BILL C-69 → WE READ THE AMENDMENTS SO YOU DON'T HAVE TO

The majority of the amendments passed by Senate are ones that should appeal across partisan lines. Increasing clarity, reducing political discretion, firming up timelines and relying on technical expertise are in everyone's interest.

After hearing from Canadians across the country, the full Senate – on the recommendation of the Standing Senate Committee on Energy, the Environment and Natural Resources – passed a suite of close to 190 amendments to Bill C-69 on June 5. While some have described the amendments as "favourable to industry," most are simply favourable to the establishment of a clear and manageable process. The bill now returns to the House of Commons for ratification or further amendment.

Right from the beginning, the Canada West Foundation has supported the stated intentions of the bill: to establish an impact assessment process 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. But we have had serious concerns about unintended consequences resulting from how the bill was drafted.

Overall, the vast majority of amendments that were introduced by the Senate should be considered improvements. They improve clarity, reduce political discretion, firm up timelines, strengthen the role of municipalities and provinces, and increase the use of technical expertise from the lifecycle regulators. These are changes that all Canadians should support, as they have implications for all project types that will pass through the review process – not just pipelines, but transmission lines, highways, mines, hydroelectric projects, and some renewable projects such as tidal and offshore wind energy projects.

Because it is a daunting task to wade through the 56-page amendment report published by the Senate, the Canada West Foundation has provided a high-level summary of the amendments, which should be helpful for those who may be interested – including the MPs now tasked with final review.

This briefing note does not attempt to analyze whether the changes are "good" or "bad," whether the Senate landed on the optimal approach, nor whether the implementation is likely to be successful. Rather, we try to answer the question: "What did the Senate attempt to achieve with the amendments?" In doing so, we hope once again to bring facts, analysis and balance to the discussion of this controversial bill.*

* Unless otherwise specified, the changes referred to are made to the proposed *Impact Assessment Act* (IA Act).

June 2019
Marla Orenstein and Martha Hall Findlay

SUMMARY OF SENATE AMENDMENTS TO BILL C-69

Emphasis on investment, innovation and economic development

- The amendments now also include a focus on certainty of investment, innovation and economic development. The centrality of these objectives are referenced at several points, including in the preamble, the purposes of the proposed *Impact Assessment Act* (IA Act) and the factors to be taken into account in the assessment (section 22).

Strengthened independence of the Agency and reduced political discretion

- The locus of control is moved from the Minister of the Environment to the new Impact Assessment Agency in many places. Now, the Agency is empowered to decide and execute on activities such as setting and extending timelines, deciding when prescribed activities have been completed, identifying when additional information is required, appointing Review Panel members and various administrative functions.**
- The President of the Agency may only be appointed after consultation with every recognized party in the House of Commons.
- It is now explicitly stated that neither the Minister of the Environment nor the President may direct the Agency or a Review Panel with respect to a report, decision or recommendation.
- The amendments limit potential "scope creep" of designated projects. Rather than being able to designate a project (that is not already on the designated project list) because there may be adverse effects or public concern, the Minister may now only designate additional projects where the effects would be complex or novel, or if there are unique or exceptional circumstances.
- Under the proposed *Canadian Energy Regulator Act* (CER Act), the relevant Minister is specified as the Minister of Natural Resources, whereas before it could have been anyone appointed from the Privy Council.

More resilient timelines

- New wording focuses on timeliness in all aspects of the review process.
- The total timeline of 600 days for projects reviewed by a Review Panel is reaffirmed.
- The amendments remove the ability of the Governor-in-Council (GIC) – that is, the federal Cabinet – to indefinitely extend timelines at two points: during the information gathering stage and also when the government is making its final determination.
- The GIC's determination must occur within 720 days.
- Some timelines are shortened, such as the time for the Minister to respond for a request for designating a project (from 90 days to 30 days).
- An application may not be delayed due to in-progress regional or strategic assessments.

Increased clarity

- The Agency (and Review Panels and a CER Commission, depending on the project) is/are empowered to define what constitutes "meaningful" public participation, and to specify the manner in which that participation may occur.
- The concept of sustainability is given some workable bounds: it is now defined in terms of environmental, health, social and economic effects, and/or specific federal policies and guidance documents on sustainability.
- Similarly, the analysis of "The intersection of sex and gender with other identity factors" points back to specific federal guidance that has been published on GBA+.
- The purpose of regional and strategic assessments has been clarified.

** Environmental activist groups and industry alike had expressed concern about excessive Ministerial discretion.

The amendments now also include a focus on certainty of investment, innovation and economic development.

Stronger role for municipalities and reinforcement of provincial jurisdiction

- Municipalities are brought forward as entities that have a role in the IA process, and must be consulted at different points.
- Provincial jurisdiction – particularly over environmental matters – is made explicit in multiple places.

Acknowledgement of the unique circumstances of Indigenous women

- Several amendments explicitly acknowledge the role of Indigenous women and require that their views and knowledge be brought forward, and that the assessment identify how Indigenous women specifically will be impacted.

Greater reliance on the technical expertise of lifecycle regulators

- The Minister of Natural Resources must be consulted when the Minister of the Environment establishes a roster of potential Review Panel members. (The roster comprises either members of the Canadian Nuclear Safety Commission (CNSC) or Commissioners of the Canadian Energy Regulator (CER), as appropriate.)
- In terms of Review Panel composition, amendments introduced in May 2018 are reversed. For both the CER and the CNSC, the chair now MUST be appointed from the roster, and a majority of panellists are allowed to be from the lifecycle regulator.
- A specific Review Panel's terms of reference must be developed in consultation with the CER/CNSC.
- Review Panels are to make an explicit recommendation on project approval.
- The terms of co-operation, consultation and shared responsibility with offshore Boards (the Canada-Nova Scotia Offshore Petroleum Board and Canada-Newfoundland and Labrador Offshore Petroleum Board) is further clarified.

Change to what projects undergo Impact Assessment

- In a bun fight with the designated project list, the amendments specifically exclude a number of project types from becoming reviewable projects, including oil sands; pipelines that are not offshore, interprovincial or longer than 40 kilometres; wind projects; solar projects; natural gas extraction; and power generation using natural gas.
- Uranium mines and mills are specified as activities that do not come under review as part of the *Nuclear Safety and Control Act*.
- As described earlier, the amendments limit the Minister of the Environment's ability to designate projects not already on the project list to those where the effects would be complex or novel, or where there are unique or exceptional circumstances.
- The amendments also limit what can appear before a Review Panel (as opposed to reviewed by the Agency); the project must be "substantially different" from any project that had previously been reviewed by a Review Panel.
- Any designation must also take into consideration whether a regional or strategic assessment has already been completed.

Additional provisions on climate change and GHGs

- The amendments provide bounding on how the government's climate change obligations and commitments shall be construed. These are now defined in terms of federal legislation and the provisions set out in any strategic assessment on climate change.
- Under the CER Act, the decision on whether to issue a certificate for a pipeline must take into account any regional or strategic assessment on climate change that has already been completed.
- The approach to assessing the climate change impacts of a project must take into account provincial legislation and jurisdiction on GHG emissions and climate change.
- Downstream GHG emissions are excluded from comprising part of the federal interest.
- Under section 22, an impact assessment must take into account not only the government's commitments and obligations with respect to climate change, but also the project's impact "on a global level" on climate change. It is unclear to us whether this means the project's share of total global impacts (which will always be negligible) or the contribution that the project may make to climate change not only within Canada but also globally.

Balanced approach to assessing impacts

- In both the IA Act and the CER Act, the directive to consider specified factors in the impact assessment has been softened from "must" to "may," with discretion by the Agency in how much effort to give each.
- The GIC's public interest determination must look at both positive and negative effects with respect to the environment, health, social or economic conditions.
- There is a return to the concept of "significance" of adverse effects in determining the relative importance of impacts.

Bounding on court challenges

- A "privative" clause is introduced that is similar to what had previously been in the *National Energy Board Act*. The clause specifies that various decisions and determinations made by the Minister and the Agency are final and conclusive, including whether to designate a project, whether an assessment is required and whether the project is in the public interest; and that judicial review shall be heard on leave by the Federal Court of Appeal.

'Duelling amendments'

There are two places – sections 17 and 37 – where overlapping sets of amendments have been set out. These likely reflect an inability of the Senate subcommittee's working group to agree on a final version before the deadline hit. For clarity and workability, these two sections will need to have the "duelling amendments" resolved before the bill is passed.

CONCLUSION

The majority of the amendments passed by Senate are ones that should appeal across partisan lines. Increasing clarity, reducing political discretion, firming up timelines and relying on technical expertise are in everyone's interest.

We hope that the final review by the House of Commons is done with a view to passing legislation that, while controversial, now includes amendments that come from extensive review. And we hope that, for the sake of Canada's environment AND economy, the passage of the amended bill is done without partisanship or electioneering.

CANADAWEST FOUNDATION

110 – 134 11th Avenue SE
Calgary, Alberta, T2G 0X5
cwf.ca

Canada West Foundation
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