BILL C-69

WE CAN GET THIS RIGHT

CANADAWEST FOUNDATION
NATURAL RESOURCES CENTRE

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FOR A CHART LISTING LINE-BY-LINE PROPOSED AMENDMENTS TO BILL C-69, SEE:

http://cwf.ca/wp-content/uploads/2019/02/2019-02-05-chart-of-amendments.pdf

The intentions of Bill C-69 are good. An impact assessment and regulatory system that Canadians trust; that helps protect the environment and the health and safety of Canadians; that enhances Canada's global competitiveness; and where decisions can be made in a predictable and timely manner, providing certainty to investors and stakeholders.

Unfortunately, as drafted, Bill C-69 most certainly will not only miss a good number of those goals, but will also make what is already a challenging situation worse.

The good news is that with a few, but material, amendments, we can get Bill C-69 right.

Investment is turning away from Canada because we cannot get much built, and cannot harness our resources effectively. Part of the blame goes to our regulatory system, which our own government has recognized must do far more to reflect economic prosperity, growth and competitiveness. The other issue is that, in the absence of clear governmental climate and Indigenous policies, the courts have been the forum for complaint – resulting in extensive delays and uncertainty for major projects.

Investors are not afraid of strong environmental rules, nor of clear parameters for Indigenous engagement – indeed, more and more proponents and investors ARE Indigenous. What investors need is certainty, consistency and trust in the process. At the same time, the public needs to trust a regulatory system that is independent of political interference and influence. As is, Bill C-69 threatens both.

The energy sector in particular – which at more than six times the size of the auto sector[1] is critical to Canada's prosperity – is reeling from the effects of lack of access to markets. Now is NOT the time to introduce more major uncertainty.

As an independent, non-partisan, evidence-based organization focused exclusively on the best public policies possible for Canada, we support the intentions of Bill C-69 – but for us to support its passage, we recommend a number of key amendments.

This report explains what those recommended amendments are, and why.

[1] In 2017, oil and gas accounted for $114 billion in GDP, compared with $18 billion generated by the auto sector. Source: ATB Financial Economics and Research Team. *Canada's oil and gas extraction sector compared to the auto sector*. June 7, 2018.

THE GOAL & THE CHALLENGES

Since we published our report *Unstuck: Recommendations for reforming Canada's regulatory process for energy projects*[2] in May 2018, Bill C-69 has proceeded through the House of Commons and is now before the Senate. Bill C-69 would replace the National Energy Board (NEB) with a new Canadian Energy Regulator (CER) and replace the federal *Environmental Assessment Act* with a new *Impact Assessment Act* (IA Act), creating a new Impact Assessment Agency (IA Agency).

Times have changed. Canadians are, rightly so, demanding more environmental protection, more effort to combat climate change, and greater recognition of Indigenous rights. The public, and our elected governments, need to be able to trust our regulators and our regulatory system to do more in these areas, more effectively. However, investors must have confidence as well, because our economic and social prosperity depend on investment and growth. Not only must these goals of public trust and investor confidence be aligned – they are mutually dependent.

The current environmental legislation, the *Canadian Environmental Assessment Act*, 2012 (CEAA 2012) does not adequately achieve these goals. We need something better. The NEB, in particular its governance and transparency of operations, also needs modernization. Both need improvement to achieve public trust and investor confidence.

Bill C-69 is intended to do this, and indeed puts forward many improvements to the assessment process – including the move to broaden the focus to more than just environmental issues, the inclusion of the early planning phase, the use of regional and strategic assessments, and increased transparency around some decision-making.

Unfortunately, aspects of the bill as proposed would cause a number of serious, unintended consequences that would both undermine the very public trust needed and turn even more investment away – exactly the opposite of what is intended. The significant downturn in Canada's attractiveness for large infrastructure investment is very real[3] and a very big problem for Canada's future prosperity.

[2] *Unstuck: Recommendations for reforming Canada's regulatory process for energy projects* is available on our website: http://cwf.ca/research/publications/report-unstuck-recommendations-for-reforming-canadas-regulatory-process-for-energy-projects/

[3] Since Natural Resources Canada began tracking planned investments in major resource projects in 2014, the projected value for these projects declined from a high of $711 billion in 2015 to $585 billion in 2018. In 2018, 80 projects with a $76 billion investment value were completed, but 37 projects with investment value of $77 billion were cancelled. Planned energy sector investment dropped by $100 billion – which represents approximately 4.5% of Canadian GDP. (Analysis from a forthcoming C.D. Howe Institute report.)

PROBLEMS & SOLUTIONS

Our analysis has shown that there are five interlinked problems – and we recommend a set of interlinked solutions. The most important of these is to keep the project approval function for pipeline, electricity transmission and nuclear projects within the NEB and Canadian Nuclear Safety Commission (CNSC) respectively. The NEB needs modernization – but it is critical that this be done OUTSIDE of Bill C-69 and by amending the *National Energy Board Act* instead. The remaining problems are explained in more detail in this report – as are the proposed solutions and our reasoning.

BILL C-69
PROBLEMS & SOLUTIONS

PROBLEM 01

Losing years of jurisprudence – back to square one

SOLUTIONS

- Keep the jurisprudence associated with the NEB established process
- Maintain clarity around duty to consult
- Amend ambiguous terms that will require court interpretation

PROBLEM 02

Public safety at risk

SOLUTION

- Keep the NEB and CNSC in charge of pipeline, electricity transmission and nuclear project approvals

PROBLEM 03

Regulatory independence versus too much political discretion

SOLUTIONS

- Establish tripartite decision-making
- Establish the IA Agency as an independent agency
- Depoliticize the Project Review Panel appointment process
- Amend clauses that allow too much discretion
- Have the IA Agency make a recommendation – not just provide a report

PROBLEM 04

National interest, economic factors and economic reconciliation must be emphasized

SOLUTIONS

- Include positive aspects of national and regional growth, prosperity and competitiveness as public interest factors
- Embrace opportunities for Indigenous economic reconciliation

PROBLEM 05

More efficiency needed on timeframes

SOLUTIONS

- Add a window for any challenges to early planning phase decisions
- Enable the IA Agency to triage stakeholder input
- Increase certainty around timeframes and clock stoppages
- Introduce innovative approaches to minimize timelines
- Establish clear policy in the areas of climate change and Indigenous rights

The energy sector in particular –
which at more than six times the size of the auto sector
is critical to Canada's prosperity – is reeling from
the effects of lack of access to markets.
Now is NOT the time to introduce more major uncertainty.

BILL C-69 PROBLEMS & SOLUTIONS

PROBLEMS & SOLUTIONS	**PROBLEM 01** Inviting future court challenges	**PROBLEM 02** Public safety at risk	**PROBLEM 03** Too much political discretion	**PROBLEM 04** National interest & economic reconciliation undervalued	**PROBLEM 05** Lengthy timeframes
Keep the NEB project approval function intact	✓	✓	✓		✓
Maintain clarity around duty to consult	✓			✓	✓
Amend clauses that are ambiguous	✓				
Keep the CNSC project approval function intact		✓	✓		✓
Establish tripartite decision-making			✓	✓	
Establish IA Agency as an independent agency			✓		
Appoint review panel from independent list			✓		
Amend clauses that allow too much discretion			✓		
Have the IA Agency make a recommendation			✓		
Include national and regional growth, prosperity and competitiveness as public interest factors				✓	
Embrace opportunities for Indigenous economic reconciliation				✓	
Add window for challenging early planning phase decisions			✓		✓
Enable the IA Agency to triage stakeholder input			✓		✓
Increase certainty around timeframes					✓
Innovative approaches to minimize timelines					✓
Establish clear policy for climate change and Indigenous rights	✓		✓		✓

Source: Canada West Foundation analysis

PROBLEM 01

Losing years of jurisprudence – back to square one

One issue has emerged above all others as critically important to get right: ensuring that the new legislation does not undermine the jurisprudence that has been established around project approvals – which would lead to unnecessary, new court challenges, add years between regulatory approval and project commencement, cost millions of both public and private dollars, and create a climate of uncertainty, in which investors and industry cannot be confident that "yes" means "yes."

The biggest cause of delay in getting major projects built and in destroying investor confidence has not been regulatory timeframes, but court challenges (see Appendix A). There are three aspects of Bill C-69 that throw the door wide open for new rounds of court challenges:

a) Losing the jurisprudence associated with the National Energy Board's established process

b) Undermining jurisprudence around duty to consult

c) Introducing ambiguous terms that will encourage a new round of court interpretation.

Project proponents realize this – and as a result, a number have stated bluntly that they simply will not put a new project through the process currently proposed under Bill C-69.

> *Fixing this problem is the most important change that needs to be made to Bill C-69. We need a robust process that does not invite court challenge where it could be avoided through better design of the bill.*

Keep the jurisprudence associated with the NEB established process

Major energy projects approved by the National Energy Board (NEB) in particular have been through the wringer with respect to court challenges. As shown in Appendix A, since CEAA 2012 was passed, five major energy projects have undergone multiple court challenges in both the Federal Court of Appeal and the Supreme Court of Canada.

The good news is that Canada has finally achieved a strong measure of judicial certainty and approval regarding the NEB's regulatory process.

With recent Federal Court of Appeal decisions,[4] the courts have reviewed the NEB's processes – and, culminating in the Northern Gateway Pipeline project and Trans Mountain Expansion Project decisions – have endorsed and confirmed the acceptability of those processes.[5] This judicial approval means that future challenges to the existing NEB's process are unlikely, as they would likely fail.

The bad news is that replacing the NEB now with an entirely new regulator that has a completely different process for major pipeline and electricity transmission project approvals and that provides for a significantly expanded role for the Governor-in-Council would set the system right back to square one with respect to court challenges. Opposition via the courts would start all over again, leading to unnecessary additional years of delay for any major pipeline or any major electricity transmission line.

Most damaging is that the loss of the jurisprudence associated with the NEB's project approval process would be irreversible – which is why this key change to Bill C-69 is so important.

There are good reasons to modernize the NEB, and it can be done now.[6] But we must NOT replace the project approval process that has been through years of court review, analysis and approval.

The changes needed to the NEB should instead be made by amending the *National Energy Board Act*. These amendments can incorporate the improvements regarding independence, governance and transparency that are currently found in Part 2 of Bill C-69. To accomplish this, the CER Act (Part 2) needs to be removed from Bill C-69, and some corresponding changes made to the rest of the bill.

This would ensure the required modernization of the NEB, while retaining the all-critical jurisprudence of the many years of court review of the NEB process.

Of all the recommendations in this report, this is the most important.

WE RECOMMEND

- → Introduce a separate bill to amend the *National Energy Board Act*, incorporating the improvements currently found in Part 2 of Bill C-69 on independent governance, transparency of decision-making, inclusion of Indigenous participation and the like.
- → Remove Part 2 of the bill (which would replace the NEB and create a new Canadian Energy Regulator) and make the corresponding changes in Part 1.

Those advocating that the NEB be entirely replaced should be careful of what they wish for. The unintended consequence of risking many more years of court challenges will apply not just to pipelines but also to interprovincial transmission lines. Electricity transmission capacity is key to our ability to embrace increased solar and wind energy production – the energy produced by renewables has to go to where it can be used. And transmission lines are at least as subject to "NIMBYism" as pipelines – in some cases more so because they are so large and visible. Replacing the NEB with an entirely new body and process will subject any major transmission project to the same court-based delaying tactics already used for pipelines. This would have the ironic, unintended effect of significantly setting back our efforts to embrace renewable energy production.

[4] Gitxaala Nation v Canada (2016 FCA 187) (Northern Gateway); Tsleil-Waututh Nation v. Canada (2018 FCA 153) (Trans Mountain Expansion Project) and other cases referred to in these.

[5] The Federal Court of Appeal in both the Northern Gateway decision and the Trans Mountain decision approved of the NEB process and GIC decision-making. Although in Trans Mountain the court found the NEB report wanting, the problem – including the issue of maritime shipping – was limited and fixable.

[6] *Up Front: Modernizing the National Energy Board* (Canada West Foundation), 2018

Fair Enough: Assessing community confidence in energy authorities (Canada West Foundation and Positive Energy, University of Ottawa), 2017

A Matter of Trust: The role of communities in energy decision-making (Canada West Foundation and Positive Energy, University of Ottawa), 2017

Maintain clarity around duty to consult

The duty to consult Indigenous groups is enshrined in section 35 of the Constitution, and is included in this legislation, as well as in previous practice under CEAA 2012. However, ensuring that the duty to consult has been appropriately fulfilled is complex – and has been a major point of contention for numerous projects. Here, too, thanks to numerous court cases[7,8,9,10] it is now much clearer what actions are needed.

It is in this context that the introduction of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) into Bill C-69 could create major problems.

The preamble to Bill C-69 contains the phrase "Whereas the Government of Canada is committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*." However, Canada has not yet determined what such implementation would mean. Including this reference, as is, will add major uncertainty as to what "free, prior and informed consent" means in the context of project approval, and whether or not Indigenous communities or individuals have veto power. While the government may have an idea as to what it would prefer (for example, no veto power), this is not explicit in the bill, and *will* be open to interpretation – and lengthy court challenges.

Some suggest that having the reference to UNDRIP only in the preamble means it has no legal weight, and does not really matter. Legislative interpretation suggests otherwise. Indeed, preambles may be used to advance interpretation of the statute being enacted, and can be challenged in court.[11] The experience of recent years suggests that this is exactly what would happen.

Canada must determine overarching policy first, and then let the regulators do their jobs. It must make its determination as to how UNDRIP will be implemented generally. It is inappropriate to leave it up to the regulator to determine what it means.

If a reference to UNDRIP is deemed necessary, we recommend simply stating the fact: "Whereas Canada has signed UNDRIP." The government must then work, outside specific legislation such as Bill C-69, to define what "implementing UNDRIP" might mean, through processes specifically intended to address this issue. Key in this regard is the planned *Recognition and Implementation of Rights Framework*. Once the framework is complete, we recommend that any reference be to the framework, not to UNDRIP itself.

WE RECOMMEND

→ Amend the preambles to the IA Act and the CER Act (unless excised as recommended above) by replacing the current wording "Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;" with "Whereas the Government of Canada has signed the United Nations Declaration on the Rights of Indigenous Peoples;"

Amend ambiguous terms that will require court interpretation

Bill C-69 introduces several key terms in various parts of the bill that are far too vague. Their interpretation is needed for the regulator to carry out its mandate; but the lack of specificity will lead to challenges to the regulator's interpretation. Unless the bill provides a definition – or changes the wording – the regulator's interpretation will end up in court – again costing all parties time and money, and exacerbating an uncertain investment climate.

7 Tsleil-Waututh Nation v. Canada (2018 FCA 153)

8 Gitxaala Nation v Canada (2016 FCA 187)

9 Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. (2017 SCC 41)

10 Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017 SCC 40)

11 Roach, Kent (2001). The Uses and Audiences of Preambles in Legislation. McGill Law Journal 47(129). See also the Interpretation Act, RSC 1985, c. I-21 s.13, which states: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."

Most damaging is that the loss of the jurisprudence associated with the NEB's project approval process would be irreversible – which is why this key change to Bill C-69 is so important.

These problematic terms include: *sustainability* (in "the extent to which the designated project contributes to sustainability" – s.63) and *meaningful* (in "meaningful public participation" – numerous sections).

Sustainability is the public interest factor that is being used to account for potential positive effects, in counterbalance to the factor that examines "the extent to which adverse effects….are adverse." However, the definition of sustainability refers to the preservation of the environment, social and economic well-being in a manner that befits present and future generations – something that is neither knowable nor necessarily achievable. It would be better to address positive effects explicitly through a factor that assesses "the extent to which positive effects are positive."

What constitutes meaningful public participation is similarly vague, and what is considered meaningful by the Agency is unlikely to appear meaningful to someone who feels they have not been adequately heard.

WE RECOMMEND

- → In s.63, replace "the extent to which the project contributes to sustainability" with "the extent to which positive effects are positive."
- → In s.2 (interpretation), provide a definition of meaningful that gives the Agency final determination as to what constitutes meaningful public participation.

PROBLEM 02

Public safety at risk

Keep the NEB and CNSC in charge of pipeline, electricity transmission and nuclear project approvals

Canada has an outstanding record for pipeline and nuclear safety that is the result of years of careful planning by industry and the lifecycle regulators – the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC).[12] Yet the proposed Bill C-69 will move the approval and condition-setting function for pipelines and nuclear facilities from these independent, expert, specialist regulators to the Ministry of the Environment. This is a dangerous change.

For major projects, the process proposed under Bill C-69 allows only for *participation* of these agencies – their input is limited and they are most definitely not "driving the bus." In fact, with the introduction of amendments to the bill in June, specialists from the NEB and the CNSC are no longer allowed to be either the Chair or form the majority of the Review Panels that decide on and set the conditions for pipeline, transmission and nuclear projects. This divorces the initial process in which a project is reviewed – not just for its effects on the environment but for its technical approach for moving oil and gas or electricity or producing nuclear power – a decision that will have consequences later when those same agencies are tasked with monitoring and enforcing conditions that affect safety.

To ensure public safety, the lifecycle regulators must continue to lead the project approval process. This is true for pipelines, transmission lines and nuclear plants.

WE RECOMMEND

- → Remove Part 2 of the bill, retaining the NEB (improved separately) and its expertise as the project approval body for pipelines and transmission lines.
- → Remove the proposed changes to the mandate of the CNSC to ensure that it remains the entity in charge of nuclear project approvals.

[12] Canada has a 99.999 per cent incident-free safety record for pipelines, and nuclear workers in Canada haven't been exposed to dangerous levels of radiation since 1952. Sources: Jaremko, D. Five charts showing the latest data on Canadian pipeline safety performance. JWN. June 28, 2017; Canadian Nuclear Association. Safety Record. https://cna.ca/why-nuclear-energy/safe/safety-record/

PROBLEM 03

Regulatory independence versus too much political discretion

In recent years, flip-flopping political decisions and long delays at both the federal and provincial levels (including the federal reversal of the Northern Gateway decision) have dramatically reduced trust in the process among investors (current and potential, domestic and foreign). The possibility of political considerations overriding or delaying a broad and well-defined process in approving or denying major projects is now a key concern. It is this kind of uncertainty that is causing investors to go elsewhere. On this issue, even environmental activist groups are worried about political discretion working against their interests in future.[13]

For both investor confidence AND public trust, there must be much clearer independence between the regulatory function and politics. While political discretion can never be completely eliminated (nor should it), there are certain governance measures that can help inject balance and build both public trust and investment confidence.

Establish tripartite decision-making

First, there should be joint decision-making by three Ministers rather than just the Minister of the Environment.

Under the current version of Bill C-69 and in particular the IA Act, the Minister of the Environment alone is in charge of key aspects of the assessment process – most importantly, the determination of whether or not a proposed project is in the public interest. There is serious concern that having the Minister of the Environment as the sole decision-maker with respect to approving or denying projects will lead to unintended bias.

Bill C-69 will have enormous consequences – not just for the environment but for our ability to harness our natural resources effectively and for the Canadian economy. Requiring three Ministers – for example the Minister of Finance and the Minister of Natural Resources as well as the Minister of the Environment – to jointly make these decisions that have broad economic and sectoral importance will substantially reduce that concern, and at the same time ensure broader perspectives regarding any project.

[13] "However, we are concerned that the broad discretion in the Act, along with a few critical gaps and problematic provisions, will greatly impede achieving its goals and the Minister's mandate." West Coast Environmental Law, Brief to the House of Commons Standing Committee on Environment and Sustainable Development, April 6, 2018

WE RECOMMEND

- Where significant ministerial decision-making is provided for, the decisions should be made jointly by the Minister of the Environment, the Minister of Finance and the Minister in charge of the project's sector (e.g., Natural Resources).

- Sections where this tripartite decision-making is recommended include s.9(1), the power to designate any activity that should come under review; s.17(1), the early decision that a proposed project involves "unacceptable environmental effects"; s.22(2), the right to determine the scope of the factors laid out in s.22(1) to be taken into account; s.60(1), a "go or no-go" decision; s.63, interpretation of the factors to be considered regarding the public interest; s.64, establishment of project conditions; and s.65, final decision over a project.

Establish the IA Agency as an independent agency

Second, the IA Agency shoud be established as an *independent* agency. The current government has repeatedly insisted (in its criticisms of the NEB) that an independent governance structure is key to ensuring accountability and restoring confidence and public trust. We agree. Therefore, such independence must extend to the IA Agency, rather than it being simply a branch of Environment and Climate Change Canada. It should have its own independent Board of Directors, a CEO responsible for daily operations who is separate from the Board, and independent commissioners.

In parallel with establishing such independence for the Agency, the IA Agency should then be the decision-maker for procedural issues – such as extending timelines – rather than the Minister of the Environment.

WE RECOMMEND

- That the Impact Assessment Agency (IA Agency) be established as an independent agency outside Environment and Climate Change Canada, with an independent CEO reporting to an independent Board of Directors rather than to the Minister of the Environment, and with independent commissioners and panellists (see also next section on Review Panel composition).

Depoliticize the Project Review Panel appointment process

The appointment of members to a Project Review Panel should also be independent of either real or perceived political influence. Section 41(1) of the bill states that panel members must be "unbiased and free from any conflict of interest relative to the designated project." This is important. *Indeed, this was a key concern about the NEB – that the appointment process needed to be more transparent and more independent. Yet Bill C-69 takes the panel appointment process in the opposite direction.*

As written, s.50 provides that it is the Minister of the Environment alone who determines the roster of members who may be appointed to Review Panels for both the new CER (which we advocate not be created) and the CNSC. The potential for conflict, bias, or the appearance of conflict or bias is tremendous. This is one of the reasons why there was a perceived diminution of "trust" in the process in the first place – this would make it even worse. This is true even if the NEB and CNSC are kept whole.

To insulate the panel from such bias, or the appearance of bias, panel members should be appointed based on selection from a list of candidates formulated by an independent committee – in the way that provincial court judges or federal senators are appointed now. As noted above, the appointment should be made by at least three Ministers (Finance, Natural Resources and Environment), or even the Governor-in-Council (GIC).

In addition, the notion that personnel from any of the lifecycle regulators cannot be Chair or make up a majority of any panel eliminates key expertise and could jeopardize public safety, as described under Problem #2. The best people should be recruited in each case, with no limits placed on who can or cannot act as Chair or what percentage can be drawn from the lifecycle regulator. A majority of the panel members, including the Chair, must have sufficient technical expertise, which lies primarily with the Commissioners of the NEB and CSNC.

WE RECOMMEND

- → Revise s.50 of the IA Act to provide that Review Panel members be appointed from a list developed by an independent committee to avoid bias, or the appearance of bias, in their selection. The appointments should be made by at least three Ministers (Finance, Natural Resources and Environment), or even the GIC. There should be strong conflict of interest and ethics disclosure requirements.
- → Delete s.44(4) and s.47(4) that place restrictions on who can be Chair and that limit personnel from any of the lifecycle regulators forming a majority on any panels, and instead *require* that they comprise the Chair and the majority.

Amend clauses that allow too much discretion

There are a number of clauses that are too far-reaching in terms of discretion and need to be amended.

S.9(1) allows the Minister to "designate" a project for federal review on his/her own initiative for a number of reasons, including "public concern." The current wording in the bill also does not require the reasons to be disclosed. To increase transparency and accountability, the reasons for designating a project should be required to be made public.

S.17(1) gives the Minister the ability to decide at the end of the early planning phase that the project as proposed would cause "unacceptable environmental effects." This is useful information for a project proponent at this stage, and should be provided.[14] But the early warning should also provide an opportunity for the proponent to offer changes or modification that could change the government's decision, rather than the decision outright suspending or terminating the impact assessment.

S.63 presents the "public interest" factors upon which the Minister's determination is based. Under CEAA 2012, there was a significance test for adverse impacts (see Appendix B). Under Bill C-69, the significance test has been removed, and replaced with the direction to consider "the extent to which adverse effects…are adverse." Although significance is an imperfect measure, it still acts as a threshold that all participants can use to gauge whether adverse effects are unacceptable. Without this measure, all degrees of adverse effects are equally valid for quashing a project. We recommend including significance in this clause. This would parallel other places in the IA Act where the significance of adverse effects is referred to, including the Act's title (*"An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects"* [emphasis added]) as well as numerous other sections.[15]

In s.68, the Minister has discretion to "amend a decision statement, including to add or remove a condition, to amend any condition or to modify the designated project's description." For stability and fairness, there should be restrictions on making changes that would materially change the cost or the timing of the project.

S.190(1) of the CER Act enables the Commission to vary a certificate, or the Minister to direct the Commission to make a recommendation to the GIC to vary a certificate. Here, too, the reasons should be made public.

[14] It is certainly far better than waiting until a full assessment is done – as happened with the government reversing the prior government's approval of Northern Gateway after years and a great deal of money, because "the Great Bear Rainforest is no place for a pipeline."

[15] Ss. 6(1)(l), 82(a), 82(b), 83(a), 83(b), 87, 90(1), 90(3).

The possibility of political considerations overriding or delaying a broad and well-defined process in approving or denying major projects is now a key concern.

WE RECOMMEND

- S.9(1): Where the decision to designate a project is made based on the Minister's initiative, the reasons for the designation be made public.
- S.17(1): The section must provide the opportunity for a proponent to appeal or respond with alternatives or amendments to the proposal that may be acceptable rather than suspending or terminating the impact assessment with no possibility of revision.
- S.63: The section should be amended to include significance of adverse effects, using the wording similar to CEAA 2012 – "is likely to cause significant adverse effects."
- S.68: The section should introduce a restriction on making changes or modifications that would materially change the cost or the timing of the project.
- S.190(1): The section should require the reasons for a variance or a recommendation for variance to be made public.

Have the IA Agency make a recommendation – not just provide a report

A major issue is trust in the system. If the government wants the public to trust the Agency, the government itself must also show this trust. The Agency – or a Review Panel acting on its behalf – must be enabled to make recommendations not just with respect to mitigation measures, but also as to whether or not a project should be allowed to proceed. The current language in both ss.51(1) and 51(3) does not clearly support this level of responsibility and should be amended.

A clear recommendation is important, not the least because it is more difficult to override politically. As independent, quasi-judicial agencies, both the NEB and the CNSC produce recommendations on whether or not a Certificate should be issued. This has worked well for Canada with the NEB and the CNSC for years, and is also spelled out for the proposed Canadian Energy Regulator (CER Act s.183(1)). The same should be applied to the IA Agency.

WE RECOMMEND

- That s.51 of the IA Act be amended to specify that the Agency or Review Panel's recommendations must include a determination of whether or not a certificate should be granted.

PROBLEM 04

National interest, economic factors and economic reconciliation must be emphasized

The government's recent Fall Economic Statement, based on the reports of the government's six Economic Strategy Tables[16], recognized the importance of having regulations and regulatory agencies explicitly include competitiveness, economic effects and economic growth as part of their mandates (see textbox on page 17). We wholeheartedly applaud this approach.

However, Bill C-69, the most important and far-reaching regulatory legislation of recent years – with potentially major, detrimental effects on our economy – has very little emphasis on economic factors, prosperity or competitiveness, and has elicited deep concern (among by far the majority of the business community) that it will turn away even more investment than that which is going elsewhere already.

The imbalance in the focus of the bill is evident. Instead of explicitly considering the economy, the bill buries the word "economic" as part of a reference to the "social and economic well-being of Canadians" in the extremely broad term "sustainability." In the bill's 392 pages, the word "competitiveness" appears only twice. The word "economy" and the phrase "economic growth" never appear at all. Yet "environment" and "environmental" appear 127 times (see below).

Why the Concern?
The following are the number of times the listed words appear in Bill C-69*

"economy"	0
"growth" or "economic growth"	0
"competitiveness"	2
"efficient" or "efficiency"	2
"prosperity"	0
"innovation"	2
"economic"	26
"environment" or "environmental"	127

**Other than as part of the name of a statute or section heading*

[16] Canada's Economic Strategy Tables. *The Innovation and Competitiveness Imperative: Seizing Opportunities for Growth*. A Report from Canada's Economic Strategy Tables. September, 2018.

A regulatory reform initiative focused on efficiency and economic growth

The government's own recently announced regulatory reform initiative[17] promises to include "efficiency and economic growth" as an integral part of regulators' mandates, and to enshrine in legislation that the "economic impacts of new, revised or cumulative regulations are key considerations for regulators."

Together, the six Economic Strategy Tables emphasized the critical need for *"strong, sustained, long-term economic growth that will secure Canadians' quality of life."* To achieve this, they recommended *"establishing a competitive system that is attractive to private investors."* They unanimously said that modernizing our regulatory system would materially improve Canada's ability to attract investment and growth-oriented businesses. Among their recommendations were: *"A modern regulatory system that fosters innovation and adoption… a new, collaborative relationship between industry and regulators."*

In particular, the Resources of the Future Table called for a Canadian regulatory system that is *"outcomes-driven, stringent, flexible, timely and predictable."*

In response, the government has committed to:

- Explore making efficiency and economic growth a permanent part of regulators' mandates
- Enshrine in legislation that the economic impacts of new, revised or cumulative regulations are to be key considerations for regulators
- Establish a dedicated external advisory committee on regulatory competitiveness
- Identify regulatory changes that will promote economic growth and innovation

  Create business efficiencies that reduce the regulatory burden and simplify government regulations
- Develop a "simpler, cheaper and more modern regulatory system."

Bill C-69, drafted *before* this effort was undertaken and these commitments were made, does the opposite. But amendments can incorporate some of this good work.

The bill was drafted *before* the excellent work of the Economic Strategy Tables, and *before* the government's own regulatory reform initiative – and should reflect that important work.

Instead of promoting efficiency, the proposed legislation bakes in delays. Instead of being clear and simple, the drafting is obtuse and bloated, with far too many terms so broadly defined they will beg for court challenges to interpret them. Bill C-69 is the perfect opportunity for the government to show that it is serious about implementing the changes it outlined in its own Fall Economic Statement.

Include positive aspects of national and regional growth, prosperity and competitiveness as public interest factors

There is currently a strong imbalance in the bill between the amount of time and attention devoted to potential adverse effects versus the potential for a project to contribute to national and/or community prosperity. As an example, adverse or negative impacts are referred to 61 times in the bill; positive effects only three times. As a result, there is little confidence that the assessment process will examine risks and benefits in a balanced way.

[17] Canada's Economic Strategy Tables. *The Innovation and Competitiveness Imperative: Seizing Opportunities for Growth*. A Report from Canada's Economic Strategy Tables. September, 2018.

There must be a much greater and clearer emphasis on the importance of economics, growth, prosperity and competitiveness as factors to be considered in ministerial decision-making.

Section 63 describes the five factors that the Minister must consider in making the determination. These are:

- the extent to which the designated project contributes to sustainability
- the extent to which the adverse effects are adverse
- implementation of the mitigation measures
- adverse impacts on Indigenous groups and the rights of Indigenous peoples
- the extent to which a project hinders or contributes to the Government of Canada's environmental obligations and climate change commitments.

The Minister is not explicitly required to consider potential positive effects on economics, national or regional infrastructure needs, competitiveness or prosperity. Instead, these large-scale effects are buried within "sustainability." This is problematic. Projects that are assessed within the federal impact assessment process are more than a collection of adverse, primarily environmental, effects. Highways, ports, railways, energy infrastructure – these projects often contribute to objectives that are important on a national or regional scale. For example:

- A new transmission line may help the country to grow clean energy in a particular region.
- A new port or port expansion may unlock market access for the manufacturing sector in another part of the country.
- A mining or port project may reinforce Canada's sovereignty in the north.
- A highway or pipeline project may comprise a critical element of Canada's Strategic Infrastructure Plan.[18]
- A particular project may provide critical economic supports to a broad region or to specific Indigenous communities.
- An LNG pipeline may cause an increase in local greenhouse gas (GHG) emissions but create a net reduction of global GHGs.

These types of potential national, regional or other benefits are much larger than just the proponent's interest – and nowhere are they explicitly brought out in Bill C-69 as issues that are important to decision-making about project approval. They should be acknowledged as public interest factors to support robust decision-making and as a balance to the focus on potential adverse impacts.

WE RECOMMEND

→ Amend s.63 of the IA Act (public interest factors) to include: "(f) the extent to which the designated project supports national or regional prosperity, competitiveness, economic development, infrastructure, sovereignty, security or other priorities."

→ Make similar additions to these other sections of the IA Act: s.22(1), s.28(3), s.36(2).

→ Add a clause to the preamble of the IA Act affirming the government's support for impact assessment decision-making to include consideration of national, regional or community economic interest. The clause could be similar to that in the preamble of the main bill or what is currently in the preamble of Part 2:

"Whereas the Government of Canada is committed to enhancing Canada's global competitiveness by building a system that enables decisions to be made in a predictable and timely manner, providing certainty to investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs for Canadians;"

[18] A concept introduced in the Resources of the Future Economic Strategy Table

Bill C-69 is the perfect opportunity
for the government to show that it is serious
about implementing the changes
it outlined in its own Fall Economic Statement.

Embrace opportunities for Indigenous economic reconciliation

The government has too often assumed that all Indigenous groups oppose major projects. On the contrary – as stated by Stephen Buffalo, president of the Indian Resource Council, "Far from being uniformly opposed to resource development, many Indigenous nations understand that careful engagement and effective partnerships will provide us with a once-in-a-century opportunity to share in Canada's prosperity."[19] The quashing of Enbridge's Northern Gateway project by the federal government is an example – it angered a number of Indigenous groups who supported the pipeline and expected to share in the benefits.[20]

Chief Roy Fox of the Blood Tribe in Alberta estimated that each family in his community was losing the equivalent of $1,400 a year due to the price differentials from lack of pipeline access to markets – "an enormous hit for a community dealing with poverty." He went on to say that "The majority of Treaty 7 chiefs strongly oppose the bill for its likely devastating impact on our ability to support our community members…"[21]

Because more and more Indigenous communities are realizing the economic and societal benefits from participation in resource projects, a large number of Indigenous stakeholders and leaders are opposed to Bill C-69. Just like other energy sector stakeholders, they are concerned about the chilling effect of the bill on new projects, and on investor confidence. If investment confidence is lost, and investment goes elsewhere, the opportunity of resource development for economic reconciliation will be lost.

As stated by Mr. Buffalo, "Bill C-69, in its present form, will undercut our autonomy and would shift more authority to environmental interveners who do not, with some exceptions, live on our lands and work with our people."

Consultation means consulation with ALL Indigenous groups – not just those who oppose projects, but also those who support them to enhance economic reconciliation.

There is no distinct recommendation for amendment coming from this problem alone; the solution for the problem lies in ensuring that changes to the bill are made as described throughout this document.

[19] Buffalo, S. "The federal government needs to end its assault on Indigenous consultation." National Post, October 19, 2018

[20] Cattaneo, C. "Loss of Northern Gateway devastating for many First Nations, chiefs say". Financial Post, April 10, 2017

[21] Fox, R. "Alberta First Nations 'unanimously' support Bill C-69? Hardly". Globe & Mail, December 10, 2018

PROBLEM 05

More efficiency needed on timeframes

Add a window for any challenges to early planning phase decisions

Court challenges have added years to the timeline of many projects. Court challenges are an important backstop against procedural or other legal infringements. However, the bill must ensure that the courts are only resorted to for legitimate issues where there is no better resolution mechanism – not as a delay tactic.

To address this problem, we suggest placing time restrictions on challenges to decisions made during the early planning phase.

During the early planning phase, decisions will be made and published about what comprises the scope of the project, the potential effects to be assessed, the engagement plan for the public and Indigenous groups, the timeline for review, and other important structural details. The appropriate time to challenge these decisions would be shortly after early planning concludes, and not several years later when the full assessment has been completed.

The bill should specify that there is a limited window after early planning phase decisions have been made public, during which they are open to challenge – and then the window closes. This will allow the project and the regulator to proceed with their own studies in the interim, and will avoid tying up the project in court at the very end of the process. If such a provision had been in place for the Trans Mountain pipeline, the problems with definition of scope (excluding marine shipping) would have been resolved years earlier, while the company proceeded with preparing its own environmental impact statement.

WE RECOMMEND

→ Introducing a clause that restricts the time in which the decisions made by the regulator in the early planning phase can be challenged.

Enable the IA Agency to triage stakeholder input

One of the key goals of the legislation is to enhance trust in the process by broadening public participation and rendering it more transparent. Sections 11, 27 and 51 of the IA Act specify that "The Agency must ensure that the public is provided with an opportunity to participate meaningfully, within the time period specified by the Agency, in the impact assessment of a designated project."

There is great value in an effective and diverse consultation process, but it will be a challenge for the new IA Agency to efficiently and effectively handle the additional volume of fact and opinion headed its way. Sheer numbers and volume of comment do not mean better input, particularly if many voices are saying the same thing. The process is also harmed, not helped, if there is no mechanism to support the highest degree of participation from those most directly affected by a particular project.

Currently, there is no language in the bill that would support any attempt by the Agency to triage public participation based on relevance or impact. Including this language is critical.

The bill must also specify that meaningful participation may come through different forms, and not just via face-to-face participation in a hearing. While there is a desire to hear everyone who wishes to speak, the bill must specify that the Agency has a right to determine *how* they will be heard; and that the method and level of participation will balance the interests of the participant with the extent to which the participant's information may be of value to the Agency's decision-making, and the need for an expeditious process.

WE RECOMMEND

→ The addition of language to s.27 of the IA Act: "The Agency has the right to determine how participants will be engaged, and the method and level of participation offered will balance the interests of each participant with the extent to which the person's information may be of value to the Agency's decision-making, and the need for an expeditious process. The decision of the Agency as to how it will receive and consider the representations of any person is conclusive."

Increase certainty around timeframes and clock stoppages

Some argue that the timeframes provided for in the bill are shorter than what we have currently.[22] In some cases this is true; however, in almost every case of a timeframe, there is almost complete discretion on the part of the Minister to extend them. Investors worry that this could easily (and perhaps for political purposes) prolong the process.

The potential for timeline extension or suspension exists in 27 places in the bill.[23] For the most part, the Minister is able only to extend once under each of these provisions; but the GIC may extend indefinitely.

An assessment of "stopped clock" time experienced during environmental assessments conducted under CEAA 2012 shows how frequently these pauses occur. An analysis[24] done by the C.D. Howe Institute found that for mining projects, these pauses amounted to over 50% of the total duration of the environmental assessment. For non-mining energy projects, clock stoppages comprised around 25% of the total time. This means that the timeline limits legislated in Bill C-69 are likely more aspirational than realistic.

Timeline extensions can be a benefit to all participants if they are used judiciously, in extenuating circumstances. However, they should not become a default mode of operating; this would suggest either an underlying problem with the project approval process itself, or that the extensions/suspensions are being used poorly.

WE RECOMMEND

→ The Canadian Environmental Assessment Agency has stated that timeline extensions are regulated and may only be made for one of four reasons: because the proponent has requested it; because there has been a major design change to the project; because the proponent has not made a payment; or because a significant new piece of information has emerged. These constraints should be made explicit in the bill.

[22] For many types of projects, and in particular for mining and oil & gas extraction, the average length of time for regulatory review in Canada substantially exceeds that for the United States and Australia – two comparable competitors. (Analysis from a forthcoming C.D. Howe Institute report)

[23] Ss. 9(5), 18(3), 18(4), 18(6), 28(6), 28(7), 28(9), 31(1), 37(3), 37(4), 36(3), 37(6), 42(b), 65(5), 65(6), 70(2), 72(2), 112(c), 130(2), 181(2.1), 183(6), 186(3), 214(6), 262(7), 262(9), 298(7) and 346(5).

[24] Analysis from a forthcoming C.D. Howe Institute report

Many Canadians – including ourselves – want a strong climate policy. There are important discussions and decisions to be made about how Canada will reduce greenhouse gas (GHG) emissions. But hosting these debates should not be the work of the regulator.

Introduce innovative approaches to minimize timelines

The government's stated intention of reducing the overall timeline is laudable – if possibly unrealistic with the proposed approach. Shorter timelines will help Canada remain competitive with countries such as the United States, Australia or Mexico.

To support ongoing efforts to reduce timelines, the bill should specify that the IA Agency conduct ongoing pilot testing to identify and implement new approaches to shorten the regulatory process, such as through fast-tracking trusted operators, or shortening the time for decision-making for projects in certain sectors or where a regional impact assessment has previously been conducted.

WE RECOMMEND

→ A new clause should be added that requires the IA Agency to continuously look for and pilot innovative ways to shorten the regulatory process, such as through fast-tracking trusted operators, or shortening the time for decision-making for projects in certain sectors or where a regional impact assessment has previously been conducted.

Establish clear policy in the areas of climate change and Indigenous rights

Finally, it is worth noting that several of the problems noted in this report – including court challenges, political discretion and lengthy timelines – are exacerbated by a lack of clear public policy.

Many Canadians – including ourselves – want a strong climate policy. There are important discussions and decisions to be made about how Canada will reduce greenhouse gas (GHG) emissions. But hosting these debates should not be the work of the regulator; they need to take place in the right venue, with government policy then informing the way in which regulatory decisions get made.

Similarly, government policy – and not the regulator – needs to shape answers about how Indigenous rights and title shall be respected within the project approval process.

There are no amendments to Bill C-69 that will fix the problem of a lack of clear policy – but it remains important to understand that without sufficient guidance, the regulatory process will continue to be the *de facto* forum for debating these concerns, significantly prolonging the assessment process and creating uncertainty for all parties.

What investors need is certainty, consistency and trust in the process. At the same time, the public needs to trust a regulatory system that is independent of political interference and influence. As is, Bill C-69 threatens both.

APPENDIX A: COURT CHALLENGES OF FEDERAL ENVIRONMENTAL ASSESSMENTS IN THE PAST FIVE YEARS

Project	Type of project	Regulator	Date of regulator's decision	Citation	Date of court judgement	Length of time between regulator's decision and final court decision
South Fraser Perimeter Road (SFPR)	Road	CEAA	June 2008	Federal Court of Appeal		**60 months**
				2014 FCA 170	June 27, 2014	
Two hydroelectric plants on the Churchill River in Newfoundland and Labrador	Hydroelectric dam	Multi-agency	March 2012	Federal Court of Appeal		**29 months**
				2014 FCA 189	August 22, 2014	
Darlington Nuclear Generating Facility	Nuclear power	CNSC	March 2013	Federal Court of Appeal		**37 months**
				2015 FCA 186	Sept. 10, 2015	
				2016 FCA 114	April 13, 2016	
Line 9B Reversal and Line 9 Capacity Expansion Project Enbridge	Pipeline	NEB	March 2014	Federal Court of Appeal		**40 months**
				2014 FCA 88	April 2, 2014	
				2015 FCA 222	October 20, 2015	
				2014 FCA 245	October 31, 2014	
				Supreme Court		
				No. 36776	March 10, 2016	
				2017 SCC 41	July 26, 2017	
Petroleum Geo-Services Offshore seismic testing in Nunavut	Oil & gas	NEB	June 2014	Supreme Court		**37 months**
				No. 36692	July 26, 2017	
Northern Gateway	Pipeline	NEB	June, 2014	Federal Court of Appeal		**32 months**
				2014 FCA 71	March 18, 2014	
				2014 FCA 182	July 24, 2014	
				2015 FCA 26	January 29, 2015	
				2015 FCA 27	January 29, 2015	
				2015 FCA 73	March 16, 2015	
				2016 FCA 187	June 23, 2016	
				Supreme Court		
				No. 37201	February 9, 2017	

table continues

APPENDIX A: COURT CHALLENGES OF FEDERAL ENVIRONMENTAL ASSESSMENTS IN THE PAST FIVE YEARS

(continued)

Project	Type of project	Regulator	Date of regulator's decision	Citation	Date of court judgement	Length of time between regulator's decision and final court decision
Site C Clean Energy Project	Hydroelectric dam	CEAA	Oct 2014	Federal Court of Appeal		**27 months**
				2016 FCA 120	April 20, 2016	
				2017 FCA 15	January 23, 2017	
Pacific NorthWest LNG Project	LNG	CEAA	Sept 2016	Federal Court of Appeal		**17 months**
				2018 FCA 41	Feb 16, 2018	
Nova Gas Transmission Line System Expansion Project	Pipeline	NEB	Nov 2016	Federal Court of Appeal		**18 months**
				2017 FCA 159	July 19, 2017	
				2018 FCA 89	May 8, 2018	
				Supreme Court		
				No. 36677	Sept. 14, 2017	
Trans Mountain Pipeline	Pipeline	NEB	Dec 2016	Federal Court of Appeal		**36 months and counting; not yet resolved**
				2016 FCA 219	September 6, 2016	
				2017 FCA 102	May 15, 2017	
				2017 FCA 116	May 29, 2017	
				2017 FCA 128	June 16, 2017	
				2017 FCA 174	August 29, 2017	
				2017 FCA 199	Sept. 26, 2017	
				2018 FCA 104	May 31, 2018	
				2018 FCA 153	August 30, 2018	
				2018 FCA 155	August 30, 2018	
				Supreme Court		
				No. 36353	Sept. 10, 2015	
				No. 38104	August 23, 2018	

Source: Canada West Foundation analysis

APPENDIX B: COMPARISON OF DECISION FACTORS IN CEAA 2012 AND BILL C-69

CEAA 2012		Bill C-69	
CEAA Act	**NEB Act**	**IA Act**	**CER Act**
Factors that must be considered in the impact assessment			
19 (1) The environmental assessment of a designated project must take into account the following factors: **(a)** the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out; **(b)** the significance of the effects referred to in paragraph (a); **(c)** comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this Act; **(d)** mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project; **(e)** the requirements of the follow-up program in respect of the designated project; **(f)** the purpose of the designated project; **(g)** alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; **(h)** any change to the designated project that may be caused by the environment; **(i)** the results of any relevant study conducted by a committee established under section 73 or 74; and	(Not directly applicable – listed in 19(1) of CEAA 2012	**22(1)(a)** the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including **(i)** the effects of malfunctions or accidents that may occur in connection with the designated project, **(ii)** any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and **(iii)** the result of any interaction between those effects; **(b)** mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project; **(c)** 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*; **(d)** the purpose of and need for the designated project; **(e)** alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means; **(f)** any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project; **(g)** Indigenous knowledge provided with respect to the designated project;	Not relevant – this function is given to the IAA

table continues

APPENDIX B: COMPARISON OF DECISION FACTORS IN CEAA 2012 AND BILL C-69

(continued)

CEAA 2012		Bill C-69	
CEAA Act	**NEB Act**	**IA Act**	**CER Act**
Factors that must be considered in the impact assessment			
(j) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.		**(h)** the extent to which the designated project contributes to sustainability; **(i)** 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; **(j)** any change to the designated project that may be caused by the environment; **(k)** the requirements of the follow-up program in respect of the designated project; **(l)** considerations related to Indigenous cultures raised with respect to the designated project; **(m)** community knowledge provided with respect to the designated project; **(n)** comments received from the public; **(o)** comments from a jurisdiction that are received in the course of consultations conducted under section **(p)** any relevant assessment referred to in section 92, 93 or 95; **(q)** any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project; **(r)** any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project; **(s)** the intersection of sex and gender with other identity factors; and **(t)** any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account.	

table continues

APPENDIX B: COMPARISON OF DECISION FACTORS IN CEAA 2012 AND BILL C-69

(continued)

CEAA 2012		Bill C-69	
CEAA Act	**NEB Act**	**IA Act**	**CER Act**
Factors the decision-maker must take into account when deciding whether to issue an approval			
52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project **(a)** is likely to cause significant adverse environmental effects referred to in subsection 5(1); and **(b)** is likely to cause significant adverse environmental effects referred to in subsection 5(2). **(2)** If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances. **(3)** If the decision maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority. **(4)** When a matter has been referred to the Governor in Council, the Governor in Council may decide **(a)** that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or **(b)** that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.	**52 (2)** In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following: **(a)** the availability of oil, gas or any other commodity to the pipeline; **(b)** the existence of markets, actual or potential; **(c)** the economic feasibility of the pipeline; **(d)** the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an oppor- tunity to participate in the financing, engineering and construction of the pipeline; and **(e)** any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application. **Environmental assessment** **(3)** If the application relates to a designated project with- in the meaning of section 2 of the Canadian Environmental Assessment Act, 2012, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.	**63** The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors: **(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 re- port 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.	**183(2)** The Commission must make its recommendation taking into account — in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including **(a)** the environmental effects, including any cumulative environmental effects; **(b)** the safety and security of persons and the protection of property and the environment; **(c)** the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors; **(d)** the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes; **(e)** the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; **(f)** the availability of oil, gas or any other commodity to the pipeline; **(g)** the existence of actual or potential markets; **(h)** the economic feasibility of the pipeline; **(i)** the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; **(j)** the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; **(k)** any relevant assessment referred to in section 92, 93 or 95 of the Impact Assessment Act; and **(l)** any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.

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