

MARLA ORENSTEIN
Director, Natural Resources Centre

Winnipeg, Manitoba
April 12, 2019

Thank you for inviting me to provide testimony with respect to Bill C-69. I greatly appreciate the opportunity, and I also want to thank you for taking the time to travel around the country to hear views on this matter.

I come here wearing two different hats. The first is in my role with the Canada West Foundation. The Canada West Foundation is non-partisan and evidence-based. We consider ourselves environmentalists – for example, we support a carbon tax. But we also recognize the importance of our resources and getting them to markets.

My second hat is as past President of the International Association for Impact Assessment, the leading global network on best practice in the use of impact assessment for informed decision-making on policies and projects. With my IAIA hat, I also look at this bill in terms of how well it provides for a meaningful process of assessing the impacts of a project on people and the environment.

For this reason, my perspective may be a bit different than the other people you have heard from. I see this legislation in terms of two separate objectives. The first of these has to do with “small i, small a” impact assessment – identifying how a project could positively or negatively impact the local environment and people in local communities, and then ensuring that the proponent has appropriately considered how to mitigate any adverse effects, and how to enhance any potential benefits. This is a scientific and technical regulatory exercise.

In Canada, we do this very, very well. We are world leaders in impact assessment and it is something we should be proud of. This is a point that is often overlooked in the C-69 discussion. And this process will be further strengthened in this bill, through better inclusion of Indigenous knowledge, the use of an early planning phase, and the use of regional and strategic assessments. This will enable us to have strong environmental protections and resilient communities – something I believe we all want.

The problem is that the legislation has a whole other side but we use almost the same words to talk about it. We also use the term impact assessment within this legislation to talk about the process of obtaining project approval from the government. This is much larger than just the question of whether or not a project can be implemented in a way that minimizes adverse impacts. Rather, it is a question of whether or not we want to allow certain kinds of development.

And it is this side of the impact assessment process where all the problems arise.

You have heard from many people about the problems in this bill, including a lack of clarity that opens the process to judicial challenge, too much opportunity for political discretion, a bias towards a higher weighing of negatives in decision-making, and overly long timelines. We share many of these concerns. But we also feel that it is possible for the Senate to amend this bill in a way that will substantially help. To be clear: we want this bill to pass. But we also believe it needs to be meaningfully revised to address those very real problems.

To this end, we support the majority of amendments that were put forward last week by CEPA and CAPP. We believe that these amendments are not about tilting the scales towards project proponents; but rather they add clarity and balance, and help reduce the likelihood that unclear language will result in problems down the road. We feel they represent the *minimum acceptable amendments* for going forward.

In addition, we also believe that these amendments do not go quite far enough. In moving the project approval function from the NEB to the new IA agency, the bill introduces some major unintended consequences – the loss of judicial endorsement of the NEB process.

For example, the Governor-in-Council – that is, Cabinet – must issue a decision statement to the project proponent to inform them about whether or not the project is approved. This is the same as what is done currently under CEAA 2012. However, section 65(2) of the bill introduces something new. It states that not only must the decision be based on the agency's report, but it must also consider – and demonstrate in writing that it has considered – the five public interest factors listed in section 63. This action is new and different, and – we would argue – problematic. First, it obliges the GIC to second-guess the regulator's determination. The GIC can no longer merely rely on the regulator's report and recommendation. In addition, it undermines previous jurisprudence. For example, the Federal Court of Appeal in two instances – Northern Gateway and Trans Mountain – determined that a GIC decision wasn't challengeable, because the GIC was able to rely on the regulator's report and was not obligated to investigate further. With the new provision, this is no longer the case and this jurisprudence no longer applies.

We anticipate that this change – and other procedural changes in different places in the bill – will set the whole system right back to square one in terms of court challenges. And that the loss of this jurisprudence is unrecoverable.

Finally, I also want to recognize that there is a fundamental problem that no amount of amendments will solve – and that is that the regulatory approval process is being substituted for policy-making. For the regulatory process to work, we need clear policy guidance coming from the federal government. To what extent does our country want to support hydrocarbon development? How much GHG emission is acceptable, and how will we allocate it? The regulatory system is not set up to deal with policy debates, nor should it be. However, it has become the *de facto* forum for debating these concerns. Without clear policy to guide the technical decision-making of the regulator, we will continue having these same arguments over and over again with every new project application.

In conclusion, we need Canada to be economically competitive *and* environmentally responsible. This is not a trade-off: we need both. And getting this piece of legislation right is critical.

Thank you very much. I am happy to take questions about this bill, proposed amendments or the process of impact assessment in general.