

Intelligence MEMOS



From: Grant Bishop
To: Canada's natural resource sector
Date: June 26, 2019
Re: **POLITICAL RISKS STILL LOOM FOR MAJOR PROJECTS AFTER BILL C-69 BECOMES LAW**

Bill C-69, the federal government's legislation to revamp the assessments for major projects as well as overhaul the National Energy Board, received royal assent last Friday.

This followed the Senate's 57 - 37 vote to approve the legislation, as amended. It was the culmination of a process that included nationwide consultations by the Senate's energy, environment and natural resource committee and full Senate recommendation of 188 amendments. The government accepted 62 of those amendments and modified 37 other provisions.

Although [the full slate of Senate amendments](#) would have offered greater certainty for project proponents, the final legislation improves on the government's original proposal. With the final amendments, C-69 better confines discretion by political decision-makers for final approvals, establishes greater independence for the Impact Assessment Agency of Canada (the successor to the present Canadian Environmental Assessment Agency), and grants authority to the agency or review panels to manage public participation in assessment processes.

In its amendments, the Senate had sought to introduce a clear dividing line between an assessment by an independent agency and any political decision-making by requiring that a "public interest" determination only be required when the independent assessment found a likelihood of "significant adverse effects."

Importantly, under the final version of Bill C-69, an impact assessment will require a finding by the agency or by a review panel on whether any adverse effects are "significant". Even so, the ultimate approval for any project will still require the minister or cabinet to determine whether adverse effects in the federal jurisdiction are in the "public interest."

Concerns remain about what Bill C-69 will mean for the future of major project approvals. Compared to the predecessor *Canadian Environmental Assessment Act 2012*, decision-making under Bill C-69 features an increased degree of political discretion for project approvals. The legislation also adds various new elements – climate change, sustainability and gender and identity factors – and many in industry remain unclear about how these will apply in practice.

The House version passed last summer first raised concerns over amplifying the political risk facing project approvals and further discouraging investment in Canadian major projects – particularly in our resource sector.

In [our February 2019 report, "A Crisis of our Own Making"](#), Grant Sprague and I observed the \$100 billion decline in planned investment in major natural resources projects between 2017 and 2018 and identified longer timelines for federal assessments of certain resource projects in Canada relative to the US or Australia.

Our report proposed an economic lens for optimally designing impact assessment. Efficient design of assessment processes should ensure that proponents mitigate a project's potential externalities and address information asymmetries between project proponents and affected stakeholders. Political decision-making should be limited to balancing trade-offs only when a project is likely to cause significant adverse effects. Under this lens, Bill C-69 risks discouraging beneficial investments because of uncertainty about timelines and political risk.

The Senate's full slate of amendments would have insulated projects that were regulated under provincial authority from federal impact assessments, as well as expressly excluding certain categories of projects – such as situ oil sands extraction or specified power generation facilities. The Senate's amendments included a "privative clause" that sought to limit litigation by stipulating any decisions were "final and conclusive", requiring leave from the Federal Court of Appeal to bring any judicial review and specifying timelines for hearing any challenges to decisions.

The federal government [rejected or modified many of proposed amendments](#) by the Senate. Certain [legal scholars criticized](#) the Senate's proposed privative clause as an inappropriate barrier to judicial oversight of decision-making by government, and the government rejected this provision. The government also rejected any limitation on the type projects that can be designated to require an environmental assessment.

Bill C-69 is now law. Although Alberta's Premier Jason Kenney has indicated that Alberta may challenge its constitutionality, legal scholars [Martin Olszynski and Nigel Bankes of the University of Calgary have argued](#) that the tether of the final decision to "adverse effects within the federal jurisdiction" keeps the legislation within bounds.

The federal government's stated aim for Bill C-69 was to restore confidence in federal assessments for major projects. However, the bill became a flashpoint for tensions around resource development, showcasing the degree to which project approvals have become politicized. With substantial political discretion and remaining uncertainties, the consequences of the new *Impact Assessment Act* will only become clear as projects move through the process.

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