

BILLS C-48 AND C-69 CLEAR THEIR FINAL LEGISLATIVE HURDLE

By Stanley Berger

On June 20th, 2019 the Canadian Senate, Parliament's chamber of second thought, approved two government bills for which it had proposed significant amendments. With respect to Bill C-69, the *Impact Assessment Act*, the government majority in the House of Commons chose to ignore most of the 188 amendments the Senate proposed on June 6th and on June 13th re-submitted the Bill to the Senate for final approval with only those amendments it chose to adopt. With respect to Bill C-48 the government bill placed a moratorium on oil tankers north of Vancouver island. The House of Commons did however, adopt the Senate's amendment that required a review of the moratorium after 5 years. Bill C-69, the *Impact Assessment Act*, is the controversial environmental assessment law applicable to major infrastructure projects across the country. It has been of particular concern to the oil industry. The transcript of the final debate on June 20th in the Senate contains an interesting reflection of senators' concerns with the new assessment law. Senator Elaine McCoy, said the following:

- First, the political decision makers. To have a cabinet and/or minister making decisions is not a good sign. When we went overseas teaching other people how to conduct impact assessments, we always said, "Try not to politicize the decisions; try to have an arm's-length, independent decision maker." And here we are in Canada adopting a practice that is more often seen in jurisdictions that we would not boast about in regular dinner party conversations.
- Second, we have not succeeded in establishing a vehicle or a practice by which government policies are clearly articulated and decided upon prior to the impact assessment being undertaken. That is one of the problems that we've been suffering from over the last seven to ten years. We need a platform. We need a space in which government policy decisions are thoroughly vetted and participated in by all of the citizens and interests that are applicable in Canada and then apply that policy, which is by that time a known entity in the assessment process. You know it ahead of time, you know what it contains and you have something you can work with — not something that changes and is declared, seven years later on a rainy day in November, after you've spent \$800 million and have all of your approvals or at least recommendations for approval, and at the last moment an announcement of a government policy that would have stopped the practice ahead of time if it had been made appropriately.



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- Third, the expertise of assessors will be sorely missed. I can only recommend to you the transcript of the committee. I think the witness Andrew Roman put it all very well, as he said, "You can't be a judge if you don't hear the evidence." You can't be a judge if you sit there and rely on someone else's summary. You can't take a briefing note and become an insightful assessor. You have to know what you're doing and you have to have sat through the evidence and you have to have listened and digested it. That's not been established.
- Fourth, there are still too many platforms for court challenges. They have not been eradicated from this bill. Indeed, what we call a privative clause in legal terms, which is a judicial review process, has not been narrowed sufficiently to contain the integrity of the assessment process. What you find is people dashing off to court and arguing their point of view all over again, which allows for so many exits. You're forever rushing off and delaying the process. So it's uncertain and it doesn't actually address everything in context.
- Those are four major, fatal flaws in the process that I think have not been secured. In the final analysis, I will also say that the process does not rely on legislation; it relies on management. Process management will be very important. It requires discipline from those who are involved. We will keep our fingers crossed that the impact assessment agency, in particular, which has been given additional authority, will also find the backbone and the professionalism to actually exercise disciplined management of the process.