Intelligence MEMOS

From: Grant Sprague

To: Concerned Canadians

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Re: WITH NO CHANGE IN THE DECISION-MAKING PROCESS, HOW WILL BILL C-69 RESULT IN CHANGE?

The fundamental construct of Bill C-69, which replaces the *Canadian Environmental Assessment Act* with a new *Impact Assessment Act,* provides for the same decision-making process found in the current act. Namely, decisions will be taken either by the Minister of Environment or by federal cabinet. In the end, political considerations and political decision-making remain, notwithstanding an attempt to bolster these decisions with scientific or evidence-based information together with a significant mechanism for public comments.

A reasonable criticism to level at the current act was that large and significant policy questions were not answered by the federal government, and as a result people sought to litigate those issues and questions throughout a project review process. Regardless of the project, the absence of policy direction from the federal government, and a mechanism to address those policy concerns, has led certain citizens (either for or against a certain policy proposal) to increasingly try and make a review process the forum to resolve policy issues.

Bill C-69 provides no forum for the resolution of policy issues. It likely only contributes to furthering the use of the review process as a means to litigate perspectives. It may be, in fact, that Bill C-69 compounds the challenge by not only seeking to resolve substantial policy issues through an ineffective process, but also by adding the concept of Aboriginal consultation on top of it.

The absence of thought as to how to resolve the policy issues results in the impact assessment process being used in one of two ways to litigate issues. First, the detailed requirements of any process found in an act or a regulation become fodder for complaints that the process wasn't adhered to or wasn't properly adhered to. This type of approach immediately highlights any procedural imperfection into a substantive matter that may cause failure of the overall system. Second, opponents of a decision will seek to have the courts assess the adequacy of the policy solutions ultimately achieved. Again, this turns a polycentric conversation into a binary analysis.

By increasing the number of mandatory procedural provisions and mandatory considerations, Parliament will have added to the checklist of complaints or areas of review for lawyers who wish to challenge decisions. Likewise, by inviting broader perspectives and ensuring a greater public participation (regardless of merit), the substantive policy choices and debates will more likely become topics for consideration by a court.

Without significant government leadership to set policy objectives and to declare them simply and clearly any revised process is likely doomed to failure. Regrettably broad platitudes that "we can have it all" or that there is a "win-win-win" solution are fantasy. If Canada is going to develop its natural resources, there will be consequences to the environment and there will be consequences to people and to communities. Ottawa needs to be clear on whether it intends to develop our natural resources or not.

There is no question that Canadians want to participate and have their views heard with respect to the development of these policies. That is a far different thing than having everyone's commentary made in the context of a specific application. Indeed it places a proponent in the unenviable place of actually trying to manage a government's policy determination process.

Without addressing and grappling with this policymaking process, the replacement of the impact assessment process with more mandatory considerations, more participants and broader perspectives, means Canada will continue to see substantial decreases in projects that are advanced and substantial decreases in direct investment in this country.

Grant Sprague QC, was Alberta's deputy minister of energy from 2013 to 2016, accountable for resource development policy, and is a Fellow at the C.D. Howe Institute.

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