Intelligence MEMOS

From: Grant Bishop

To: The Hon. Catherine McKenna, Minister of Environment and Climate Change

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Re: LET'S RETHINK BILL C-69

Backlash has surged to the proposed revisions to rules around federal environmental impact assessments and the revamp of the National Energy Board and the bill (C-69) arrives tomorrow at the Senate for first reading. While present gaps in federal approval processes must be addressed, the federal government has not addressed key criticisms of the legislation.

Particularly after the *Tsleil-Waututh Nation* decision on the TransMountain pipeline, Canada faces a reported chill among investors who are now uncertain about the approval of major projects. With billions in resource sector investment in limbo, the federal government needs to address significant concerns with Bill C-69 to assuage industry and investor uncertainty.

As the Mining Association of Canada has noted, the legislation laudably aims to improve impact assessment in a number of ways and instil greater public confidence in approvals. Indeed, Bill C-69 may improve impact assessments by allowing greater provincial coordination and by consolidating all reviews under uniform processes of a single agency (the new Impact Assessment Agency of Canada).

However, the legislation creates additional confusion about the standard for project approvals and many are concerned about predictability. There are significant risks with its "one size fits all" assessment framework across mines and linear pipelines. Certain in industry fear the National Energy Board's expertise and well-developed practices could be compromised in the shuffle.

A major anxiety is that Bill C-69 is silent on standing and removes the long-established "interested party" test to control participation in hearings. The new agency will have to develop some standard for who participates, and many from industry fear "death by inundation" from political opponents without a direct relationship to a project.

A submission from the Canadian Bar Association details further problems:

- "Economic impact" of a project is not expressly included as a factor to be weighed in determining the public interest.
- While the bill prescribes timelines, the legislation does not constrain cabinet's discretion for indefinite extensions.
- The bill prescribes a set of 20 mandatory factors for the impact assessment while the minister or cabinet is only to consider a subset of five factors for determining whether a project is in the public interest. It's ambiguous how factors should be weighed and whether aspects of the impact assessment can simply be ignored when determining the public interest.
- The Bill mandates consideration of how a project will impact Canada's climate change obligations; however, it does not specify whether this intends to include upstream or downstream greenhouse gas emissions, nor indicate how carbon pricing should be considered.

Moreover, legal confusion remains about the scope of a "designated project". This is highlighted in the NEB's error in TransMountain on whether the project included the potential effects of marine traffic.

Additionally, the big holdup on projects has been the federal government's own difficulties fulfilling the duty to consult, and Bill C-69 will not solve the missteps witnessed on TransMountain. Importantly, the duty to consult belongs to the Crown, not project proponents. And this is a constitutional duty that legislation cannot alter.

Notably, of roughly 25 decisions of Federal Courts concerning the *Canadian Environmental Assessment Act 2012*, 14 involved challenges on the federal government's duty to consult. Those only concerning environmental assessments or procedural challenges were almost all dismissed. The quashing of the approval for Northern Gateway resulted from the Harper government's failure to adequately consult indigenous groups. Similarly, in the recent TransMountain decision found the Trudeau government failed to fulfill its consultative duty.

Industry is therefore understandably frustrated by the federal government's missteps before approving projects: even if proponents have done everything right, they are hindered by Ottawa's errors.

With major flaws and uncertainties in the text of Bill C-69, the federal government needs to hear critics' concerns and address these before pushing ahead.

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