Intelligence MEMOS

From: Grant Bishop

To: Senator Rosa Galvez, Chair of Senate Standing Committee on Energy, the Environment and Natural Resources

Date: May 16, 2019

Re: **SENATE MUST OVERHAUL OR REJECT BILL C-69**

In its session today, the Senate Standing Committee on Energy, Environment and Natural Resources must decide on amendments to Bill C-69, the legislation revamping federal assessment of major projects. This will be the culmination of a process that included cross-country hearings where senators probed witnesses on the bill's environmental, economic and constitutional implications.

The Senate's review of the legislation has shown the upper chamber at its best in fulfilling its two roles: First, to provide "sober second thought" on problematic legislation proposed by the government of the day. Second, to provide a voice for regional interests in Ottawa. This latter function is especially relevant for Bill C-69, aspects of which appear to invade provincial jurisdiction.

Provincial governments not only counterbalance federal favouritism and Ottawa's frequent disconnect with regional concerns. Canada's division of powers ensures the provinces make important decisions about health, education and resource extraction because they can better reflect local needs and preferences. In a diverse country like Canada, we do not want centralized bureaucracy in Ottawa regulating regional industries or local matters.

Potential federal overreach is exemplified by Ottawa's inclusion of in situ oil sands projects on the proposed list of projects to be assessed under Bill C-69. Environment and Climate Change Canada has indicated that these projects are to be included "primarily due to their potential for greenhouse gas emissions." It is unclear on what basis Ottawa asserts jurisdiction over assessing GHG emissions of individual projects.

In its May 3 decision on the constitutionality of the federal carbon pricing backstop, the Saskatchewan Court of Appeal emphatically rejected the sweeping federal assertion of jurisdiction for "the cumulative dimensions of greenhouse gases." The court's majority fashioned a much narrower definition of "the establishment of minimum national standards of price stringency for GHG emissions" as a "national concern" under the Constitution's peace, order and good government power. Indeed, during the hearing at the Ontario Court of Appeal on the parallel challenge to the backstop, counsel for federal government conceded that Parliament "passing a law targeting specific sectors" would be outside any "national concern" for regulating GHGs. Ottawa appears outside its constitutional bounds to sweep in situ projects into federal impact assessment.

Moreover, Bill C-69 expands the set of "mandatory considerations" for any impact assessment – including to those that are clearly within provincial jurisdiction. The primary constitutional basis for including works like mines and hydro dams in federal environmental assessments has been the federal fisheries power. In its landmark *Oldman River* decision, the Supreme Court warned against environmental assessments becoming "a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction."

Bill C-69 envisions the federal government conducting reviews of new hydro facilities, coal mines or petroleum refineries that include mandatory assessment of "the extent to which the designated project contributes to sustainability." This appears an intrusion into provincial jurisdiction. As local matters or relating to natural resources, managing these concerns properly falls within provincial jurisdiction. The federal fisheries power must not be a beachhead for Ottawa to regulate regional economic development policy.

Senators must also guard against the politicization of what should be a science-based and technical assessment. Bill C-69 diminishes the role of independent expert agencies like the National Energy Board and Canadian Nuclear Safety Commission. And, by doing away with an agency's assessment of whether a project causes "significant" adverse environmental effects, Bill C-69 will instead empower the minister or Cabinet to make a discretionary call on whether any project is in the public interest.

Our election campaigns already feature politicians opining about whether they would or would not approve a given project. As the senate committee heard emphatically, project proponents cannot tolerate political uncertainty for each and every investment. With planned investment in Canadian resource projects plunging by $100 billion between 2017 and 2018, investors are already voting with their feet.

For legislation with long-lasting and far-reaching effects, the Senate provides an important check on the federal government of the day. On Bill C-69, the Senate must resist this government's bid to erode provincial jurisdiction and centralize project approvals at the cabinet table.

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