

# Federal Reforms and the Empty Shell of Environmental Assessment

Bruce Parody



FRASER  
INSTITUTE

2018



# **Federal Reforms and the Empty Shell of Environmental Assessment**

by Bruce Pardy

# Contents

Executive Summary / i

Introduction—Bill C-69 / 1

Environmental Assessment Is an Empty Shell / 4

The power to decide / 6

Factors to consider / 7

Purposes to serve / 10

Mandates to pursue / 12

The Myth of “Science-Based” Decision Making / 15

The Timelines They Are a-Changin’ / 17

Conclusion: What Matters in EA Is Who Sits in Government / 18

About the author / 19

Acknowledgments / 20

Publishing Information / 21

Supporting the Fraser Institute / 22

Purpose, Funding, and Independence / 22

About the Fraser Institute / 23

Editorial Advisory Board / 24

Parts of this paper rely on previous publications on related topics, including Bruce Pardy (2010), *Environmental Assessment and Three Ways Not to Do Environmental Law*, *Journal of Environmental Law and Practice* 21: 139; and Bruce Pardy (2015), *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Fifth Forum Press).

# Executive Summary

In February 2018, Catherine McKenna, the federal Minister of Environment and Climate Change, introduced Bill C-69, the Trudeau government's proposal for reform to federal environmental assessment law. Bill C-69 will, among other things, replace the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) with the new *Impact Assessment Act*. McKenna claimed the new Act will restore public trust by increasing public participation in project reviews; create more comprehensive impact assessments by evaluating environmental, health, social and economic factors and requiring climate change and gender-based analysis; reduce duplication and red tape by creating a system of one project, one review with reduced timelines and clearer requirements; and make decisions based on science, evidence and Indigenous traditional knowledge.

Critics of Bill C-69 say it will create regulatory uncertainties and delays, leading to decreased investment in energy projects and infrastructure. Under the Bill, environmental assessment (EA) processes will indeed be uncertain, complicated, and potentially lengthy. Decisions will be discretionary and political. However, these are not new features created in C-69 proposals. The battle over the form EA legislation should take obscures a basic truth: all EA regimes are discretionary and political. EA embodies the idea of law as process—of discretionary, participatory decision-making without substantive rules or standards. EA statutes establish a series of procedural steps to study project proposals and their expected impacts, solicit public input, and conduct reviews before the projects are allowed to proceed. None of those steps are subject to substantive criteria. There are no environmental rules, standards, or rights against which to compare the anticipated impacts of a project. EA provides government with the ability to seek the public interest—which, like beauty, depends on the eye of the beholder.

EA procedures are complicated. A formalized, intricate, expensive, and time-consuming EA process obscures the reality of the function that EA actually serves, which is to legitimize contentious decisions. An anthropologist might say that EA is political ritual. It blesses the outcome, whatever it happens to be. Although the process does not determine the content of the decision, it nevertheless gives legitimacy to the result. The purpose of EA is to be able to say that EA has been carried out. The government decides whether to approve major projects on a case-by-case basis, in the absence of legal goalposts, in accordance with the political winds of the day. Environmentalists

favour extensive EA procedures because they create hurdles for proponents of resource development and provide a platform for those opposed to such development to state their objections. The result is a figurative shouting match over whose values should prevail. EA empowers officials to listen to the voices that they prefer to hear.

Discretionary outcomes are not the product of a flawed EA process but a feature of the concept. The EA process provides a veneer of adjudication by making it appear as though decisions are rigorous and based upon evidence and criteria, but the outcome of each EA is actually a policy decision based upon a government's calculation of political pros and cons. Under C-69, EAs will consider a wider variety of objections to project approval. It signals government receptiveness to constituencies hostile to project approvals. According to the Trudeau government, the Bill establishes principles and markers that will guide decisions, but in reality it will instead simply make EA more like itself—a process to provide legitimacy for discretionary decisions divorced from substantive legal criteria.

## Introduction—Bill C-69

In February 2018, Catherine McKenna, the federal Minister of Environment and Climate Change, introduced Bill C-69,<sup>1</sup> the Trudeau government’s proposal for reform to federal environmental assessment law. Bill C-69 will, among other things, replace the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) with the new *Impact Assessment Act*. McKenna claimed the new Act will restore public trust by increasing public participation in project reviews; create more comprehensive impact assessments by evaluating environmental, health, social, and economic factors and requiring climate-change and gender-based analysis; reduce duplication and red tape by creating a system of one project, one review with reduced timelines and clearer requirements; and make decisions based on science, evidence and Indigenous traditional knowledge.<sup>2</sup>

Critics of Bill C-69 say it will create regulatory uncertainties and delays,<sup>3</sup> leading to decreased investment in energy projects and infrastructure. For example, according to GMP First Energy, the proposed legislation

appears to create significant new barriers to timely decision making and effectively prevent any major new project from reaching any form of positive recommendation, or to impose such a massive series of requirements under any such positive recommendation as to make the project untenable and cost uncompetitive. A lack of hard timelines and a regulatory process that has been subject to dithering and near endless legal challenges will become the major stumbling block for domestic and international investor confidence in the Canadian energy sector.<sup>4</sup>

---

1 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1<sup>st</sup> session, 42<sup>nd</sup> Parliament, 2018.

2 The Honourable Catherine McKenna, Minister of Environment and Climate Change (2018), Press conference (February 8), Parliament Hill, Ottawa.

3 See, for example: Joe Oliver (2018), Liberals Just Drove Another Nail in the Coffin of Canada’s Resource Industry, *Financial Post* (February 9): <<http://business.financialpost.com/opinion/joe-oliver-liberals-drive-another-nail-in-the-coffin-of-canadas-resource-industry>>; Ron Wallace and Jack M. Mintz (2018), Trudeau Wrongly Said Canadian Energy Regulation Was “Broken”. Then He Wrecked It, *Financial Post* (February 23): <<http://business.financialpost.com/opinion/trudeau-wrongly-said-canadian-energy-regulation-was-broken-then-he-wrecked-it>>.

4 GMP First Energy Equity Research (2018), *Oil and Gas Sector* (February 12).

Joe Oliver, Minister of Natural Resources in the Harper government, said that the new regime

will examine cumulative effects in the context of an excessively broad scope that extends well beyond the direct economic and scientific impact of the proposed projects to include long-term social and health impacts and upstream and downstream emissions. It will also consider potential impacts on the government's climate-change guidelines. Furthermore, it must incorporate traditional Indigenous knowledge, which raises questions about how that knowledge would be evaluated and whether it raises conflict-of-interest concerns for affected First Nations communities. In addition to its open-ended mandate, the agency will hear from people who may not be directly impacted by the project but who have an opinion. Public consultations will be very broad, including input on evaluation of project designs, plans and studies, and will be likely chaotic, reflecting deeply held but irreconcilable views. Also, time lines will be longer, because of the addition of an early engagement process of up to 180 days.<sup>5</sup>

Under the Bill, environmental assessment (EA) processes will be uncertain, complicated, and potentially lengthy. Decisions will be discretionary and political. However, these are not new features created in C-69 proposals. EA regimes are, almost by definition, uncertain, complicated, lengthy, discretionary, and political. Not all EA regimes are equal in these respects, but the disputes that erupt when reforms are introduced is a reflection of the highly political nature of EA. In his March 2012 budget speech, then Finance Minister Jim Flaherty announced plans for a new streamlined process for EA. He called it “one project, one review”,<sup>6</sup> designed to ensure that Canada had “the infrastructure we need to move our exports to new markets”. The intent of the reforms, which eventually led to enactment of CEAA 2012, was to streamline the EA process by reducing obstacles, duplications, and timelines. Those reforms produced a furor amongst environmentalists for what they perceived as a weakening of the EA process. When McKenna introduced C-69, she criticized CEAA 2012 in terms that could easily be used to condemn the

---

5 Oliver (2018), *Liberals Just Drove Another Nail*.

6 “We will implement responsible resource development and smart regulation for major economic projects, respecting provincial jurisdiction and maintaining the highest standards of environmental protection. We will streamline the review process for such projects, according to the following principle: one project, one review, completed in a clearly defined time period. We will ensure that Canada has the infrastructure we need to move our exports to new markets.” Jim Flaherty’s 2012 Federal Budget Speech: Full Text, *National Post* (March 29), <<http://nationalpost.com/news/canada/federal-budget-2012-speech-full-text>>.



very proposals contained in C-69. She said that CEAA 2012 had eroded the public trust in how decisions are made, making it more difficult to get projects approved: “Weaker rules hurt our environment and our economy,” she said, and claimed that under the Harper regime, project approvals were “based on politics rather than robust science”.<sup>7</sup>

Similarly, one could imagine Joe Oliver’s claims about the efficacy of CEAA 2012 coming from McKenna in praise of C-69:

[CEAA 2012] established the principle of “one project, one review” in a defined time period, based on an objective scientific analysis by an independent regulatory agency, after consultation with Indigenous communities and people who were directly impacted by the project. Our goal was to foster comprehensive reviews that were protective of the environment, but were not lengthy, duplicative, or vulnerable to manipulative and dilatory tactics designed to make projects economically unviable.<sup>8</sup>

No government (and few critics, whether they be in favour of obstructing or facilitating project approval) will acknowledge that every EA regime is essentially an empty procedural shell devoid of substantive legal content.

---

7 McKenna (2018), Press conference (February 8).

8 Oliver (2018), Liberals Just Drove Another Nail.

# Environmental Assessment Is an Empty Shell

The battle over the form legislation governing environmental assessment (EA) should take obscures a basic truth: all EA regimes are discretionary and political. EA embodies the idea of law as process—of discretionary, participatory decision-making without substantive rules or standards. EA statutes establish a series of procedural steps to study project proposals and their expected impacts, solicit public input, and conduct reviews before the projects are allowed to proceed. None of those steps are subject to substantive criteria. There are no environmental rules, standards, or rights against which to compare the anticipated impacts of a project. EA provides government with the ability to seek the public interest, which, like beauty, depends on the eye of the beholder.

EA procedures are complicated. A formalized, intricate, expensive, and time-consuming EA process obscures the reality of the function that EA actually serves, which is to legitimize contentious environmental decisions. An anthropologist might say that EA is political ritual. It blesses the outcome, whatever it happens to be. Although the process does not determine the content of the decision, it nevertheless gives legitimacy to the result. The purpose of EA is to be able to say that EA has been carried out. The government decides whether to approve major projects on a case-by-case basis, in the absence of legal goalposts, in accordance with the political winds of the day. Environmentalists favour extensive EA procedures because they create hurdles for proponents of resource development and provide a platform for those opposed to such development to state their objections. The result is a figurative shouting match over whose values should prevail. EA empowers officials to listen to the voices that they prefer to hear.

Although major projects such as pipelines, dams, and oil sands developments are typically subject to provincial and/or federal EA regimes, sometimes it is not even clear whether a particular project will be subject to EA requirements. Often the application of EA legislation is ambiguous and uncertain. Bill C-69 does not even attempt to define the kinds of projects to which the regime will apply. Instead, the Trudeau government has said it will seek feedback before it puts together a list that identifies the types of projects within federal jurisdiction that would require review.<sup>9</sup>

---

<sup>9</sup> “What projects are assessed? The project list would be updated, in consultation with stakeholders. The focus would be on projects that pose significant risks to the environment in areas of federal

Discretionary outcomes are not the product of a flawed EA process, but a feature of the concept. The EA process provides a veneer of adjudication by making it appear as though decisions are rigorous and based upon evidence and criteria, but the outcome of each EA is actually a policy decision based upon a government's calculation of political pros and cons. Bill C-69 amplifies these features but they have been characteristics of EA all along. Under C-69, EAs will consider a wider variety of objections to project approval. The reform proposals do not make a good thing bad but a bad thing worse.

EA cannot be carried out in a manner that complies with rule-of-law principles such as binding rules, government accountability, the application of precedent, and consistency from case to case because those features are inconsistent with EA's premises. Although there are diverse views about what the rule of law requires, it represents the alternative to an arbitrary "rule of persons" under which government officials are empowered to make things up as they go.

Stripped of all technicalities, [the rule of law] means that government in all its activities is bound by rules fixed and announced before-hand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.<sup>10</sup>

Under a robust rule of law, the branches of government are distinct in their functions. Legislatures create rules that apply to all cases of common subject matter and officials and courts work out specific cases by applying those general rules. In an ideal rule-of-law universe, statutes would establish standards for the construction of pipelines and other infrastructure projects. Any pipeline that complied with the standards would be permissible, and any proposal that did not would be prohibited. No politicized EA process would be necessary because predetermined rules would dictate the outcome.

The Harper government had its chance to transform the process of project approval from a system of ad-hoc, case-by-case review to a rules-based system where principled requirements were developed and set out beforehand for all to see before projects were even proposed. No doubt the enterprise of establishing such rules would

---

jurisdiction. This would be defined by regulation, which would be developed in parallel with the legislative process" (Government of Canada (2018), *Better Rules for Major Project Reviews to Protect Canada's Environment and Grow the Economy*, <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/ia-handbook.html>>.

10 F.A. Hayek (1944), *The Road to Serfdom*, University of Chicago Press: 72.

have been challenging and contentious. EA hides value judgments and provides the control to manage development as a government goes along, but it preserves the ability of the next government to do similarly.

While CEAA 2012 does not establish a process consistent with a robust conception of the rule of law, in the hands of a government sympathetic to energy infrastructure it was able to convey at least a modicum of predictability about what the process entailed and the prospects for success. Bill C-69 projects a different agenda. Proposed amendments in C-69 may make EA even more uncertain and more discretionary than it was under CEAA 2012. They will make a political process more political. They signal government receptiveness to constituencies that can be expected to be hostile to project approvals. According to the Trudeau government, the Bill establishes principles and markers that will guide decisions, but in reality it will instead simply make EA more like itself—a process to provide legitimacy for discretionary outcomes divorced from substantive legal criteria.

### The power to decide

At the core of EA is the government's discretionary power to decide whether to approve projects and whether to attach conditions. The decision has legal effect but it is not an adjudicative decision like a court judgment or even that of an administrative tribunal or agency. A court declares its result, in principle, by applying substantive rules to the facts as determined from the evidence of witnesses. Since the judiciary constitutes an independent branch of the state, governments can influence judicial decisions only to the extent of fashioning the rules that apply to the kind of case that has come before a court. They can exercise more control over administrative tribunals or agencies, which as organs of the executive branch can be subject to government policy directives.<sup>11</sup> However, when adjudicating particular cases, even tribunals exercise a degree of autonomy from the immediate machinations of Ministers and Cabinet.

In contrast, EA decisions lie in the hands of politicians. Bill C-69 provides ultimate decision-making authority to the Minister of the Environment and federal Cabinet. The Bill states:

60 (1) After taking into account the report with respect to the impact assessment of a designated project ... the Minister must

---

<sup>11</sup> *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

- (a) determine if the adverse effects within federal jurisdiction—and the adverse direct or incidental effects—that are indicated in the report are ... in the public interest; or
- (b) refer to the Governor in Council the matter of whether these effects are ... in the public interest.

...

62 If the matter is referred to the Governor in Council under paragraph 60(1)(b) ... the Governor in Council must ... determine whether the adverse effects within federal jurisdiction—and the adverse direct or incidental effects—that are indicated in the report are ... in the public interest.

These provisions give the Minister and Cabinet the ability to make political decisions on project approvals. In this respect Bill C-69 is not very different from CEAA 2012, which provided:

52 (1) ... [the Minister] must decide if, taking into account the implementation of any mitigation measures that [the Minister] considers appropriate, the designated project

- (a) is likely to cause significant adverse environmental effects

...

(2) If [the Minister] decides that the designated project is likely to cause significant adverse environmental effects ... [the Minister] must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

...

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

- (a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances.

## Factors to consider

The guts of an EA statute are the list of factors that a decision-maker must consider. In Bill C-69, as is typical in EA statutes, a variety of decision-makers are prescribed an assortment of factors. For example, when making their ultimate decisions under section 60 or 62 above, the Minister and Cabinet are subject to the requirements of section 63:

### Factors—public interest

63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must include a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and
- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

Different considerations apply to the environmental impact assessment itself. Section 22 gives a much longer list, which states in part:

**Factors—impact assessment**

22 (1) The impact assessment of a designated project must take into account the following factors:

- (a) the effects of the designated project, including
  - (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
  - (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
  - (iii) the result of any interaction between those effects;

...

- (g) traditional knowledge of the Indigenous peoples of Canada provided with respect to the designated project;
- (h) the extent to which the designated project contributes to sustainability;
- (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

...

- (s) the intersection of sex and gender with other identity factors; and
- (t) any other matter relevant to the impact assessment that the Agency or—if the impact assessment is referred to a review panel—the Minister requires to be taken into account.

A list of factors does not constitute a substantive rule because none of those factors have priority over any of the others and the weight to be given to any one factor lies within the discretion of the decision-maker. The more factors that must be considered, the more discretionary is the decision. The result is an unwieldy process and unpredictable outcomes.

The simplest rules ... are those in which the answer to a single question of fact determines the legal outcome. Age requirements for voting or holding public office are usually offered as the simplest of simple rules because a single answer to an obvious question establishes legal rights and duties. On the opposite side of the ledger are those rules that are ever so much more common today: in order to decide whether a given product has a defective design, it is necessary to review a list of six, ten, or fifteen factors, all of which are relevant to the decision but none of which is decisive. In each case, both sides to the litigation are forced to play a game of “edges” in an inquiry that is structured to make it impossible to have dispositive answers to any question. Litigants therefore must seek to milk each factor for all that it is worth, and must recognize that an impressive victory scored on factor 4 could be wiped out by a calamitous defeat on factor 7. In essence, a question that necessarily has a yes/no answer—is the defendant liable to the plaintiff—is not governed by some simple on/off switch, but by a massive, costly, and uncertain inquiry.<sup>12</sup>

Provisions that identify the factors to be taken into account are stated in mandatory terms: an impact assessment must consider these matters. A process that does not do so may be attacked for failing to comply with procedural requirements. However, unless the decision-maker has failed to take the minor step of turning its mind to these considerations, the decision is essentially unassailable because there are no substantive tests to apply and therefore it cannot be wrong. Section 65(2) of C-69 requires that the Minister’s decision contain reasons for the decision that “demonstrate that the Minister or the Governor in Council, as the case may be, considered all of the factors referred to in section 63”.

In CEAA 2012, the mandatory factors to be considered are narrower. The relevant section does not list several factors that appear in C-69, most notably climate change and “the intersection of sex and gender with other identity factors” (the meaning of which is a mystery).<sup>13</sup> However, CEAA 2012 does provide the Minister

<sup>12</sup> Richard Epstein (1995), *Simple Rules for a Complex World*, Harvard University Press: 25.

<sup>13</sup> Graeme Hamilton (2018), Lawyers Stumped over New Gender and Identity Provisions for Environmental Impact Assessments, *National Post* (April 3): <<http://nationalpost.com/news/politics/lawyers-stumped-over-new-gender-and-identity-provisions-for-environmental-impact-assessments>>.

with the discretion to add matters to be considered in a particular assessment. The section states in part:

19 (1) The environmental assessment of a designated project must take into account the following factors:

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

...

(j) any other matter relevant to the environmental assessment that the responsible authority, or—if the environmental assessment is referred to a review panel—the Minister, requires to be taken into account.

As if prescribing factors rather than rules or standards did not provide enough discretion, both C-69 and CEAA 2012 allow that the scope of some of the factors to be considered is also discretionary. Under C-69:

22 (2) The scope of the factors to be taken into account under paragraphs (1)(a) to (l) and (s) and (t) is determined by

- (a) the Agency; or
- (b) the Minister, if the impact assessment is referred to a review panel.

Under CEAA 2012:

19 (2) The scope of the factors to be taken into account under paragraphs (1)(a), (b), (d), (e), (g), (h) and (j) is determined by

- (a) the responsible authority; or
- (b) the Minister, if the environmental assessment is referred to a review panel.

## Purposes to serve

When it comes to EA decisions, the discretion of government officials is not absolute. It must be exercised in accordance with the terms and purposes of the legislation in which it is granted.<sup>14</sup> However, the broader the purposes of the statute, the broader are the boundaries of the discretion. The purposes of C-69 are very broad indeed. They are identified in section 6, which includes the following:

---

<sup>14</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.



### Purposes

6 (1) The purposes of this Act are

- (a) to foster sustainability;
- (b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project.

In section 6(1)(a), the first purpose of the Bill is “sustainability”. Sustainability is a notoriously slippery and all-encompassing term. The definition in section 2 states:

sustainability means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.

Sustainability thus includes environmental, social, economic, and health considerations, but does not prioritize them or explain what to do when those interests are in conflict. These four considerations are also listed in section 6(1)(b), which also does not prioritize them. It too provides a mandate to decision-makers to craft what they judge to be in the public interest, in whatever combination of environmental, economic, and social considerations seems appropriate.

The effect of these purposes in section 6 is not very different from two parts of the purpose section of the CEAA 2012:

4 (1) The purposes of this Act are

- (a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;

...

- (h) to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy.

Section 4(1)(h) uses the term “sustainable development” rather than “sustainability”, and although one might try to make something of the distinction, there is little difference in legal consequences. Both encompass a wide range of considerations and do not commit the EA process to any specific outcome.<sup>15</sup>

---

<sup>15</sup> See for example B. Pardy (2001), Sustainable Development: In Search of a Legal Rule, *Journal of Business Administration and Policy Analysis* 28: 391.

## Mandates to pursue

The Purpose sections of both C-69 and CEAA 2012 include a provision that articulates a mandate. In C-69:

### Mandate

6 (2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability and applies the precautionary principle.

In CEAA 2012:

### Mandate

4 (2) The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

The wording of the two provisions is the same except that the phrase “protects the environment and human health” from the CEAA 2012 has been replaced with “fosters sustainability” in C-69. The latter arguably provides a broader mandate and therefore provides more discretion, since within the concept of sustainability lies social and economic considerations in addition to the protection of the environment and human health. Yet the difference is more symbolic than substantive since the mandate section in CEAA 2012 does not prevent the government from taking economic considerations into account even though economic considerations are not specifically listed.

Similarly, in slightly different ways C-69 and CEAA 2012 define “effects” that are to be taken into account. The differences do not carry significant substantive consequences. Section 2 of Bill C-69 states:

effects means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the consequences of these changes.

effects within federal jurisdiction means, with respect to a physical activity or a designated project,

(a) a change to the following components of the environment that are within the legislative authority of Parliament:

(i) fish and fish habitat, as defined in subsection 2(1) of the Fisheries Act,

- (ii) aquatic species, as defined in subsection 2(1) of the Species at Risk Act,
  - (iii) migratory birds, as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and
  - (iv) any other component of the environment that is set out in Schedule 3;
- (b) a change to the environment that would occur
- (i) on federal lands,
  - (ii) in a province other than the one where the physical activity or the designated project is being carried out, or
  - (iii) outside Canada;
- (c) with respect to the Indigenous peoples of Canada, an impact—occurring in Canada and resulting from any change to the environment—on
- (i) physical and cultural heritage,
  - (ii) the current use of lands and resources for traditional purposes, or
  - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- (e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

In CEAA, “environmental effects” are defined in section 5(1):

**Environmental effects**

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

- (a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:
  - (i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,
  - (ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,
  - (iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and
  - (iv) any other component of the environment that is set out in Schedule 2;
- (b) a change that may be caused to the environment that would occur
  - (i) on federal lands,
  - (ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
  - (iii) outside Canada; and

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

- (i) health and socio-economic conditions,
- (ii) physical and cultural heritage,
- (iii) the current use of lands and resources for traditional purposes, or
- (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

# The Myth of “Science-Based” Decision Making

Minister McKenna claims that decisions under C-69 will be “based on science”.<sup>16</sup> Wallace and Mintz maintain that the National Energy Board, which C-69 proposals will replace with a new federal agency called the Canadian Energy Regulator, has for years made science-based decisions.<sup>17</sup> Neither of these statements is correct if they purport to suggest that science alone can determine the outcome. Decisions whether to approve pipelines and dams are not scientific decisions. Scientific data is relevant but not determinative because the questions to be resolved are not scientific in nature. When proponents of a decision-making process claim that the process is “based on science” or “determined by scientific facts”, they are failing to acknowledge, either inadvertently or on purpose, the value judgments inherent in the assessment. Standards such as the “public interest” or “national interest” are inherently subjective and based upon philosophical and ideological premises about what is best.

Any decision that requires trade-offs between competing values cannot be arrived at scientifically. In fact, EA decisions are inherently political and no amount of scientific data can make them not so. Ronald Doering, former head of the Canadian Food Inspection Agency, has maintained that science, policy, and politics are inextricably intertwined.

What is surprising is how much our public discourse is still dominated by the quaint utopian view that science and policy can be strictly separated ... Scholars of science in policy have long ago shown that you can’t take policy out of science. Studies of scientific advising leave in tatters the notion that it is possible, in practice, to restrict the advisory practice to technical issues or that the subjective values of scientists are irrelevant to decision making ... If

---

16 Catherine McKenna (2018), *Government of Canada Takes Steps to Ensure a Clean Environment and Strong Economy*, News release (February 8), <<https://cmckenna.liberal.ca/news-nouvelles/government-of-canada-takes-steps-to-ensure-a-clean-environment-and-strong-economy/>>.

17 “After almost 60 years of proven regulatory performance, this government claims to have concluded that the NEB was incapable of achieving decisions based on “science-based” assessments. The contention that the NEB’s assessments were not “science-based” is ridiculous” (Wallace and Mintz (2018), *Trudeau Wrongly Said Canadian Energy Regulation Was “Broken”*).

only we could get the science right, the public policy answer would follow. If only the world were that simple ... In practice, assumptions that have potential policy implications enter into risk assessment at virtually every stage of the process. The idea of a risk assessment that is free, or nearly free, of policy considerations is beyond the realm of possibility.<sup>18</sup>

Sometimes substantive rules are based upon scientific criteria. For example, regulations or permit conditions may prohibit emissions of certain substances beyond a specified amount or concentration in air or water. Scientific evidence is necessary to determine whether such prohibitions have been breached but it cannot determine what the rule should say. Deciding where the line is to be drawn inevitably calls for trade-offs between competing values. The difference between EA and enforcement of predefined rules is not that one is based on science and the other is not but that substantive rules reflect a policy judgment that is made at the time the rule is promulgated. Therefore, the same policy judgment is made for all situations to which the rule applies. In contrast, a different policy judgment can be made for each individual project and EA.

---

<sup>18</sup> Ronald L. Doering (2010), Don't Be Fooled. Science Is Always Politicized, *Financial Post* (January 15).

## The Timelines They Are a-Changin'

At her press conference, McKenna emphasized that C-69 contains shorter legislated timelines than CEAA 2012. However, the deadlines in the two statutes do not always apply to the same tasks. Under section 37(1) of C-69, where the assessment of a designated project has been referred to a review panel, the panel must submit a report within 600 days of the panel being appointed. That is four months shorter than the 24-month period set out in section 38(3) of CEAA 2012. However, within that longer period in 38(3) the Minister must also appoint the panel and issue a decision.

While much might be made of deadlines set out in C-69, in practice those requirements cannot be depended upon because the Bill provides the Minister and Cabinet with opportunities to extend them. For example, under section 65(3), the Minister must issue a decision statement within 30 days of the posting of an EA report. However, under section 65(5):

The Minister may extend the time limit referred to in subsection (3) ... by any period—up to a maximum of 90 days—for any reason that the Minister considers necessary.

And under section 65(6):

The Governor in Council may, on the recommendation of the Minister, extend the time limit extended under subsection (5) any number of times.

## Conclusion: What Matters in EA Is Who Sits in Government

C-69 may well turn out to be detrimental to resource development. The Bill does not prescribe negative outcomes on environmental assessment decisions but it does provide opportunity for the federal government to create obstacles and to deny approvals if it so chooses. It will be a flexible political tool for a government intent on signalling its receptiveness to constituencies hostile to pipelines and other energy projects. However, the risk that C-69 represents is inherent in the nature of EA. In the hands of a different government with a different disposition, it could produce different results. At McKenna's press conference to announce the changes in C-69, a reporter asked her what would happen under the new EA regime when another government came into power with a different view of the proper balance between the environment and the economy in the public interest. McKenna ignored the question. The answer is that everything can change.



## About the author

### Bruce Pardy

Bruce Pardy is a Professor of Law at Queen's University. He has written extensively on environmental governance, ecosystem management, civil liability, education law, human rights and the rule of law. His research focuses on the theoretical and principled foundations of environmental law, challenging orthodoxies found within that discipline, as he does in his book *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Fifth Forum Press, 2015). Professor Pardy has taught at law schools in Canada, the United States, and New Zealand, practiced litigation at Borden Ladner Gervais LLP in Toronto, and served as adjudicator and mediator on the Ontario Environmental Review Tribunal.



# Acknowledgments

The author would like to acknowledge the helpful comments and insights of several anonymous reviewers. The author, however, is alone responsible for the report itself, its conclusions, and recommendations. As the researcher has worked independently, the views and conclusions expressed in this paper do not necessarily reflect those of the Board of Directors of the Fraser Institute, the staff, or supporters.

# Publishing Information

## Distribution

These publications are available from <<http://www.fraserinstitute.org>> in Portable Document Format (PDF) and can be read with Adobe Acrobat® or Adobe Reader®, versions 7 or later. Adobe Acrobat Reader® DC, the most recent version, is available free of charge from Adobe Systems Inc. at <<http://get.adobe.com/reader/>>. Readers having trouble viewing or printing our PDF files using applications from other manufacturers (e.g., Apple's Preview) should use Reader® or Acrobat®.

## Ordering publications

To order printed publications from the Fraser Institute, please contact us via e-mail: [sales@fraserinstitute.org](mailto:sales@fraserinstitute.org); telephone: 604.688.0221, ext. 580 or, toll free, 1.800.665.3558, ext. 580; or fax: 604.688.8539.

## Media

For media enquiries, please contact our communications department via e-mail: [communications@fraserinstitute.org](mailto:communications@fraserinstitute.org); telephone: 604.714.4582.

## Copyright

Copyright © 2018 by the Fraser Institute. All rights reserved. No part of this publication may be reproduced in any manner whatsoever without written permission except in the case of brief passages quoted in critical articles and reviews.

## ISBN

978-0-88975-495-9

## Citation

Bruce Pardy (2018). *Federal Reforms and the Empty Shell of Environmental Assessment*. Fraser Institute.

# Supporting the Fraser Institute

To learn how to support the Fraser Institute, please contact us via post: Development Department, Fraser Institute, Fourth Floor, 1770 Burrard Street, Vancouver, British Columbia, V6J 3G7, Canada; telephone: toll-free to 1.800.665.3558, ext. 548; e-mail: [development@fraserinstitute.org](mailto:development@fraserinstitute.org); or visit our web page: <<http://www.fraserinstitute.org/support-us/overview.aspx>>.

## Purpose, Funding, and Independence

The Fraser Institute provides a useful public service. We report objective information about the economic and social effects of current public policies, and we offer evidence-based research and education about policy options that can improve the quality of life.

The Institute is a non-profit organization. Our activities are funded by charitable donations, unrestricted grants, ticket sales, and sponsorships from events, the licensing of products for public distribution, and the sale of publications.

All research is subject to rigorous review by external experts, and is conducted and published separately from the Institute's Board of Directors and its donors.

The opinions expressed by authors are their own, and do not necessarily reflect those of the Institute, its Board of Directors, its donors and supporters, or its staff. This publication in no way implies that the Fraser Institute, its directors, or staff are in favour of, or oppose the passage of, any bill; or that they support or oppose any particular political party or candidate.

As a healthy part of public discussion among fellow citizens who desire to improve the lives of people through better public policy, the Institute welcomes evidence-focused scrutiny of the research we publish, including verification of data sources, replication of analytical methods, and intelligent debate about the practical effects of policy recommendations.

# About the Fraser Institute

Our mission is to improve the quality of life for Canadians, their families and future generations by studying, measuring and broadly communicating the effects of government policies, entrepreneurship and choice on their well-being.

Notre mission consiste à améliorer la qualité de vie des Canadiens et des générations à venir en étudiant, en mesurant et en diffusant les effets des politiques gouvernementales, de l'entrepreneuriat et des choix sur leur bien-être.

## Peer review—validating the accuracy of our research

The Fraser Institute maintains a rigorous peer review process for its research. New research, major research projects, and substantively modified research conducted by the Fraser Institute are reviewed by experts with a recognized expertise in the topic area being addressed. Whenever possible, external review is a blind process. Updates to previously reviewed research or new editions of previously reviewed research are not reviewed unless the update includes substantive or material changes in the methodology.

The review process is overseen by the directors of the Institute's research departments who are responsible for ensuring all research published by the Institute passes through the appropriate peer review. If a dispute about the recommendations of the reviewers should arise during the Institute's peer review process, the Institute has an Editorial Advisory Board, a panel of scholars from Canada, the United States, and Europe to whom it can turn for help in resolving the dispute.

# Editorial Advisory Board

## Members

Prof. Terry L. Anderson

Prof. Herbert G. Grubel

Prof. Robert Barro

Prof. James Gwartney

Prof. Jean-Pierre Centi

Prof. Ronald W. Jones

Prof. John Chant

Dr. Jerry Jordan

Prof. Bev Dahlby

Prof. Ross McKittrick

Prof. Erwin Diewert

Prof. Michael Parkin

Prof. Stephen Easton

Prof. Friedrich Schneider

Prof. J.C. Herbert Emery

Prof. Lawrence B. Smith

Prof. Jack L. Granatstein

Dr. Vito Tanzi

## Past members

Prof. Armen Alchian\*

Prof. F.G. Pennance\*

Prof. Michael Bliss\*

Prof. George Stigler\*†

Prof. James M. Buchanan\*†

Sir Alan Walters\*

Prof. Friedrich A. Hayek\*†

Prof. Edwin G. West\*

Prof. H.G. Johnson\*

\* deceased; † Nobel Laureate