September 25, 2018

Bill C-69's Detractors Can Blame Harper's 2012 Omnibus Overreach (Blog Edition)

By: Martin Olszynski

Legislation Commented On: *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* (Bill C-69)

Last week, Postmedia columnists Licia Corbella and Don Braid both set their sights on Bill C-69, the federal Liberal's environmental law reform bill that proposes new impact assessment legislation and the replacement of the current National Energy Board with a new Canadian Energy Regulator. Ms. Corbella claimed that Bill C-69 is "so destructive it just might be the bookend to [the] disastrous and infamous National Energy Program." Mr. Braid suggested that it poses a "grave danger" to the already beleaguered Trans Mountain pipeline and implored for the Bill to be "ritually slaughtered" by the Senate when it comes before it later this fall.

The problem is that Bill C-69 poses no such danger. In fact, the relevant transitional provision (s 182) makes clear that a project like Trans Mountain, whose assessment began under the current *Canadian Environmental Assessment Act, 2012,* SC 2012 c 19 s 52 (CEAA, 2012), would remain under that regime even if that assessment is not completed when the law comes into force. Unfortunately, almost all of Ms. Corbella and Mr. Braid's assertions about Bill C-69, as well as those of the Canada West Foundation's Martha Hall Findlay and former Conservative Party leadership candidate Rick Peterson, on which both columnists rely, do not withstand scrutiny.

Ms. Hall Findlay complains that project assessments will take longer but a comparison of the relevant provisions shows that they would be shorter (300 days versus 365 days for standard assessments; 600 days versus two years for panel reviews). Yes, there are provisions for "stopping the clock," but these are found in both the current and proposed regime. Ms. Hall Findlay also complains about "how much arbitrary political power the legislation would give to ministers and the government," and yet the current regime is even more discretionary and arbitrary. At least under the IAA, the Minister and Cabinet will have to give detailed reasons for their decisions following the consideration of certain mandatory factors.

Mr. Peterson's arguments are equally dubious. His "top ten" list of concerns begins with the fact that the legislation was introduced by the Minister of Environment and Climate Change. Anyone following this process for the past three years, which included an expert panel on the modernization of the NEB, will know that the Minister of Natural Resources and his department have been heavily involved throughout. Second on Mr. Peterson's list is the inclusion of gender and other identity analysis, the implication being that it would be crazy, for example, for government to want to know about – and perhaps even mitigate – the well-documented gendered

effects that a sudden influx of workers can have in remote northern communities. Third on his list is the idea of "added discretionary power on deciding whether a project goes ahead or not;" but, as above, Bill C-69 would actually curtail the exercise of discretion with a requirement to give reasons for project approval. Another concern is that Bill C-69 does away with the current regime's "directly affected" standing test that was intended to restrict public participation. Research by my colleague Professor Shaun Fluker, however, has found inconsistent and often generous applications of this test (*i.e.* relatively few restrictions on public participation) across several recent projects anyway. And the IAA is actually ambiguous about what form public participation will take in any given assessment.

It is also not possible to fairly assess Bill C-69 without first recognizing it as a direct response to former Prime Minister Stephen Harper's legislative overreach back in 2012. I am referring to Bill C-38, the infamous omnibus budget bill (introduced by the Minister of Finance, incidentally) that repealed the original Canadian Environmental Assessment Act (passed by Brian Mulroney's Progressive Conservative government in 1992) and replaced it with CEAA, 2012. CEAA, 2012 fundamentally altered the federal environmental assessment regime from one that assessed the effects of federal decision-making broadly to one that focuses almost exclusively on large resource projects. To give some sense of this change, nearly 3,000 environmental assessments were terminated with the coming into force of CEAA, 2012, pursuant to which roughly 65 projects have been undergoing assessment in any given year (the current number is 75). Bill C-38 also drastically reduced the scope of Canada's Fisheries Act RSC 1985 c F-14, and the protections for fish habitat in particular; my own research suggests a near total abandonment of the field (see also here). What was then called the *Navigable Waters Protection Act* was also fundamentally altered. Renamed the *Navigation Protection Act* RSC 1985, c N-22, it now applies to only a fraction of the water bodies that were subject to its pre-2012 regime. Finally, the *National Energy Board Act* RSC 1985, c N-7 (NEBA) was amended to give Cabinet, rather than the NEB, the final authority to either approve or reject pipeline projects, thereby "politicizing" the process.

All of these changes did not, of course, go unnoticed. They were met with considerable opposition by Indigenous peoples, environmental groups, scientists, and former politicians – both liberal and conservative. Ultimately, "restoring lost protections" became a key plank of the federal Liberal campaign in 2015. Having won that election, and following nearly three years of study by both parliamentary committees and expert panels, the exceedingly democratic result is Bill C-68, which proposes to restore the *Fisheries Act* to its pre-2012 *status quo*, and Bill C-69, which as noted above introduces a new Impact Assessment Act (IAA) and proposes to replace, perhaps in name more than anything, the current NEB with a Canadian Energy Regulator.

Bill C-69 is not perfect by any stretch. Fundamentally, the IAA is best characterized as a CEAA, 2012-*plus* regime. It still retains the latter's focus on major projects. Notwithstanding expert recommendations and public opinion to the contrary, the IAA still puts proponents in the driver's seat in terms of carrying out project assessments. It does add a new planning phase at the outset of the process, but even here there is precedent going back to the original CEAA. It does also add a number of factors that the government must consider before granting approval, including a project's contribution to sustainability and whether it will contribute to or hinder Canada

achieving its climate change commitments, but even these requirements are wobbly; the IAA, like all of its predecessors, does not draw an environmental – or any other – line in the sand. It merely requires the government to *identify and consider* impacts in a transparent manner. Accordingly, Minister McKenna was on solid legal ground when she said that the Trans Mountain pipeline expansion could have been approved under the proposed regime. Any project could, subject only to our politicians' assessment as to where the public interest – and vote – lies. This has long been the bargain reflected in such laws and accepted by industry, which for the most part it has served very well. Interprovincial pipelines, due to regional differences, mounting concerns about climate change, and the potential effects of spills, are one of few notable exceptions to this rule.

Ms. Hall Findlay also raises competitiveness concerns, but these too are easy to overstate – at least insofar as President Trump's deregulatory agenda is concerned. That agenda has largely been thwarted by courts insisting that the President and his agencies comply with federal procedural requirements before modifying or rescinding existing regulations. It is also curious that none of the competitiveness concerns currently being invoked, including President Trump's tax cuts, were even on the horizon back in 2012 when Canada's environmental regime was being hastily dismantled – and yet industry's role in lobbying for those changes is well-documented. It would appear that for some in industry, the best regulation is little or no regulation. The Canadian mining sector, on the other hand (which represents a significant portion of current projects being assessed under CEAA, 2012), has recently come out in support of Bill C-69.

Could Bill C-69 be improved? Absolutely. In its current form, it is debatable whether it even regains the ground lost back in 2012. Whatever the case, improvement – not ritualistic slaughter – is the proper role for what is supposed to be the chamber of sober second thought.

This post may be cited as: Martin Olszynski, "Bill C-69's Detractors Can Blame Harper's 2012 Omnibus Overreach (Blog Edition)" (September 25, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/09/Blog_MO_Bill_C_69_Sept2018.pdf