Canadian Energy: Senate passes Bill C-48 and C-69

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Introduction

On June 21, 2019 the Senate passed Bills C-48 and C-69, after a prolonged and contentious debate in both the upper and lower chambers. Bill C-48, which imposes a ban on oil tankers off British Columbia's Northern Coast, passed in substantially the same form as originally tabled in the House of Commons. Bill C-69, which significantly overhauls the federal regulatory approval process, passed with 99 amendments that were approved by House of Commons. Both Bills received royal assent on the same day.

The passage of both bills marks the end to a controversial Parliamentary saga that has generated anxieties from western provinces and certain industries that view both pieces of legislation as further frustrating an already fledging natural resources industry. Premier Kenny has reiterated his commitment to launching a constitutional challenge to both bills, on the grounds that it represents an unconstitutional intrusion into provincial power and prejudicially targets provincial industries in Alberta.

Background: Key Changes & Provincial Opposition

Bill C-48

Bill C-48, known as the *Oil Tanker Moratorium Act,* formalizes the current moratorium on oil tanker traffic from the northern tip of Vancouver Island to the Alaska border. Specifically, the Bill prohibits tankers carrying more than 12,500 metric tonnes of certain petroleum products

from "stopping or unloading crude oil or persistent oil, at ports or marine installations located along the British Columbia's north coast." The Bill also establishes an administrative and enforcement regime that includes requirements to provide information and to follow directions and that provides for penalties of up to a maximum of $5 million.

The Standing Senate Committee on Transport and Communications, to which Bill C-48 was referred, recommended that the Bill not proceed. The Senate as a whole rejected that recommendation, and passed an amended version of the Bill, which was referred back to the House of Commons. The House rejected amendments that would require regional impact assessments involving indigenous communities and oil-producing provinces and create a corridor to Nisga'a Nation lands, who were opposed to the legislation. The Senate then passed the House's version of the Bill.

Bill C-48 has been criticized by western provinces and industry. Premier Kenny has repeatedly mentioned that Alberta will launch an immediate constitutional challenge on the grounds that a moratorium singles out and prejudices Alberta, preventing it from exporting its key commodities. This challenge partly derives from the fact that tanker traffic is widely permitted on eastern Canada's coast without similar restrictions. Certain First Nations, such as the Lax Kw'alaams Nation, who seek to benefit from the proposed Eagle Spirit Energy pipeline and energy corridor along its traditional territory, are expected to challenge the Bill on the grounds that Canada has failed to discharge its duty to consult and are frustrating their ability to benefit from their traditional lands.

Bill C-69

Bill C-69, an *Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act,* makes sweeping changes to the federal environmental assessment regime. The Bill repeals *CEAA* 2012 and the *NEB Act* and establishes the *Independent Assessment Act* (IAA) and the Canadian Energy Regulator. This new framework implements a new early planning assessment process, requires the regulator to consider a suite of new factors, and makes various changes to timelines and public participation. Section 9 of the Bill also empowers the Minister to, on request or on his or her own initiative, designate a physical activity if carrying out that physical activity may cause "adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation." Similar to *CEAA 2012,* the Bill allows the Minister to designate a project, or a class of projects, that will be subject to federal assessment. The Government of Canada released a draft project list, which captures a broader range of projects that would have traditionally not been subject to federal review. Most controversial is the possible inclusion of in *situ oil* sands projects with a production of over 2,000 cubic metres per day. A more detailed summary of the Bill can be found here.

The Standing Senate Committee on Energy, the Environment and Natural Resources recommended 188 amendments to the Bill, which the Senate as a whole referred back to the House of Commons. Of these amendments, 99 were approved by the House and referred back to the Senate, which was the version passed on Friday.

Bill C-69 has been widely criticized by a range of provinces, including Alberta, Saskatchewan, Manitoba Ontario, New Brunswick and the Northwest Territories. Premier Kenny has vowed to launch a constitutional challenge to the Bill on the grounds that it unconstitutionally intrudes into the sphere of exclusive provision jurisdiction under 91(13) and 92(A) of the *Constitution Act.* The *IAA* arguably expands the federal government's control over the environmental assessment process to projects that are purely local in nature. With the many factors and criteria to be considered in an impact assessment (including sustainability and GHG emissions), the federal government is purporting to give itself the authority to determine whether projects are appropriate on

the basis of elements that go beyond federal jurisdiction. Such authority may be *ultra vires* the federal government.

Further, it may be argued that Bill C-69 upsets the bargain that was struck by the constitutional compromise of 1981. Bill C-69's *IAA* will require an impact assessment and project approval for traditionally provincially regulated *in situ* oil sands projects and other developments not directly connected to federal jurisdiction. Similar to BC's proposed environmental legislation on Trans Mountain that was recently found unconstitutional because it would effectively veto a core federal undertaking, the *IAA* has the potential to effectively veto natural resource projects wholly situated within Alberta.

Both Bills received royal assent on June 21, 2019 and take effect immediately. Bill C-48 will have instant implications for the Eagle Spirit Pipeline, which becomes unfeasible without the ability to ship petroleum products through a port in Northern British Columbia. The Bill may effectively prevent any other similar pipeline projects, such as a future resurrected Northern Gateway, from moving forward. As indicated by Premier Kenny and Lax Kw'alaams Nation, legal challenges to the legislation can be expected in short order.

Bill C-69 will apply to applicable projects moving forward. Since the designated project list has not yet been finalized, it is difficult to evaluate the extent of this legislation's expanded scope into smaller, provincial projects. Minister McKenna has indicated that the inclusion of *in situ* oil sands projects will depend on whether Alberta implements a legislated hard cap on greenhouse gas emissions. In any event, it is expected that Alberta will launch a constitutional challenge at some point, as it recently has done with the federal carbon tax.

By

Matti Lemmens

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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