

PREFACE TO 12TH EDITION OF KEY DEVELOPMENTS IN ENVIRONMENTAL LAW

Stanley Berger :Published by Canada Law Book/Thomson Reuters

The Review this year features a number of articles commenting on different aspects of the federal government's legislative effort to revitalize federal environmental assessment. The government's challenge has been daunting. The government felt it needed to address a loss of faith by indigenous peoples and environmental groups in the assessment process. Repeated complaints about a lack of transparency and regulatory agencies and tribunals being captive to developers whose projects were being assessed, were perceived as having tarnished the integrity of the process. At the same time, the government was concerned that the pace of the assessment process and uncertainty occasioned by appeals following their completion, was adversely affecting investment in major infrastructure development and Canada's ability to bring natural resources to market. Bill C-69 received third reading in the House of Commons on June 20, 2018. The Bill was intended to address these concerns.

We've assembled environmental lawyers from across the country to comment on various aspects of the Bill . *Selina Lee-Andersen and Paul Cassidy from McCarthy Tétrault LLP in B.C.* look at the interaction between Bill C-69, a revamped *Fisheries Act (Bill C-68)* and the new *Navigation Protection Act* and the potential impacts changes to these laws could have for the approval of resource development projects. *Julie Belley Perron, Roger Bill, Oliver Scheffer and Marc-Antoine Séguin from Langlois lawyers LLP in Québec* outline the current cooperative regime between the Province of Québec and the federal government and go on to analyze the interplay between Québec's Bill 102, assented to in 2017 and Bill C-69. *Daniel Watt, a partner at McInnes Cooper in Halifax,* Nova Scotia examines how Bill C-69 may affect the assessment and approval of offshore oil and gas projects in Atlantic Canada. *Michael Fortier at Torys* provides an up-to-date overview of Bill C-69.

The Federal Court of Appeal's decision on August 30, 2018 in *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.* has prompted an outpouring of commentators to call for Bill C-69 to be scrapped in its current form. On September 4, 2018 lawyers from Norton Rose Fulbright Canada wrote in the Globe and Mail that "Bill C-69 would make the current approval process even more unwieldy, turning it into a venue for debating everything from climate change to indigenous consultation, to gender-based analysis." Gary Mason, in that same paper on September 1, remarked that "There needs to be a way of knowing whether government has ticked all the boxes when it comes to consultation. Whether that is done by a tribunal that includes indigenous representation, I don't know. But leaving it to the Federal Court of Appeal to decide each time is simply not an option." And that really is the problem with the assessment process and Bill C-69. Judicial review and appeals from assessments and cabinet approval are complex and protracted. They unwittingly assist those who will oppose resource development projects at any cost. Professor Tom Flanagan refers to the strategy of development opponents as a form of guerilla warfare which he dubs "lawfare". While the appellate process plays out, costs mount and the ability to compete in global markets evaporates. Investors are forced to bow out and seek opportunities elsewhere. The CIBC's C.E.O. Victor Dodig said as much at a lunch speech on September 11, 2018 in Toronto. The challenge for government is to find an assessment process which, while involving a broad spectrum of perspectives and employing techniques to build consensus, is capable of identifying and promoting the one(s) which best

represents the national interest. Francis Fukuyama in a recent article on the influence of identity politics in the magazine *Foreign Affairs*, recognized the need to protect marginalized groups and not to abandon the idea of identity which he considered central to how people think about themselves. At the same time, he advocated defining larger and more integrative national identities. He identified as a key priority diminished economic status - "Resentment over lost status starts with real economic distress and one way of muting the resentment is to mitigate concerns over jobs, incomes and security." This approach won't appease everyone, but if a common national interest rising above any singular interest can serve as the defining principle in environmental assessment, and that national interest is consistently promoted by federal and provincial governments, it can bring greater predictability to the approval process.

In this year's review we also follow-up on legal issues which were in the news last year. *Duff Harper, at Blake, Cassels & Graydon in Calgary* follows the legal and political developments on greenhouse gas regulation in Canada. *Donna Shier and Anand Srivastava from Willms and Shier* compare three cases in Ontario- *Sorbam Investments Ltd. v Litwack, Hamilton Beach Brands Canada* and *R.v ControlChem Canada Ltd.*, to show the significance of the applicable legal forum in dictating the outcome of an environmental case. *Bruce McMeekin* updates readers on the Superior Court decision *Alex Smith and Mark Strychar-Bodnar* commented upon in last year's review: *Yaiguaje v. Chevron*. The Ontario Court of Appeal has recently upheld the lower court judgment. The appellate court, like the court of first instance, was not willing to make an exception to the well-recognized principle of corporate separateness and lift the corporate veil. In the result, the appellants were unsuccessful in enforcing a judgment obtained in Ecuador against Chevron, against Chevron Canada. Bruce goes on to summarize the arguments made by the parties in the leave to appeal filed in the Supreme Court of Canada on June 25, 2018. He also offers some thoughts on how the Supreme Court might rule.

We've made an effort this year to have representative contributions from every region of the country. We hope you like the result and as with other years, we encourage your input on how the annual review can better serve you.

Stan Berger, October 2018, Editor