recommendations are not being effectively conditioned or modified by participation.

Still, "interested persons" are in a higher participation category than the general public under the *CEAA, 2012*, and there was hope that Bill C-69 might do more to ensure that participation could, where possible, have an impact on pipeline review processes for this group. But the proposed provisions of the *IAA* seem to be swinging the pendulum too far in the opposite direction.

Community Participation Under the IAA

The first mention of citizen participation in the *IAA* appears in s 6(1)(h), which states that one of the purposes of the legislation is, among other things, to ensure "for public participation during an impact assessment." Under the *IAA*, reviews of pipeline projects are to be undertaken either by the new Impact Assessment Agency (the "Agency") or by independent review panels of at least three people, one of whom will be a CER commissioner, not by the new Canadian Energy Regulator (*CER*) (see *IAA* ss 47(3), 50(c)). During the planning phase, the Agency is tasked with ensuring public participation, including inviting public input "within the period that it specifies" (see *IAA* s 11). During the hearing phase, review panels—which would be reviewing most pipeline proposals—are to ensure public participation and to consider factors including "comments made by the public" with no limitation on who might be included in "the public" (see *IAA* s 22(n)). The term "interested persons" has been removed (it also doesn't appear in the proposed *Canadian Energy Regulator Act*).

What are these changes intended to accomplish? On one hand, the government seems to have heard the complaints that the NEB's "interested persons" standing test is too narrow and exclusionary, and so it has flung open the proverbial door to anyone who wishes to participate. On the other hand, the result of opening the hearings to everyone may be that participation has slid even further down Arnstein's ladder. As previously stated, one of the purposes of citizen participation is to disburse costs and benefits to citizens who are adversely impacted by proposed projects, and although this may be giving citizen participation more distributional power than the government would subscribe to, it presumably still should be something more than just process with no substance. But if "meaningful" participation is the goal, the processes for facilitating that participation should be designed to allow for the project to be modified or to be carried out under certain terms and conditions that are responsive to the concerns of these citizens. While it will be up to the regulators and review panels to create these participation processes to include any member of the public under the *IAA*, it's hard to see how they can be both effective and equally accessible to any person who wishes to be heard.

One possibility might be to create a two-pronged approach, wherein citizens meeting some version of the NEB's "interested persons" parameters are given one avenue of participation and members of the general public have another. This might provide the hearing panel with the ability to distinguish between citizens' concerns that might be mitigated or otherwise addressed in its recommendations and concerns that are more general, regional, or nationwide. As Nigel Bankes has [pointed out](#), when panels are considering designated pipeline projects, they must prepare two reports: one report carrying out their responsibilities under the *IAA*, which can include consideration of some aspects of climate change; and a second report carrying out their duties under the *Canadian Energy Regulator Act*, which is silent on climate change. A two-pronged approach might thus work well for the purpose of preparing the two reports.

But it begs the question of what a panel is supposed to do with citizen comments that pertain to climate change. The proposed participation provisions in the *IAA* mean that a panel may end up spending a considerable amount of time listening to citizens' concerns on climate change, but how are those concerns translated into terms and conditions of a recommendation? It's possible that they might be factored into a consideration of whether the project is ultimately in the public interest, but this runs the risk of turning citizen participation into a veto—and it seems very unlikely that that the *IAA* is intended to give citizens a veto over pipeline projects. Of course, the most likely result under the *IAA* is that the review panels will end up doing exactly what the NEB is doing now: running town halls where citizens speak and panel members listen...and, in many cases, don't do much else.

In summary, Bill C-69 does show that the government has heard the criticisms of the narrowness of citizen participation provisions under the *CEAA, 2012*—and those provisions could certainly use updating to make participation actually effective—but by opening up pipeline project hearings to the general public, the *IAA* may be further undermining its stated purpose of ensuring meaningful public participation. The Bill gives both the Agency and panels reviewing designated pipeline projects a tremendous amount of discretion in determining when and how members of the public are to participate and how to consider their input against other factors. It's possible that this discretion will still allow the Agency and the review panels to craft procedures that do give recognition to the different types of concerns held by people living near proposed pipelines

as opposed to those held by the public at large, but given the expansive language of the *IAA*, it's likely that establishing a standing test with no "interested persons" language to provide guidance will result in legal challenges. It would be unfortunate if the proposed citizen participation provisions of the *IAA* were truly intended to provide meaningful participation, because that does not seem to be their likely result.

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