April 6, 2018

Ms. Deborah Schulte
Chair
Standing Committee on Environment and Sustainable Development
House of Commons
Ottawa ON K1A 0A6

Via Email: ENVI@parl.gc.ca

Dear Chair Schulte and Committee Members:

Re: 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

About Independent Contractors and Businesses Association (ICBA)

By way of background, ICBA has been the voice of BC's construction industry for nearly 43 years, representing more than 2,000 members and clients who collectively employ over 50,000 workers. ICBA advocates for its members in support of a vibrant construction industry, responsible resource development, and a growing economy for the benefit of all British Columbians (and Canadians).

Introduction

ICBA is pleased to make this submission to the Standing Committee on Environment and Sustainable Development on Bill C-69. This a critical piece of legislation that has far-reaching implications for the scope and pace of major project development in Canada, and consequential economic and social benefits for Indigenous Nations and communities throughout our country.

Competitive Backdrop to Bill C-69

Construction industry activity – and jobs for our members – is driven in significant measure by ground-breaking projects and those that are national in size, scope and scale, many of which are found within federal jurisdiction. Interprovincial pipelines, for example, are critically important for spurring construction activity in their own right but are even more so for the "derived demand" in the broader goods and services economy, resulting in well-paid family supporting jobs and significant tax revenues for government to support health, education and social programs.

Bill C-69 – in its present form – represents a substantial revision to the federal laws applying to major project assessment across the country, including British Columbia. This comes at a time of increased international competitive pressures for businesses currently operating or contemplating new investments in

major projects. Regrettably, over the past number of years the ability of major project proponents to "get to yes" on their proposals in Canada has become exceedingly difficult – and indeed almost impossible – due to increasingly complex legal frameworks and indeterminate regulatory processes driven in large measure by societal and government pressure to include matters beyond cost, technical, scientific and environmental considerations.

Our organization is very concerned about the cumulative effect of measures being enacted by both federal and provincial authorities which are adding to the cost and complexity of major project development. Investment capital is highly mobile. Domestic and foreign investors looking at Canada and British Columbia as a place to invest are comparing the ease of doing business and the returns on capital that can be achieved here with that in other jurisdictions around the world. In recent years, investors in Canada have been besieged by significant federal and provincial tax increases which – taken together with recent substantial tax reductions in the United States and general uncertainty over NAFTA negotiation outcomes – underscore that Canada's (and British Columbia's) small, open trade-exposed economy is no longer competitive.

To illustrate the magnitude of the challenge, recently Dave McKay, President and CEO of RBC, raised concern about investment capital leaving Canada in real time, noting that a significant exodus of capital from Canada to the United States is well underway. Mr. McKay's comments have been echoed by John Manley the President and CEO of the Business Council of Canada who stated recently that real issues of competitiveness are absent from the federal government's thinking, noting "[Canada] is always in difficult competition to attract investment and to retain investment – and it's not to be taken lightly because investment can move quickly"[1]. Recent commentary by Suncor President and CEO Steve Williams notes that his company, Canada's largest integrated oil firm, will not embark on new major projects in our country because of the "burdensome regulations and uncompetitive tax rates".[2] Finally, late last year, TransCanada Pipeline Corporation, after spending $1 billion, cancelled its proposed $17 billion Energy East pipeline project out of frustration with the project approval process.

These examples – and other examples across the country -- should be a clarion call for policy makers to fix uncompetitive tax rates and dysfunctional regulatory processes. In Canada, we are at a crossroads; a point in time when we are being challenged to attract more investment, jobs and talent, but we are failing to rise to the occasion. In fact, we are going in the opposite direction. In Bill C-69 we have policy that seems to assume that companies, both Canadian and international, seeking to invest capital, can be taken for granted; that their financial resources are "bottomless"; that their patience with our country's regulators is infinite; and, that they have no choice but to place their investment capital in Canada. If these are the assumptions of the sponsors of Bill C-69, then they are manifestly wrong.

"Ground zero" for Canada's competitiveness problem – driven by increasing taxation and uncertain regulatory process -- is pipeline infrastructure. In the decade from 2005 to 2015, a staggering $226.8 billion was invested in the Oil Sands in Alberta with the implicit understanding by most investors that market access to the Eastern Canadian, European, and vast Asia Pacific markets – principally through pipelines –

[1] Andy Blatchford, "Investment dollars are already flowing out of Canada in 'real time', RBC CEO warns", Financial Post, April 2, 2018 http://business.financial post.com/news/economy/investment-outflow-from-canada-already-underway-in-real-time-rbc-head.

[2] Geoffrey Morgan, "Suncor to shun new projects amid 'difficult' regulatory environment", Financial Post, February 9, 2018.

would be possible[3]. The Standing Committee knows well the litany of challenges that Canada's energy pipeline sector has faced. Canada was not able to "get to yes" on Energy East; a project clearly in the national interest from the perspective of displacing foreign imports feeding refineries in Eastern Canada with domestic crude from Alberta. And perhaps more disturbing, even though a "yes" was achieved through a robust regulatory process for Kinder Morgan's Trans Mountain expansion project, the federal government has failed to backstop the decision by "prosecuting" its own case for the project as part of the balanced "environment and economy" narrative the Prime Minister and the federal Minister of Environment and Climate Change so often speak about. Instead, the approved Trans Mountain pipeline continues to languish interminably at the hands of an obstructionist and ideologically-driven government in Victoria and the seeming indifference of federal officials in Ottawa.

Against this ominous backdrop, major project proponents must now contend with Bill C-69. Upon reading the first draft, one could be forgiven if they drew the conclusion that the aim of the crafters of the legislation was to make it more difficult to invest in Canada and confine bold, visionary and nation-building construction and infrastructure projects to Canadian history text books. The legislation is a deeply flawed set of policy measures that mixes core objective scientific, technical, and environmental project review parameters with highly subjective social policy matters that are more appropriately addressed elsewhere or, at the very least, better defined within Bill C-69.

The next two sections briefly address some of these considerations.

Bill C-69 – Certainty of Process and Outcomes?

Investors in the natural resources sector require certainty of process and certainty of timeline for decision-making. Regrettably, Canada has achieved neither in existing legal frameworks, and in our view, Bill C-69 compounds existing systemic regulatory uncertainty.

Following is our assessment of the core deficiencies within Bill C-69 and some suggestions for improvement:

- Absent from the ***Purposes*** section in the legislation is any explicit reference to making the Impact Assessment process, in its totality, more efficient and effective for project proponents. We suggest that a statement to this effect be included within the Purposes section of the Impact Assessment Act (IAA) and other legislation within Bill C-69.
- The determination of ***Project Lists*** requires clear criteria. This is notably absent from Bill C-69.
- Bill C-69 eliminates the ***standing test*** which has helped determine which interested parties actually have a stake in a major project proposal. Without the standing test, there is significant scope for trivial, frivolous or vexatious interventions on a major project review, and its absence may wrongly establish false expectations leading to disappointment when individual citizens' concerns cannot be addressed. We are concerned that stakeholder representations on major project assessments will be reduced to a "numbers game" between opposing interests, rather than robust and substantive

[3] David Yager, "Pipeline Politics Destroyed Canada's Reputation for Investors", Pipeline & Gas Journal, February 2018, Vol. 245, No. 2, p.2.

consideration of scientific, technical and environmental matters actually relevant to a project's review.

- The addition of an ***early planning phase*** makes sense so long as the process establishes clear milestones during the 180-day prescribed period. In the absence of this, we are concerned that Bill C-69 may actually increase – rather than decrease – timelines. Overall, the process appears to have increased uncertainty and subjectivity. We note, as an aside, that most major project proponents engage "early and often" with Indigenous communities and other relevant stakeholders as a matter of best practice, risk mitigation, and determining how to share benefits from project advancement.[4] It is imperative that early planning increase certainty, and not be a government-enabled means for stakeholders to slow down early-stage project proposals or leverage interminable delays. Bill C-69 could be improved by adding the proven BC Environmental Assessment "Application Information Requirement" (AIRs) process to help deal with policy matters outside the scope of scientific, technical and environmental considerations.[5]

- The legislation expands upon the ***highly subjective matters*** that were part of the challenge with CEAA 2012 legislation. For example, by adding gender-based analysis, climate change objectives, and other socio-economic concerns to the existing list of items a proponent must examine as part of their review, the government has made the process more – not less – complex. In fact, the IAA lists more than 20 factors to be considered in assessing project impacts. As many legal commentators have suggested, references to "sustainability" and to the "intersection of sex and gender with other identity factors" are very subjective, lack definition and do not streamline the assessment process.[6]

- There is nothing in Bill C-69 that suggests future assessments will be streamlined, more efficient, or timely. In fact, the ***timelines for the IAA*** can be extended by the Minister and Cabinet repeatedly, and it is far from evident that the approach improves upon the CEAA 2012 legislative framework. We suspect that the timelines will be less certain and actually some 8 – 10 months longer in practice.[7]

- The new Impact Assessment Agency's guiding philosophy of ***one project, one review*** is a worthy "touchstone". It is important that this principle be at the forefront of not only federal inter-agency impact assessment activities, but also include provincial and Indigenous processes, including, to the greatest extent possible, relevant work already undertaken. This also extends to continued use of "substitution and equivalency".

- ***Regional impact assessments*** are useful to streamline and identify potential risks in some circumstances, but we note that for the most part, a major project should be "de-linked" from upstream or downstream activities. For example, an oil pipeline has little to do directly with oil

[4] The Standing Committee should take note of the collateral implications the federal government's commitment to apply principles of the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) may have for major projects if Bill C-69 is passed into law.

[5] For further information see: http://www.eao.gov.bc.ca/guidance.html

[6] See for example: Cristin Schmitz, "Bill C-69 aims to expand and speed federal reviews but lawyers doubt process will be faster or cheaper", The Lawyer's Daily, February 9, 2018, p. 3; https://www.thelawyersdaily.ca/articles/5872

[7] In fact, under Impact Assessment Act (IAA), the combined process – including all facets (early planning, impact assessment and decision-making phase) – will now be 510-570 days, versus 410 under the previous CEAA process. Under the IAA Review Panel and CEAA Panel process, the total is 915 and 765 days respectively. This does not include any further delays which could be imposed by Ministerial or Cabinet order.

sands extraction or processing activities. On the other hand, properly administered, regional assessments can be useful for determining exclusions from project lists, serve to streamline engagement activities, and help to eliminate overlapping or redundant assessment activities.

- We note that Bill C-69 includes the replacement of the ***National Energy Board (NEB)*** with a new ***Canadian Energy Regulator (CER)***. While shifting many functions of the previous NEB to the Impact Assessment Agency may be reasonable for some major resource projects, we note the concerns of the Canadian Energy Pipeline Association (CEPA)[8] with respect to the institutional knowledge and longstanding expertise of the NEB as a "life-cycle" regulator for linear projects. We share CEPA's concern about the uncertainty generated for the pipeline industry as regulatory functions[9] are shifted to the new Impact Assessment Agency. If it is not possible to restore the full mandate of the NEB in the new CER, then we urge that all three (3) member panels be required to have two (2) members from CER and only one from the new Impact Assessment Agency as recommended by CEPA.

Expansion (Politicization) of the Assessment Process?

Bill C-69 has set the stage for inherent delays in the impact assessment process which will be of concern to major project proponents. As noted elsewhere in this submission, timelines under the new IAA have been *de facto* lengthened and when coupled with the Ministerial and Cabinet discretion to grant extensions, interminable delays in project approvals will likely continue.

While the new regime purports to strike a balance between legitimate expectations of proponents seeking timely decisions and broad stakeholder input, we note that the IAA approach is out-of-step with the trend towards more timely approvals in the United States. The *quid pro quo* for a more extended, expansive, and expensive process should be clarity and certainty about timely decisions. We are deeply concerned that the expanded scope of matters to be considered within the review process, coupled with extended timelines, will end up politicizing the assessment process further and continue to bog proponents down in interest group politics. The focus for the impact assessment process should be on the scientific, technical and environmental aspects of a major project and addressing "how to" make it happen, not "whether to" build it.

A Few Notes on Major Project Review Personnel

Of equal, or arguably more importance, in major project review is the "people side" of the regulatory process. Timelines associated with designated projects will largely depend on the discipline of the panels reviewing a given project and internal project management processes within both the Impact Assessment Agency and the CER. Policy (legislation, regulation, and guidelines) enabled through Bill C-69 is only the beginning; the two "p's" of people and practices are also critically important.

[8] Canadian Energy Pipeline Association, Submission to the Parliamentary Committee on Environment and Sustainable Development Bill C-69, March, 2018.

[9] The NEB has built up significant technical expertise over its 60-year history of overseeing the planning, approval, construction, operations, maintenance and abandonment of pipeline infrastructure.

While it is positive to see that the federal government has earmarked $1 billion over five years to increase scientific capacity in the federal government and Indigenous participation, acute attention should be paid to the "hard skills" (technical credentials) and "soft skills" (finding pathways to "yes") of government review personnel. Experience suggests that the competence of the "people" driving review processes within statutory agencies often is the determining factor of whether a major project is converted from being in "planning and review", to being "underway"[10].

Conclusion

ICBA appreciates the opportunity to provide the Standing Committee on Environment and Sustainable Development with our thoughts on Bill C-69. When judged against recent statements by Canada's leading business leaders and by international investors about our country's uncompetitive tax and regulatory environment, the legislation does not meet the test of sound public policy.

Canada's energy sector directly employs over 425,000 men and women and is the single largest source of private sector investment in the country. Yet the companies investing, or planning to invest, billions of dollars in our economy are vilified at nearly every turn. As a result, Canada's energy sector is being hollowed out – Canada is losing investment, jobs and talent. Capital that should be committed to projects in Canada is instead being deployed in other jurisdictions providing opportunities and growth for our competitors. The implications for our long-term prosperity are both enormous and frightening given the lack of commitment by all levels of government to act with purpose to correct the dangerous trend lines that are starting to show up in Canada's economic performance

The cascading consequences of recent tax and regulatory changes combined with this legislation – if left unamended – will extend in a very negative way to small and medium sized businesses in Canada who provide many of the goods and services required by major projects. Put simply, our members, many of whom provide construction services to major projects, are deeply concerned about the forgone opportunity that will result from Bill C-69. The flaws with Bill C-69 are many but overarchingly deal with the following: definitional ambiguity; indeterminate timelines; layering on of more out-of-scope social considerations in the assessment process; and, opening the process to anyone, including those who may have trivial, frivolous or vexatious views on a major project proposal.

We also note that the federal government has failed to backstop Bill C-69 with a clear long-term vision of responsible resource development in Canada. This is troubling when judged against the staggering resource endowment in our country that can – and should – be leveraged to provide significant, sustainable, shared prosperity for all Canadians. Canada is fundamentally a small, open market, trade-dependent economy. This means that the public policy choices government takes matter – and they matter a great deal. The easy path for government is to broker legislation to the "lowest common denominator" by capitulating to interest group politics, rather than pursuing an outward looking, competitive, approach to responsible resource development to create wealth to improve the lives of Canadians.

Bill C-69 is legislation of considerable consequence for Canada's economic well-being.

[10] Senior ICBA staff who have held senior executive roles in the provincial government have experienced first-hand the difference that experience and competence can make to moving major projects from planning and review stages through to completion.

We urge the federal government to set Bill C-69 aside and take the time necessary to work with industry to craft Impact Assessment legislation that provides a robust scientific, technical and environmental review and a clear and certain process for major project proponents. Failure to do so will have significant implications for Canada's long-term prosperity.

Respectfully,

Independent Contractors and Businesses Association

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President