



Canadian  
Chamber of  
Commerce

Chambre de  
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du Canada

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Le porte-parole des entreprises canadiennes<sup>MD</sup>

## Written Submission by the Canadian Chamber of Commerce on Bill C-69

“An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts.”

### Senate Standing Committee on Energy, the Environment and Natural Resources

September 28, 2018

The Canadian Chamber of Commerce appreciates the opportunity to offer its perspective on *Bill C-69, an Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts.*”

The Canadian Chamber of Commerce is Canada's most broadly-based business association. Through our network of more than 450 chambers of commerce and boards of trade representing more than 200,000 businesses of all sizes and in all sectors of the economy across the country, the Canadian Chamber is the voice of businesses, communities and families from coast to coast to coast.

*Canada must develop its resources responsibly and sustainably*

Canada's resource sector remains a vital driver of our economy, helping to create jobs and economic prosperity not just for those who work in the sector, but also for millions of Canadians across the country. In its 2015 election platform the Liberal Party of Canada acknowledged this fact, stating that resource projects “create jobs and spur investment.”<sup>1</sup> The following year, the federal government recognized not only that our resource sector is a key source of jobs, but also that maintaining “this contribution to our long-term prosperity depends on getting our natural resources to market in sustainable ways.”<sup>2</sup>

The Canadian Chamber of Commerce agrees that Canada's resource sector is not only a vital component of the country's economic engine, but that our resources must be developed responsibly and sustainably and that we must support the development of the infrastructure required to ship them to markets across Canada and around the world. Unfortunately, the *Canadian Environmental Assessment Act, 2013 (CEAA 2012)*, provides neither the certainty that investors in resource projects require to proceed, nor the transparency of a project's safety that the public requires in order to support it. In fact, in some cases, *CEAA 2012* actually hurts investment in and the growth of Canada's most economically important resource sectors, including mining.

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<sup>1</sup> <https://www.liberal.ca/realchange/environmental-assessments/>

<sup>2</sup> Natural Resources Canada 2016-17 Report on Plans & Priorities,

[https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/plansperformancereports/rpp/2016-2017/pdf/NRCan\\_RPP\\_2016-17-eng.pdf](https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/plansperformancereports/rpp/2016-2017/pdf/NRCan_RPP_2016-17-eng.pdf)

The federal government's solution to these problems is *Bill C-69*, which is intended to boost public confidence in the regulatory system and give businesses greater certainty that the system will deliver fair, timely and predictable outcomes to environmental assessments, allowing them to plan and invest in resource projects. The Canadian Chamber supports the government's objective of a review and assessment process that is efficient, that is transparent, that incorporates both science and Indigenous knowledge, and that provides the public with appropriate opportunities to participate in the process.

However, the Canadian Chamber has deep concerns with *Bill C-69* as it is currently drafted because, just like CEAA 2012 before it, it contains flaws that would seriously disadvantage specific sectors. For example, although the mining industry in general has found the legislation an improvement over CEAA 2012, companies engaged in linear projects and major infrastructure investments have identified significant issues. Unless these issues are resolved, the legislation will increase regulatory uncertainty for many of Canada's resource sectors and their related industries. This uncertainty will deter investment and undermine economic growth and job creation. Attempting to deal with the diversity of projects covered by the legislation with a one-size-fits-all legislative solution is doomed to fail. To achieve its intended purpose, *Bill C-69* must be flexible enough to address the unique circumstances of all of our resource and infrastructure projects, from ports, mining and utilities, to oil and gas, among others.

The Canadian Chamber proposes the following amendments which, if implemented, will help to provide greater flexibility, along with some much-needed precision and clarification.

## Principle 1: Ministerial Discretion

Much like the Canadian Environmental Assessment Agency legislation, *Bill C-69* assigns a strong role to the Minister of Environment and Climate Change Canada (ECCC). There are three aspects of the Minister's proposed role that require further attention and clarification. Specifically:

- 1) If the Minister decides that it is clear that the designated project would cause unacceptable environmental effects within areas of federal jurisdiction, Section 17 (1) of the Act empowers him/her to provide the proponent with written notice of their opinion.
- 2) Sections 36 and 63 of the Act allow the Minister to suspend a project if he or she decides that it is not in the public interest. Consequently, in instances where the Minister considers that the project does not meet the criterion of public interest, the project can be stopped and suspended at the Minister's sole discretion.
- 3) Section 68 (1) The Minister may amend any decision statement provided by the Agency. This includes the power to add and remove a condition, amend any condition or modify the designated project's description.

### Recommendations on Section 17

The Canadian Chamber of Commerce proposes the following two amendments to Section 17. First, that Section 17 (1) be amended to read as follows:

"If, at least 30 days before the Agency provides the proponent of a designated project with a notice of the commencement of the impact assessment of the designated project under subsection 18(1), the proponent so requests, the Ministers of Finance, Natural Resources Canada and the Environment and Climate Change Canada must, prior to the notice of commencement provide a written notice if, in their opinions, the project is inconsistent with formal government policy. The written notice must set out the basis for the Minister's opinion."

Second, to improve certainty for project proponents the Canadian Chamber of Commerce recommends the inclusion of the following new subsection after section 17(2):

17(3) For greater certainty, the provision of a written notice to a proponent of a designated project under subsection 17(1) does not suspend or terminate the impact assessment of the designated project.

### **Recommendation on Ministerial Discretion**

Before subjecting a project to further review, suspension, or the addition or removal of project conditions, the Minister has a duty to consider several factors, including potential environmental impacts and feasible alternatives of carrying out the proposed project, as well as any other matters deemed relevant to the impact assessment.

These social, cultural and environmental factors are intended to help the Minister decide if a project is in the public interest. However, other factors must also be considered when evaluating public interest, including the project's potential economic contribution. Resource projects generate significant economic benefits, both in job creation and in producing investment and development for Indigenous communities. These potential benefits should also receive due consideration. Consequently, the Canadian Chamber makes two recommendations.

First, that Parliament amend the Act to add the Minister of Natural Resources Canada and an economic minister (Finance/ Trade Diversification) to share decision-making authority with the Minister of ECCC throughout the Act. This amendment would ensure that the net economic benefits of a given project are given due consideration, including an understanding of what economic benefits would be lost if a project does not proceed.

Second, that the Act be amended to expand the Minister's mandate to include economic considerations when evaluating the public interest in a given project. Increasing the Minister of ECCC's economic mandate would follow the practice adopted in other G7 Nations, including the United Kingdom, to ensure that regulators consider economic outcomes as well as environmental, social or cultural factors when evaluating projects. Economic evaluations include factors such as the costs and benefits of a project, employment and job creation opportunities, and the anticipated economic activity and opportunity costs.

This economic mandate would help ensure that the economic benefits for indigenous communities are fully considered during the impact assessment process. Resource projects often go far beyond benefits agreements to create wide-ranging economic opportunities that improve the economic autonomy and capacity of indigenous communities. In particular, the resource sector often facilitates the creation of indigenous businesses, allows for greater indigenous control over resource projects, and produces significant, long-lasting direct and indirect jobs. An economic mandate would require the Minister to value these opportunities and the social and economic costs to communities if they were lost by suspending or cancelling a project.

## **Principle 2: Public Participation**

Improving the certainty of our regulatory system demands that both project proponents and the people affected by these projects have the opportunity to discuss concerns and exchange information in various phases of the project. Ensuring that consultation with communities potentially affected by development projects is key to public confidence and mutual trust between communities and project proponents.

To meet this goal *Bill C-69* should include a clear mechanism to empower the Impact Assessment Agency to determine the nature and scope of participation in the review panel process. The Canadian Chamber of Commerce believes that public engagement strengthens the planning process of major projects. It is especially important that project proponents can engage meaningfully with those most affected by the

project. As currently drafted, *Bill C-69* would permit those who are most affected by the project to be drowned out by those with more general concerns. We believe that basic fairness requires that those who are most affected must be given priority.

## Recommendation

The Canadian Chamber of Commerce recommends that *Bill C-69* be amended to allow for a mechanism to define the nature and scope of public participation to the public in the assessment process. In particular, the members of the public eligible to stand and provide evidence for the review panel must demonstrate that the project presents "significant adverse environmental effects" to themselves or their communities. Individuals who cannot demonstrate that the project would have significant adverse environmental effects for them or their communities would be encouraged to submit their perspectives via online platforms or by mail, tools currently used by the agency to manage the public engagement.

The new assessment process needs to ensure that individuals and communities most likely to be affected will be given immediate consideration and that project proponents will receive the relevant information they need to build or extract resources in a responsible, sustainable manner. Finally, greater precision will also help to ensure that those agencies charged with consultation have the resources to meet the needs of the individuals and parties who are most affected.

## Principle 3: Federal Backstop

The Canadian Chamber of Commerce applauds the Government for its commitment to improving relationships with Indigenous communities based on recognition of rights, respect, co-operation and partnership. The Chamber also recognizes that reconciliation is a collective responsibility, not just a responsibility of government. *Bill C-69* will contribute to this effort by requiring proponents to consider twenty potential impact factors outlined in Section 22 (1). The Canadian Chamber of Commerce believes that this thorough review by Government is key to ensuring Canadians trust their regulatory agencies and that the complexities of project development are understood.

It is also clear that reconciliation and meaningful consultation with indigenous communities is complex and evolving. As the recent decision on the Trans Mountain pipeline project demonstrates, although the Government may execute its duty to consult, it can still fail to meaningfully address the concerns from indigenous communities to the satisfaction of the judicial system.<sup>3</sup> The Canadian Chamber of Commerce wants to see the Federal Government discharge its duty to consult and lead Canada forward in reconciliation. However, the Government's task is not simple. There may be future instances where, despite its best intentions, the Crown may not successfully execute its duty to consult and major projects could be delayed or cancelled, due to no fault of the proponents.

Such a failure of the system is intrinsically unfair. It would create significant uncertainty for developers and investors and drive investment away from Canada's resource sector. In particular, proponents who invest in studies, and consultations required by the project review process could find their projects unable to continue and have no means to recoup the capital they were forced to invest. To give just one recent example, the Northern Gateway project, which, like the Trans Mountain project, faltered because of the Government's failure to meaningfully consult indigenous communities, cost the project proponent half a billion dollars during the regulatory process.<sup>4</sup> Similarly, indigenous communities that had established partnerships with the project proponent lost opportunities through no fault of their own. To ensure fairness and that *Bill C-69* achieves its aims of improving the certainty and predictability of our resource sector,

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<sup>3</sup> Malcolm Lavoie and Moira Lavoie, "Transmountain and the problem with pipeline consultation in Canada" September 4<sup>th</sup>, 2018. Fraser Institute, <https://www.fraserinstitute.org/blogs/trans-mountain-and-the-problem-with-pipeline-consultation-in-canada>

<sup>4</sup>Peter O'Neil, "Are taxpayers liable for Enbridge's 500m in Northern Gateway costs?" November 30<sup>th</sup>, 2016, *Vancouver Sun*

project proponents need assurances that, when they comply fully with the regulatory system, they will not be penalized for and Government errors in executing its duty to consult.

## Recommendation

Government cannot compromise on its constitutional duty to provide meaningful consultation with Canada's indigenous communities. However, project proponents need to know that, when they follow the regulatory processes, they will not be unfairly penalized. The Canadian Chamber of Commerce recommends that the Act be amended to include a *Federal Backstop*. A Federal Backstop will be crucial in drawing carefully considered projects and investment back to an investment environment that appears uncertain. Many proponents are reluctant to invest in Canada only to find that, through no fault of their own, they have lost the development opportunity and have no hope of recouping the costs inflicted by Canada's regulatory system. However, the backstop would not be a guarantee that a project would move forward and would in no way compensate proponents who had not adhered to the conditions and stipulations of Canada's regulatory system.

This *Federal Backstop* would:

- 1) Compensate companies that had adhered and *fully complied* with the regulatory process but find their project cannot proceed because of errors made by the Government in the consultation and assessment process.
- 2) Compensate indigenous and other communities for the economic losses associated with the cancellation of a project because of the Government's inability to fully execute its duty to consult. The compensation would cover lost opportunities from shared construction benefits, money earmarked for long-term community investment, and lost direct employment opportunities.

## Principle 4: Clarification of new project criteria

*Bill C-69* includes new impact factors that will be used to assess projects. Section 22 includes over twenty criteria for assessment. These criteria form the building blocks of a review process intended to include more social and cultural considerations. However, greater clarity is needed to reassure project proponents that they can comply with the new factors being introduced. These criteria must not simply become another means for opponents to abuse the process by routinely attempting to either overturn the regulatory decisions or further delay the project. The process must be, consultative, transparent and functional, and not simply serve as a mechanism to obstruct projects.

## Recommendation

The Canadian Chamber of Commerce asks that the Act be amended so that impact factors are clearly defined. Without greater precision, the legislation will create the potential for each project review to be subject to a far-reaching, highly politicised debate. As an example, to achieve clarity on the meaning and scope of the "intersection of sex and gender with other identity factors" the Government should provide clear policy guidance that includes the categories of assessment used in the GBA+ analysis as they pertain to *Bill C-69*. Doing this will allow project proponents to understand the extent to which these categories and forms of analysis already inform their socio-economic studies. Stating how the categories of GBA+ analysis will feature in the Act will allow project proponents to:

- 1) Align their current corporate practices with these project criteria that ensure inclusion and gender equity;
- 2) Anticipate and develop new practices or procedures to ensure these criteria are successfully

included in future projects; and

- 3) Ensure they understand the Government's criteria so business leaders can share best practices across the business community.

## Principle 5: Project List Clarification

Like CEAA 2012, *Bill C-69* includes language around screening provisions that suggests the Agency will have discretion to decide whether an impact assessment of a designated project is required. This discretion implies that the drafters of the legislation understand that there may be some projects that, despite being designated, would not warrant an impact assessment.

The Canadian Chamber of Commerce agrees that this discretion is important, especially as the legislation should be sufficiently flexible to manage the many different types of infrastructure projects that fall within its purview. However, at present the criteria that would have to be met to allow for a designated project to be exempt from an Impact Assessment are not adequately outlined in the Act. In particular, although Subsection 16(2) of *Bill C-69* lists factors that must be taken into account by the Agency when deciding whether an impact assessment of a designated project is required, how these factors will be weighed or considered is unclear.

### Recommendation

The Canadian Chamber of Commerce recommends that the conditions under which a designated project can be exempt from the Impact Assessment be better defined. Moreover, in providing clarification to subsection 16 (2), instances where the designated project in question may already have an equivalent assessment in an implicated jurisdiction should be added as a criterion for exemption.

## Principle 6: Table Regulations while *Bill C-69* is reviewed by Parliament

The Government recognizes that *Bill C-69* will cover projects of all sizes from many different sectors. The scope of the legislation creates many opportunities for uncertainty and omissions of the particular circumstances that could be faced by project proponents. Consequently, the Government has indicated that it intends to resolve unclear aspects and issues within the legislation through regulations. The Canadian Chamber of Commerce supports the Government's commitment to addressing the concerns raised by project proponents. However, because the Government intends to resolve many significant aspects of the legislation through regulations, Canadians should be able to review these regulations to see if their concerns have been addressed and, where necessary, have a chance to raise issues before the legislation is passed into law.

### Recommendation

The Government must ensure that the regulations it intends to enforce are completed and tabled for consideration while *the Bill C-69* is under review by Parliament. The business community and others should be given the opportunity to review these draft regulations so they can be assured that important issues that remain unresolved in the legislation have been properly addressed in regulations.

## Conclusion

The Canadian Chamber of Commerce fully shares the government's expressed goal of ensuring that Canadians have a regulatory system that is transparent, fact-based, timely, fair and effective. Further, we appreciate the government's undertaking to fairly consider suggested improvements to the legislation. We also fully subscribe to the need to address problems that exist with the current CEAA 2012 process. However, we believe that, left in its current form, Bill C-69 would cause much-needed investment, jobs and economic growth to leave Canada for other jurisdictions. We offer our proposed amendments in the hope that Parliament will provide Canadians with a regulatory regime that will ensure that Canadian resources can successfully be brought to market in a way that respects the environment and the rights of communities across Canada.

The Canadian Chamber of Commerce thanks the Senate Standing Committee on Energy, the Environment and Natural Resources for the opportunity to share our thoughts. We would be pleased to provide further information on any of the issues discussed in this submission.