April 30, 2019

(Final?) Brief re: Bill C-69 to the Senate Committee on Energy, Environment and Natural Resources

By: Martin Olszynski

Legislation 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*

The Senate Committee on Energy, Environment, and Natural Resources (the Committee) is in the final stages of its hearings into Bill C-69, which if passed will replace the current federal environmental assessment regime pursuant to the *Canadian Environmental Assessment Act 2012*, SC 2012 c 19 s 52 (CEAA, 2012). What follows is a slightly edited version of the brief that I submitted to the Committee last week, following my appearance before it on April 9, 2019, here in Calgary.

I am pleased to submit this brief to the Committee as part of your review of Bill C-69 – and the proposed *Impact Assessment Act* (IAA) in particular. Much has been said and written about Bill C-69. In addition to this brief, I myself have written or co-written the following articles/blogs since Bill C-69 was passed in the House of Commons:

- https://ablawg.ca/2018/09/25/bill-c-69s-detractors-can-blame-harpers-2012-omnibus-overreach-blog-edition/;
- https://nationalpost.com/pmn/news-pmn/how-post-truth-politics-is-sinking-debate-on-environmental-assessment-reform;
- https://theconversation.com/cooling-the-rhetoric-on-canadas-environmental-assessment-efforts-113539;

My own contributions have been spurred less by a desire to defend the Bill and more to simply set the record straight. That is the spirit that animated my remarks to the Committee on April 9, 2019 and that is at the core of this brief, which is organized as follows:

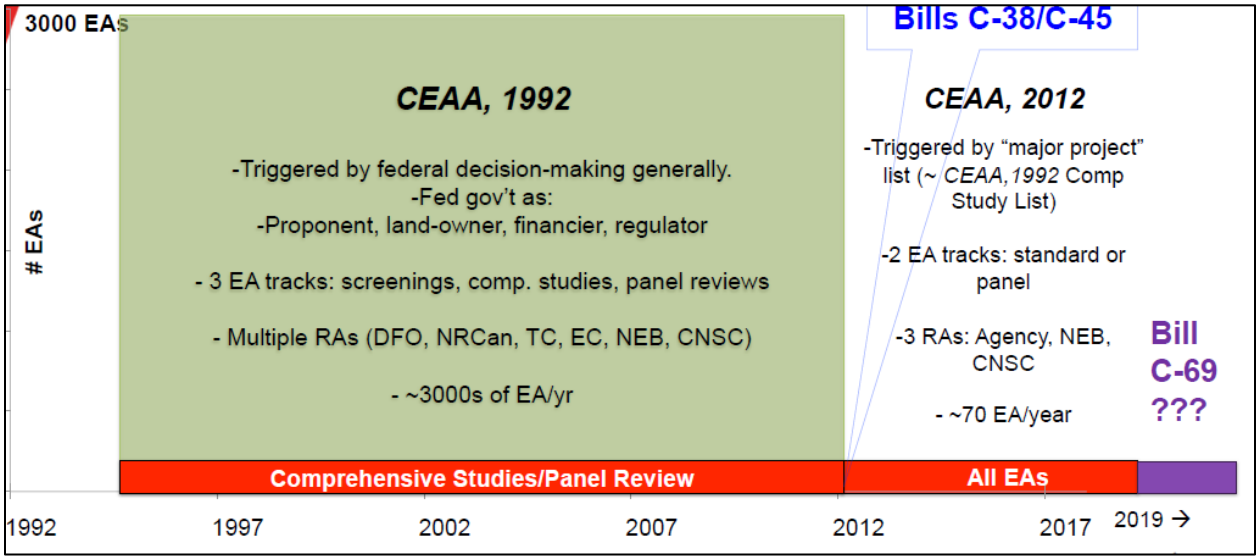
I. THE NATURE OF IMPACT ASSESSMENT

As I indicated in my appearance before the Committee, it is important to always bear in mind the fundamental nature of Canada's assessment regime, whether past, present, or future. Impact assessment is primarily about process – not substance. Substantive requirements may be found in related legislation (e.g. the *Metal and Diamond Mining Effluent Regulations*, SOR/2002-222 pursuant to the federal *Fisheries Act*, RSC 1985 c F-14), but environmental or impact assessment laws in and of themselves do not contain any – and this includes the IAA's references to sustainability and climate change (sections 22 and 63). The IAA merely requires the identification and consideration of such effects in decision-making, which are then subject to political or democratic accountability. For example, one project may be considered as contributing to Canada's achievement of its climate change commitments, while another project as hindering it. In the end, either one or both may ultimately be deemed to be in the public interest. I make this point here because it is difficult, if not impossible, to square with opponents' claims that Bill C-69 represents a "no pipelines bill" or a "no offshore oil bill". If these projects are considered to be in the public interest, as their proponents' claim them to be, there is no basis for claiming that they cannot or will not proceed.

II. PAST, PRESENT, AND FUTURE OF CANADA'S ASSESSMENT REGIME

It is also important for the Committee to situate the IAA in its historical context – especially in light of alarmist claims with respect to the Bill's potential impact on the natural resources sector (broadly defined). As Figure 1 illustrates, between 1995 and 2012, the federal government was carrying out several *thousand* environment assessments (EA) annually with no apparent adverse effects on economic growth. It now carries out roughly 70 per year(i.e., a 98% reduction).

Figure 1: Environmental assessments burden under CEAA and CEAA, 2012



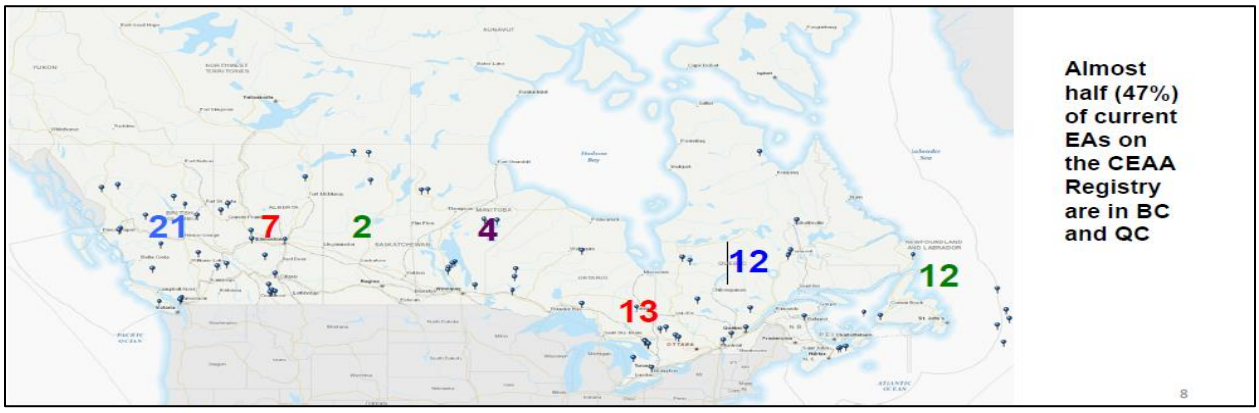
To be sure, I am not claiming that regulatory regimes have no impact on project economics but rather that such claims should be *substantiated.* In what way – specifically – does the IAA make

resource development uneconomical as compared to a realistic assessment of the *status quo*? To the best of my knowledge, this case has not been made out by any of the Bill's detractors. In addition, such claims should be scrutinized bearing in mind the following findings recently made by the Smart Prosperity Institute:

- Evidence shows that the costs of complying with regulations are often overestimated;
- A review of the existing literature highlights the large net benefits (benefits significantly outweighing costs) of environmental regulations in most cases. The costs of regulations are more than offset by a broad range of economic, health, greenhouse gas… and other benefits;
- Estimates of anticipated costs made prior to the regulation's implementation have sometimes been much greater – even double, and sometimes as much as 10 times greater (or more) – than the realised costs.

Finally on this point, as a "major project" regime, the current CEAA, 2012 applies to only a fraction of the resource activity being carried out in Canada (see Figure 2 below): two projects in Saskatchewan, four in Manitoba, and seven in Alberta. These include *major* oil and gas, mining, and hydro projects, as well as public works (e.g. highways). While many of these are obviously important projects, such as the Trans Mountain project, so were many under the previous *Canadian Environmental Assessment Act*, SC 1992, c 37 (CEAA) regime, as are many of the thousands of projects that fall exclusively within provincial regulatory regimes. Although we do not currently have a project list in front of us, it is not unreasonable to expect similar coverage under the IAA, given that it also is clearly a "major project" regime. All of this further undermines opponents' dire claims with respect to Canada's natural resources sector.

Figure 2: Projects currently undergoing federal environmental assessment



III. PRIVATIVE CLAUSES

Several parties, including the Canadian Association of Petroleum Producers (CAPP), have proposed the inclusion of a so-called "privative clause" to shield impact assessments from judicial scrutiny except with respect to questions of jurisdiction or law. As further set out below, this idea is both bad and misguided. In order to restore trust in Canada's assessment regime, there needs to be *greater* potential for judicial scrutiny of impact assessments, not less.

As a starting point, it is useful to recall why we have a separation of powers in the first place: to ensure some level of control over government, to protect against arbitrary or otherwise unreasonable exercises of power. In short, to ensure the rule of law. This is reflected in the current subsections 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7, which lays out the grounds for judicial review:

> 18.1(4) The Federal Court may grant relief…if it is satisfied that the federal board, commission or other tribunal
>
> a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
> e) acted, or failed to act, by reason of fraud or perjured evidence; or
> f) acted in any other way that was contrary to law.

A privative clause re-arranges the conventional separation of powers by restricting the scope of judicial supervision over the executive branch. The privative clause being proposed would purport to limit recourse to questions of jurisdiction or law, shielding any factual determinations from independent judicial scrutiny (in contrast to subparagraph 18.1(4)(d), above). There are at least three reasons that the Committee should reject such a clause here.

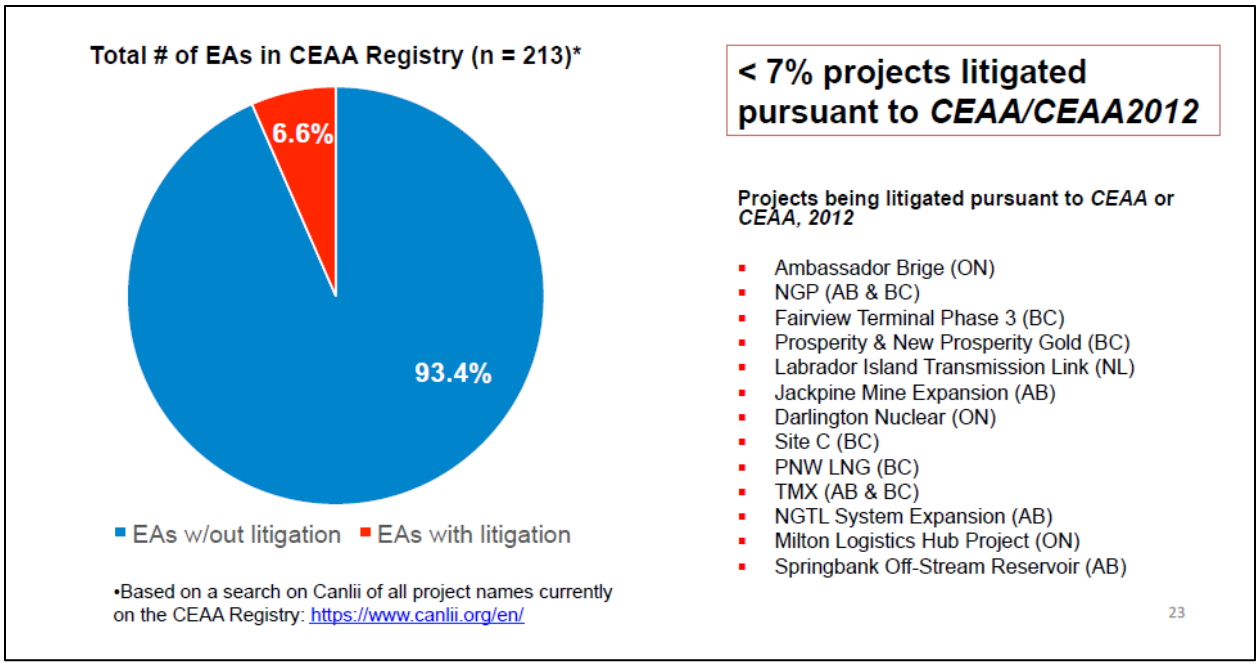
First, it is unnecessary. Canadian courts are already instructed through administrative law doctrine to defer to the factual determinations of government agencies and departments. So long as these determinations are "reasonable" – generally accepted as a low standard – they will not be disturbed.

Second, privative clauses are often ineffective: lawyers can circumvent them by characterizing their client's issues as matters of law rather than fact. It also bears noting that, currently, only NEB-assessed projects are subject to a privative clause under CEAA, 2012 and yet this has *not* prevented their litigation (see e.g. Northern Gateway, Bigstone, Trans Mountain Expansion). A privative clause would also do nothing to shield assessments from challenges on the basis that the government failed to adequately consult Indigenous peoples, whose constitutionally protected rights (i.e. section 35 of the *Constitution Act, 1982*) may be impacted by a proposed project.

Thirdly and finally, such a clause appears to be being proposed on the basis of a false premise. While there is evidence to suggest that litigation with respect to resource projects is on the rise overall, Figure 3 shows that there is no excess of CEAA-related litigation that would justify the inclusion of a privative clause: less than 7% of projects on the CEAA registry (currently 213 projects) are litigated pursuant to that legislation. Rather, what is clear is that it is generally the

more controversial projects that are being litigated – something that a privative clause is unlikely to change.

Figure 3: Projects on the CEAA Registry being litigated pursuant to CEAA/CEAA,2012



On the other hand, shielding proponents' and the bureaucracy's factual assessments from *any* independent scrutiny whatsoever can only perpetuate – and perhaps worsen – the current lack of scientific rigor in Canada's EA process. That the science of impact assessment needs to be more rigorous was one of the more important themes to emerge in the context of the current reform process. The federal expert panel on environmental assessment processes concluded that "stronger guidelines and standards are needed to ensure that IA processes include rigorous scientific methods."

Alternatives to a privative clause include a direct appeal or judicial review application to the Federal Court of Appeal rather than to the Federal Court of Canada in the first instance. This would shorten the period over which litigation occurs while having less of an impact on the rigour and scope of judicial supervision.

IV. CONSIDERING ADVERSE EFFECTS

Another key theme to emerge during the law reform process was that continued reliance on "significance" as the demarcating line between sustainable and unsustainable projects was ineffective; a project with numerous *moderate* adverse effects may be better than a project with numerous *significant* adverse effects, but neither necessarily contributes to sustainability.

The IAA does away with the concept of significance as the bright-line for determining whether a project should be presumptively approved or require further justification ("justified in the

circumstances" under the current CEAA, 2012 regime), replacing it with a "public interest" test that includes a consideration of five mandatory criteria (section 63):

> **(a)** the extent to which the designated project contributes to sustainability;
> **(b)** the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
> **(c)** the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
> **(d)** the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
> **(e)** the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change. (emphasis added)

My concern here is with subparagraph 63(1)(b), and specifically that by abandoning any categorization of adverse effects whatsoever, it may be very difficult for members of the public to understand whether a project is one that they support or one that they do not. There are infinite ways in which "the extent to which adverse effects…are adverse" could be described, some being very clear (e.g. "severe"), with others being potentially quite opaque (e.g. "somewhat adverse"). In addition to being opaque, the absence of any clear categories could result in inconsistent approaches across impact assessment reports.

Consequently, I recommend that the Act explicitly set out three or four categories of adverse effects: significant, moderate, minor, and no effect. The Impact Assessment Agency or a review panel would have to slot adverse effects into one of these categories as part of its assessment, as would the Minister and Cabinet. Alternatively, the binary concept of significant/not significant could be retained for the purpose of describing adverse effects.

V. CONCLUDING REMARKS

By way of conclusion, I make the following two observations. The first is the dearth of empirical evidence informing not only this Committee's review, but really this entire law reform process since its inception in 2016. Expert and public opinion are obviously important but they are not a substitute for facts. This applies equally to environmental considerations as it does to economic ones (already discussed above). It is puzzling to me, for example, that the Committee never expressed any real interest in knowing about, let alone understanding, the potential environmental effects of the 2012 changes to Canada's environmental assessment regime, and the 98% reduction in the number of assessments in particular. This omission is particularly glaring bearing in mind that the initial (and continued) framing for this reform exercise was to "restore lost protections." Should Bill C-69 be passed and implemented, this Committee should ensure that any subsequent review of the regime includes an assessment of its actual performance, including the accuracy of impact predictions, the effectiveness of mitigation

measures, and the regime's suitability for managing cumulative effects on areas of federal jurisdiction.

Second, and as alluded to at the outset of my brief, it is difficult for me to overstate the level of misinformation generated and disseminated in relation to Bill C-69 after it was passed in the House of Commons in June of 2018. While polls indicate that Canadians are largely unaware or supportive of the proposed regime, I remain concerned that many of those opposed, including in my home province of Alberta, do not have an accurate understanding of the proposed regime. I therefore urge the Committee to include, as part of its report, a plain language overview of the legislation and what it does – and does not – do.

This post may be cited as: Martin Olszynski, "(Final?) Brief re: Bill C-69 to the Senate Committee on Energy, Environment and Natural Resources" (April 30, 2019), online: ABlawg, https://ablawg.ca/2019/04/30/final-brief-re-bill-c-69-to-the-senate-committee-on-energy-environment-and-natural-resources