Canada's Environmental Law:

Promises Made versus Promises Kept

By Joanna Skrajny, *AWA Conservation Specialist*

Opinions about Bill C-69, Ottawa's wide-ranging law amending the federal environmental protection regime, were as plentiful as showers in Calgary this summer. Premier Kenney dubbed it the "No More Pipelines Bill"; B.C. Senator Richard Neufeld predicted that "it will have disastrous consequences on our country"; Ecojustice lawyer Joshua Ginsberg stated that the bill is "not perfect, but it strikes a balance by making sure important environmental issues like climate change, Indigenous rights, and sustainable economic development are all factored into future assessment."

So now that Bill C-69 is part of the legislative landscape what will happen? Will it be the fourth horseman, a harbinger of the apocalypse? Hardly. If anything, Bill C-69 is more like putting lipstick on the proverbial creature created by the Harper Government's drastic slashes to environmental protections in 2012. Spin and outrage aside, it doesn't deliver a significant strengthening of federal environmental review processes. Canadians should be outraged that Bill C-69 failed to amend our laws enough to help give environmental integrity and values more prominence.

So what gives? What happened to the process, and *what is* Bill C-69, really?

Our answer begins in the summer of 2016, when it was hard not to feel hopeful about the future of Canada's environmental laws. Environment and Climate Change Canada Minister McKenna received a mandate from Prime Minister Trudeau to "review Canada's environmental assessment process to regain public trust and help get resources to market and introduce new, fair processes that will restore robust oversight and thorough environmental assessments of areas under federal jurisdiction." This directive was reinforced by a commitment to "ensure that decisions are based on science, facts, and evidence, and serve the public's interest" and "provide ways for Canadians to express their views and opportunities for experts to meaningfully participate."

The Expert Panel

In August 2016, the Minister established an Expert Panel tasked with recommending how the federal government could go about improving environmental assessment. That fall and winter, the Panel travelled across Canada, visiting 21 cities and hearing over 400 in-person presentations. I attended one of the Calgary sessions, providing the Panel with AWA's perspective on the importance of properly incorporating cumulative effects into Canada's environmental assessments. The list of presenters that day included myself, representatives from Enbridge, Canadian Pacific Railway, the In-Situ Oil Sands Alliance, and Canadian Parks and Wilderness Society.

What I heard that day concurs with the Expert Panel's summary of the public sessions held in Calgary:

- Canadians do not feel connected to environmental assessment decisions anymore. Both Canadians and investors need to feel confident in a process that is fair and transparent.
- An environmental assessment should be an objective, rigorous, and scientific process that looks at the positive and negative effects of a project, and is free from political interference.
- When done properly, public participation results in better planning, projects and outcomes.

These examples show that there was a great deal of synchronicity in suggested improvements to the environmental assessment process that would provide assurance to both industry and the greater public. For example, Canadian Pacific recommended including strategic assessments to consult on the potential benefits and impacts of new government policies as well as regional assessments to address the cumulative effects of multiple projects on a landscape. These recommendations very closely mirrored the suggestions I made during my presentation. This symmetry goes to show that changes to the environmental assessment system can be mutually beneficial for all stakeholders: while conservationists support the government in taking responsibility for the impacts of the many projects on our working landscapes, industrial players also support the attention to cumulative effects because it provides their sectors with guidance and certainty about how their projects fit into the bigger picture.

Of course, that's not to say there were no protests to shifting the scales in favour of the environment. Some of the presentations favoured leaving things the way they were, or leaving assessments in the hands of provinces. Rob Sturgess of Matrix Solutions argued in favour of provincial assessments: "Today, when the Federal and Provincial EA [environmental assessment] processes try

Despite having a smaller overall footprint than open pit mines, in situ "in its original place" oil sands projects, such as the one pictured here, can have a number of associated impacts on the environment. This includes habitat fragmentation from the entire associated infrastructure, such as transmission lines, seismic lines, pipelines and roads. This can impact watershed capacity and function, as well as species that depend on intact habitat such as boreal caribou. PHOTOS: © C. CAMPBELL

to proceed in parallel, information needs and timing differences usually results in a 6 to 12 month overall project delay. (sic) As an example, the Alberta process takes a 3 to 4 page submission from which an EA is made. The same project, through CEA [the Canadian Environmental Assessment Agency], takes considerable more technical information, typically 100-200 pages of submission for the Federal determination if an EA is required." While the speaker used this as an example to showcase what was, in his opinion, an undue burden to project approval, to me it was a chilling example of how lackadaisical our provincial environmental assessment standards are.

However, presentations favouring the status quo seemed to be the exception rather than the rule. This was reinforced by the questions the Expert Panel asked afterwards. After one presentation by an industry representative who favoured keeping the environmental assessment process as it was, the Panel stated that they had heard all across the country that the current environmental assessment process had lost the public's trust and required major improvements – so what was the industry official willing to change? I no longer remember the representative's uncertain reply, other than that the official completely dismissed any concerns about the environmental process.

I would be remiss not to mention the main points raised by the Canadian Association of Petroleum Producers (CAPP), an organization that later became one of the main opponents to the new *Impact Assessment Act*. CAPP supported the incorporation of Indigenous Knowledge and participation, advocated for the continued use of a project list and legislated time limits, and supported the inclusion of Regional Environmental Assessments. CAPP also advocated for the exemption of in situ oil sands projects from undergoing assessments (as was the case under CEAA 2012) and reiterated its belief that provinces should have exclusive decision making authority for resource development projects.

And so, after hundreds of individual presentations and approximately 2,500 written submissions, the Expert Panel reconvened to produce a report with recommendations on how to improve the environmental assessment process.

In a 2017 WLA article, I provided an in-depth review of the Expert Panel's recommendations. Here are some of its highlights:

- Major changes are needed to restore public trust in the current federal assessment process
- Jurisdictions (i.e. municipal, provincial and federal governments, as well as Indigenous Groups) should co-operate together to undertake a singular assessment.
- There should be a list of projects which automatically require federal assessments. This would be supplemented with a provision that any projects which have the potential to impact current and future generations require an impact assessment. As well, any person or group can also request that an assessment be completed.
- To meet the needs of current and future generations, federal assessments should provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being.
- Strategic and regional assessments should be used to determine the impacts of policies and to guide the development of multiple projects on a landscape.
- Assessment information should be permanently and publicly available, scientific data should be publicly available on a federal government database, decisions should be evidence based and any criteria used for decision making should be clearly listed.

Accompanying the Expert Panel's report was a public consultation period, inviting the public to share their views on the recommendations.

Bill C-69

Only two months after the Expert Panel's report, the federal government released its

own discussion paper. Frankly this discussion paper cherry picked the aspects of the Expert Panel's recommendations it would adopt and ignored, without any justification, other recommendations. The result was: the public was forced to look at and assess a whole new set of proposals from scratch, with no clear indication of how or whether their initial participation was acknowledged. To top it all off, the proposals were so vague it was difficult to discern exactly what the final legislation would look like. Personally, I was beginning to feel exhausted by the whole process and wondered whether my earlier efforts to engage with the Panel had been worth the time and energy.

Then came the draft Bill C-69, introducing the proposed details of the new Impact *Assessment Act*, in February 2018. On the face of it, this bill definitely attempted to restore the most damaged or suspect parts of the current environmental assessment regime (CEAA 2012). But, the bill also didn't address many troubling aspects of the current process.

For instance, the purpose of CEAA 2012 was to determine whether a given project would cause "significant adverse environmental effects" (read: irreparable damage). Even in those instances, the Governor in Council (the federal cabinet) had the discretion to determine whether those adverse effects were "justified in the circumstances." Given the need to show irreparable damage it's no surprise then that, as highlighted in a Canada West Foundation review, 95 percent of projects that underwent a federal environmental assessment under the CEAA 2012 framework were approved. Even for those projects where it was determined that there would be significant and adverse effects, 73 percent of those projects were approved. So, in short, the circumstances almost always justified any anticipated harm to the environment.

Bill C-69 outlines a new purpose. This is that an impacts assessment should determine whether a project contributes to sustainability (impacts on the environment, economy, society, health and on current and future generations) and whether it is in the "public interest." In deciding whether a project is in the public interest the government must consider whether the project will contribute to sustainability, how adverse the project impacts will be, what mitigation measures will be used to address these impacts, the impact of the project on Indigenous peoples, and what impact the project will have on Canada's ability to meet its climate targets. Martin Olszynski, an associate professor with the University of Calgary, noted a major flaw to this approach: the new Act "like all of its predecessors, does not draw an environmental – or any other – line in the sand. It merely requires the government to *identify and consider* impacts in a transparent manner. Accordingly, Minister McKenna was on solid legal ground when she said that the Trans Mountain pipeline expansion could have been approved under the proposed regime. Any project could, subject only to our politicians' assessment as to where the public interest – and vote – lies. This has long been the bargain reflected in such laws and accepted by industry, which for the most part it has served very well."

Under CEAA 2012, stricter criteria were introduced to govern the public's ability to participate in assessments and to provide comments. Only members of the public who were considered to be "directly affected" or who have "relevant information or expertise" were able to participate in Review Panel hearings or assessments of pipelines being considered by the National Energy Board - which are usually the biggest and most contentious projects. This tightening excluded large portions of the public from participating in major project assessments that arguably impact the Canadian public-at-large. Under the 2012 regime it was more difficult to participate based on concerns extending beyond a project footprint, such as a project's contribution to climate change. Bill C-69 removed this limitation to public participation – definitely a step in the right direction. However, much more needs to be done before public trust in the process is restored. The public needs to feel as though their input matters to the outcome of the project. They need to be provided with simple, easy to understand documents that clearly outline the issues at hand, instead of binders brimming with consultant jargon. In other words, they need to be provided with the resources and the time to feel heard, and to believe their opinion is valued. The new *Impact Assessment Act* does not provide these opportunities.

CEAA 2012 instituted new, shorter, deadlines to complete different types of environmental assessment work. A final environmental assessment decision was expected to be reached no later than one year after the Canadian Environmental Assessment Agency began an assessment. If a matter was referred to a review panel it was expected that a final environmental assessment decision would be made in no more than two years. The rationale for these deadlines was simple: speed up project approvals. It also should be noted that these clocks could be stopped, and the timeline for completing an assessment therefore could be extended, while information requests were being addressed.

The new *Impact Assessment Act* shortens these timelines for completing assessments even further, to 300 days for a general review and 600 for projects subject to a review panel. This shortened timeline is coupled with a new 180 day "early planning stage", which is intended to provide early opportunities for public input and consultation with Indigenous governments. A concerning aspect to these shortened timelines is a new change wherein the time taken by proponents to respond to a review panel's request will no longer result in a pause to the assessment deadline (as was previously the case). Any "stopping of the clock" would have to be done by the Environment Minister. This substantially shortens the timelines for panel reviews. Tight timelines have been widely criticized for limiting public participation in the assessment process as the public is given insufficient time to review hundreds of pages of technical documents, or hearings are cut short. Many environmental legal

experts, including the Expert Panel itself, have pointed out that these mandatory deadlines also have not worked to shorten the amount of time assessments take. Instead, for both the benefit of the public and industry, estimated timelines to complete project reviews should be undertaken on a case-by-case basis.

One of the biggest changes in CEAA 2012 was the introduction of a "project list", where only certain types of projects were subject to assessment. Political considerations certainly affected the content of this list: projects such as in-situ oil sands projects – which are expected to constitute the majority of future oil sands exploitation – were exempted from environmental assessments entirely. Disappointingly, the *Impact Assessment Act* will still only assess a hand-picked list of projects within a designated list. Now in situ projects *may* be assessed. Whether or not an in situ project would be subject to an environmental assessment depends on whether the province hosting the project has a legislated limit on total oil sands emissions. If such provincial legislation exists, the in situ project would be exempt from a federal environmental assessment. In the absence of such legislation a federal assessment would be required. This treats in situ projects very generously since the provincial emissions limit, as was the case for the Notley government's, could be dramatically higher in the future than it was in 2015. While the use of a project list is intended to provide clarity to proponents, this may result in some unintended omissions and invites politicization. Consultation on the proposed project list was not released until 2019, which raised fears from both the industry sector and conservationists about what was (or wasn't) going to be assessed.

Even though it is an improvement over CEAA 2012, the new *Impact Assessment Act* is also over reliant on ministerial discretion. This issue was raised by MPs, industry executives, and environmental NGOs alike as it leaves too much open to political whims. All proponents that participate in the impact assessment process want an objective, science-based decision making process.

Compelling evidence of the need to conduct environmental assessments of in situ oil sands projects was provided in the spring of 2013. Then, at a blowout at Canadian Natural Resources Limited's Primrose oil sands operations, 1.6 million litres of bitumen bubbled to the surface. This photo shows approximately 100 litres of bitumen that CNRL allowed to accumulate over a two-week period.
PHOTO: © C. CAMPBELL

The new *Impact Assessment Act* promised to restore public trust; it promised to include science more; it promised to establish meaningful public participation. Yet it's clear that, as written, the Act failed to deliver on these key promises. Overall, the biggest problem is that the *Impact Assessment Act* follows the CEAA 2012 too closely. The 2012 changes were included and passed as part of the *Jobs, Growth and Long-term Prosperity Act* – without any serious public consultation. At what point should we balk at working with legislation we had little to no say about in the first place?

These criticisms and more were raised when Bill C-69 was initially debated in the House of Commons, most staunchly by Green Party Leader Elizabeth May and NDP Member of Parliament Linda Duncan. Over 150 amendments were made before Bill C-69 passed in the House of Commons in June of 2018.

Then came the Senate Review. Things really started to go off the rails in the Chamber of Sober Second Thought.

Opponents to the bill descended on the Senate, publicly decrying that the end was nigh:

- "There will be no new development in the oilsands. Many would argue that's the very intent of the legislation,"– Doug Black, Alberta Senator February 2019
- "Bill C-69 – as it is drafted – will have serious impacts on the Canadian economy and, specifically, on investment in Alberta." – Environment Minister Shannon Phillips, October 2019 News Release
- "This bill is as damaging to the Canadian economy as any piece of legislation that we've seen in a decade," Tim McMillan, president and CEO of the Canadian Association of Petroleum Producers November 2018

Even a cursory overview of the new Bill shows that these arguments hold no water. This was also the assessment legal experts offered after their analyses of the legislation. A March 2019 submission by the Canadian Environmental Law Association (CELA) to the Senate Committee on Energy, Environment and Natural Resources stated:

> *"CELA is dismayed by the extensive misinformation that some Bill C-69 opponents have conveyed about the IAA [Impact Assessment Act] after the legislation was referred to the Senate. In fact,*

some of these anti-IAA comments are so erroneous that CELA questions whether these commentators have actually read or properly understood the Act."

I share CELA's sentiment. I also was glad to see that not all industry associations viewed Bill C-69 as the harbinger of the apocalypse. The Canadian Mining Association, for example, pointed to areas of the established environmental assessment process that worked and other areas that needed improvement. They recognized the need to strengthen the environmental review process and were supporters of the bill. As they also propose about 50 percent of projects that get assessed, their view suggests that the true nature of this bill wasn't nearly as threatening as opponents suggested.

As a result of these misleading claims, the Alberta public was riled up, horrified at the idea that their jobs may be lost. There was outrage, protests, and a truck convoy to Ottawa.

And there was lobbying, lots of it. Sharon J. Riley and Sarah Cox of *The Narwhal* showed that "industry and related groups, primarily from the oil and gas industry, are responsible for more than 80 per cent of Senate lobbying on Bill C-69, Canada's proposed new environmental assessment law. In contrast, just 13 per cent of Senate and Senate staff lobbying was conducted by environmental groups and four per cent was carried out by one First Nation."

So what did opposed groups suggest as improvements to the bill?

The Alberta Government asked to exempt in-situ oil sands projects and intra-provincial pipelines from federal assessment, to exclude downstream climate emission as grounds for rejecting a project, and to release the complete project list before passing the legislation.

The Canadian Association of Petroleum Producers' (CAPP) main recommendations included explicit provisions to prevent any member of the public from challenging decisions made during the Impact Assessment process. They recommended limiting public participation, stating that opening it up would mean "funded activists living in New York City will have the ability to drown out the voices of Canadians living next door to development." CAPP also petitioned for a number of factors to be optional instead of mandatory, such as including Indigenous knowledge and considering impacts to Indigenous peoples. CAPP abandoned much of their 2016 presentation to the Expert Panel, where they declared their support for Indigenous knowledge and participation.

In the end, the Senate adopted many of these groups' recommendations as part of its 187 amendments to the bill. In some instances, the Senate Committee copied CAPP's suggestions word-for-word. A particularly egregious example was an addition to the purpose of the Act, which was "to improve investor confidence, strengthen the Canadian economy, encourage prosperity and improve the competitiveness of the Canadian energy and resource sectors."

As former Alberta MLA Kevin Taft commented on the Senate amendments in an interview with *The Narwhal*: "Those should be ringing loud alarm bells for every Canadian. When we have a rich, powerful, foreign-controlled industry drafting our legislation for us we have a real problem with democracy in Canada."

In the end, the House of Commons accepted almost 100 of the Senate's recommended amendments but rejected some of the most damaging provisions recommended by the Senate (such as the including energy sector competitiveness in the purpose). The Senate accepted the Commons' revised version of Bill C-69, passing it on June 20.

However, the damage – in terms of public awareness – has been done. Too many allege that this bill, even in its current state, will destroy Canada's future. Premier Jason Kenney promised to challenge "pipeline killer" Bill C-69 in the courts. In reality, the new *Impact Assessment Act* is far less dangerous to industry. The law partially restores some protections to better include the public and Indigenous peoples in the assessment process, and requires environmental assessment decisions to consider the impacts of projects on climate change and society as a whole.

It also undid some of the few remaining environmental protections that were left. The new Project List, published quietly in August this year, once again opens the door to exempting in-situ oil sand projects from needing an assessment. The list also exempts fracking and geothermal projects. The thresholds have also been substantially weakened. Previously, any coal mines that produced over 3,000 tonnes a day were subject to assessment; in the new list, it is 5,000 tonnes. That's allowing mines that are 60 percent bigger to fly under the radar. These regulations are in many ways the teeth of the Impact Assessment Act, and I couldn't be more disappointed by them.

Misinformation and propaganda on the parts of opponents hoping to gain more economic advantages damages society. I'm disappointed in the role the media played in cultivating the vitriol flung at Bill C-69. The mainstream media's failure to fact check and question some of the opponents' assertions harms public discourse. The average Canadian doesn't have the time to read through every single proposal and the media needs to do a better job at recognizing when public fears are being preyed upon and stoked with misinformation.

Now it's your turn. Take a minute, read Bill C-69 for yourself. Talk to your friends and neighbours. Support credible news sources that provided appropriate coverage of Bill C-69: The *National Observer, The Narwhal*, and independent analyses from *The Globe and Mail* all come to mind. They offered important counterweights to the fear mongering promoted by other media.

Have no doubt that Bill C-69 will be an election issue. It's your responsibility to ensure that as many people as possible are informed about it.