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Chair

Mrs. Deborah Schulte

Standing Committee on Environment and Sustainable Development

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● (1110)

[*English*]

The Chair (Mrs. Deborah Schulte (King—Vaughan, Lib.)): I'd like to bring the meeting to order.

We're a little late. Sorry about that. There was an exciting meeting just before us, and I hope ours will be as exciting.

Mr. John Aldag (Cloverdale—Langley City, Lib.): Not that exciting.

The Chair: Well, maybe not that exciting. I don't want all those reporters running after us.

We are carrying on with our study of Bill C-69, and we have quite a few witnesses in front of us. I always wonder, what is the right word: guests, witnesses, experts?

Thank you very much for joining us today, and I'll just let the committee know who's with us.

We have Nigel Bankes, professor, faculty of law, University of Calgary, and he's with us through video conference. From the Canada West Foundation, we have Colleen Collins, vice-president, research. From the Ecology Action Centre, we have Mark Butler, policy director. We also have Lisa Mitchell. executive director and senior lawyer for East Coast Environmental Law. Finally, from the Pembina Institute, we have Duncan Kenyon, managing director, and Nichole Dusyk. Dr. Dusyk is a postdoctoral fellow responsible for federal policy.

Welcome to each of you. We're very much looking forward to the discussions today.

We'll start with Mr. Bankes.

Professor Nigel Bankes (Professor, Faculty of Law, University of Calgary, As an Individual): Thank you.

Good morning and thank you for the opportunity to appear before this committee. Thank you also for accommodating my appearance via teleconference.

I am a professor of law at the University of Calgary, where I teach, amongst other subjects, energy law. I also comment regularly on developments in energy law and policy on our blog, which is the blog of the faculty of law. I appear this morning in my personal capacity, and I also made a personal submission to the energy modernization panel.

My submission focuses principally on part 2 of Bill C-69, which, as you know, is concerned with the abolition of the National Energy Board and the creation of the new Canadian energy regulator. My written brief makes six main points and I think I have time for three of those this morning.

The first point the bill needs to address, in my view, is the close connection between energy policy, greenhouse gas emissions, and Canada's climate change commitments. I think it is self-evident that there is a close connection between energy policy and climate policy, simply because the extraction, processing, production, transportation, and consumption of carbon-based fuels results in emissions of greenhouse gases, including carbon dioxide and methane.

Part 1 of Bill C-69, the impact assessment act, addresses this connection in two linked provisions. Proposed section 22 deals with the content of an impact assessment, and proposed section 63 deals with the final project decision to be made by the minister or Governor in Council.

There is no similar provision in part 2 of Bill C-69, notwithstanding the interconnection between climate and energy issues. I think this omission is especially significant when we consider that the CER will continue to perform the NEB's energy information function under proposed sections 80 to 86 of part 2 of Bill C-69. We can anticipate that the CER will continue, as part of this function, to prepare energy supply-demand forecasts for Canada. It's crucial that these forecasts be informed, and indeed constrained, by Canada's climate change commitments, as well as relevant provincial commitments.

Accordingly, I recommend that the committee consider proposing a series of amendments to part 2 to recognize the connection between energy policy and climate policy. I have three concrete proposals.

First, part 2 of the bill might include appropriate references to climate and energy policy in the purposes section, proposed section 6, and in the mandate provision of the bill, proposed section 11.

Second, I think that part 2 of the bill might borrow from the provisions of part 1 of Bill C-69, which I have already mentioned, and list climate change obligations as a relevant consideration when considering new projects.

Third, I propose a substantive provision that might be inserted immediately after the current proposed section 55. This might read as follows: “When making a decision, an order, or a recommendation under this act, or in discharging its mandate under sections 80 to 84, the commission must consider the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.”

I am now going to change direction a little and address two issues that relate to the transparency of the NEB's and the CER's processes, and the resulting judicial supervision of these processes. To do that, I need to make two background comments. The first is that we find ourselves here today discussing part 2 of this bill, because the elected government concluded that Canadians had lost faith in the review system for energy projects. Accordingly, we should be checking to ensure that the procedures that are being proposed will help restore that faith.

Second, the drafting of part 2 of Bill C-69 exhibits, notwithstanding its huge length, a certain economy in approach. What l mean by that is that notwithstanding the new name and the abolition of the NEB, much of this legislation is simply cut and pasted from the existing National Energy Board Act. One of the implications of this is that there are missed opportunities to improve the current approach.

I'll now make have two substantive comments following from those propositions.

● (1115)

The first is that the bill, as drafted, fails to clarify what is referred to as the exceptions process in the current act. This process allows the NEB to exempt projects from the requirements of the act, including the requirements for a public hearing and the need to obtain a certificate of public convenience and necessity. While this seems fairly innocuous since it's confined to pipelines not exceeding 40 kilometres, it was also the process that was used in relation to the controversial Line 9 project, which involved the reversal of over 600 kilometres of the Enbridge line between North Westover, near Hamilton, and Montreal, and a related expansion of throughput to allow oil sands product to reach further east. The exemption could be triggered because the project was largely using existing pipe and right-of-way.

The difficulty with this current provision, which is section 58, is that it's completely opaque from the outside. It fails to communicate to the public, including municipalities and others, how this discretion will be exercised and what terms and conditions might be included as part of granting the exemption. Bill C-69 does nothing to clarify this in what is now proposed section 214 of the bill, which is a copy of the current section 58.

Accordingly, I recommend that the committee consider how the bill could be amended to provide more transparent direction to the CER in exercising this important discretionary power. One possible avenue to explore will be to require the CER to address its mind to all of the factors listed in proposed section 262, which is the list of relevant considerations for pipeline projects requiring a certificate.

My final point relates to another missed opportunity, this time in the context of judicial supervision of the process. Under the current rules, decisions of both the NEB and the Governor in Council, where appropriate, can be appealed to the Federal Court of Appeal. The first step in this process is for an aggrieved party to file an application for leave to appeal with the Federal Court of Appeal. It's only if the court grants leave that a panel of the court will consider the merits of the appeal. By tradition, and I think it's no more than that, the Federal Court of Appeal does not provide reasons when it grants—or more commonly, denies—an application for leave. As a result, unsuccessful applicants feel aggrieved when they are denied further access to the court without knowing the reasons. The city of Burnaby has recently experienced this in the context of the Trans Mountain expansion project.

Once again, the current provisions are reproduced verbatim in part 2 of Bill C-69, proposed sections 72 and 188. In my view, this undermines the faith of the public and the integrity of the project review scheme in a most unfortunate and unnecessary way. Accordingly, I recommend that the committee should propose amendments to Bill C-69 to require the Federal Court of Appeal to provide reasons for its decision on leave applications under this act.

While I acknowledge that it is perhaps unusual to give this level of direction to a court, I think that if the court can't see the problem itself then it needs some direction. Other superior courts in Canada provide reasons for exercising their authority under similar leave applications. For example, the Court of Appeal of Alberta routinely provides reasons on leave applications involving the Alberta Energy Regulator.

I make these last two points—the exception point and this point about reasons—in light of the concerns that are alleged to be driving this modernization process. I think that each of these proposals will add transparency and accountability and, hence, improve the public's trust in the integrity of the process.

That concludes my remarks.

The Chair: You do have a minute.

Prof. Nigel Bankes: I'm done. Thank you.

The Chair: Thank you so much.

Who would like to go next?

Ms. Collins.

Ms. Colleen Collins (Vice-President, Research, Canada West Foundation): Good morning, Madam Chair, and honourable committee members. I am Colleen Collins, vice-president of the Canada West Foundation, an independent, non-partisan public policy research organization with a western Canadian perspective.

Bill C-69 proposes to overhaul Canada's energy project assessment process, create a new impact assessment agency, and replace the National Energy Board with the Canadian energy regulator. Changes to the existing process are necessary to restore both public trust in the project approval system and the confidence of potential investors in the Canadian economy.

We are pleased that the government has put forward a comprehensive vision for a process that is intended to increase transparency, fairness, and inclusiveness. However, it fails to address the implications of that process on trust, economic activity, and national competitiveness, the very reasons that drove the change in the first place. Proponents and investors are not worried about tough, evidence-based regulation. What discourages investment is decision-making that is vague, uncertain, and subject to politically motivated decisions at the end of a long and expensive process.

Bill C-69, as proposed, retains some of the same features that are causing problems in the current system. Most important, the bill continues to leave the political decision until after the end of the regulatory process. Without question, decisions about what is or is not in the national interest should be made by our elected leaders. That is key to our democracy. However, those decisions need to be made up front, before the long and costly regulatory process begins. Bill C-69's proposed planning phase prior to the impact assessment provides an ideal window for this upfront political decision.

The national interest decision should not be subject to changing political views during or after the process. We have seen political decisions undermine the credibility of the regulatory process. If the government does not trust the regulator to make fair, independent, evidence-based decisions, then why should Canadians and investors? There needs to be certainty that during the long process of seeking regulatory approval the goalposts will not change and a new government will not overturn prior decisions and commitments.

Bill C-69 further compounds this problem by removing the requirement for a decision by the regulator at the end of its assessment process. Currently, the regulator recommends to the government whether it should approve a project or not. Bill C-69 does not extend this authority to the new IAA, and this is a mistake. The government's job is to put in place a framework for the regulatory process. It must let the regulator do its job. That job should go beyond communicating a project's impact, benefits, and mitigation. After examining the evidence presented, assessing and balancing positive and negative impacts, as well as potential mitigation, the regulator is in the best position to make an informed and impartial decision on whether or not the project should proceed.

Another critical driver of uncertainty and lack of trust has been a shifting of the development of economic, indigenous, and environmental policy onto the regulator. A regulatory process cannot and should not be expected to determine policy. Ongoing political debates about climate, energy, and indigenous relations have found their way into NEB project hearings for lack of any other venue in which to resolve these issues. These policy debates are much broader than any specific project. The federal government must address broader policy questions before they encumber the regulatory process with issues beyond its scope. The combination of clear policy on relevant issues and a regulatory process that deals with project specifics is critical to improving both trust and the investment climate in Canada.

A positive step forward is the shift to an assessment process that considers both the positive and negative impacts of a project, unlike the focus on negative impacts under the current system. In addition, including the formal recognition of health, social, and economic effects will also contribute to a more balanced assessment and a balanced public debate. The new regulator will also have to figure out how to deal with the increased volume of participation in regulatory reviews stemming from the elimination of the well-established principle of “standing”.

● (1120)

While obtaining input from a wide variety of people is a positive step, the regulator will need to establish a strong process to manage them. It should ensure that diverse voices are heard without the consultation becoming an impediment to good decision-making. It will need to ensure that the most relevant voices are not lost. Finally, whatever process is used, it must be clear to all that consultation does not mean veto power.

Thank you.

● (1125)

The Chair: Thank you.

Mr. Butler, do you want to go next?

Mr. Mark Butler (Policy Director, Ecology Action Centre): We were going to start with Lisa.

The Chair: Okay, that's fine.

Lisa.

Ms. Lisa Mitchell (Executive Director and Senior Lawyer, East Coast Environmental Law): Thank you. Good morning, Chair and committee members. Thank you for agreeing to hear from us today.

I'm with the East Coast Environmental Law association, an environmental law charity based in Halifax. We work throughout Atlantic Canada, providing environmental law information, advice, and support. Over the past several months, we have been providing support to the Ecology Action Centre—and my colleague, Mark Butler is with you today—and to the offshore alliance.

Given the breadth of your review of Bill C-69, our focus today is very narrow. Our focus is on the role of the offshore energy regulators in impact assessment; so in particular, the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board, which I will refer to collectively as the petroleum boards. As you know, the petroleum boards are the regulatory bodies responsible for the development of oil and gas resources and the management of petroleum operations off the coasts of Nova Scotia and Newfoundland and Labrador.

Currently under CEAA 2012, the petroleum boards do not conduct environmental assessments of designated activities. In this regard, they are treated differently from the other two energy regulators, the Canadian Nuclear Safety Commission and the National Energy Board. The NEB and the CNSC are responsible authorities under CEAA 2012, with the power to conduct EAs of designated projects in combination with their own regulatory processes. Of course, this was not always the case. Prior to CEAA 2012, the NEB and the CNSC did not conduct EAs. The merging of project assessment processes and regulatory processes began under CEAA 1992, through the substitution provisions, and proceeded to be formalized for the NEB and CNSC under CEAA 2012. Those changes were made with the intent of streamlining project assessment.

The federal government has stated an objective of regaining public trust in environmental assessment. The appointment of the expert panel on EA reform was part of that objective, and the introduction of Bill C-69 is presumably the culmination of the government's efforts to achieve this objective. Perhaps in an effort to strike a balance, Bill C-69 requires referral to a review panel of all designated projects that include physical activities regulated by CNSC, the Canadian energy regulator or CER, and the petroleum boards. This would be a significant change for the NEB and the CNSC, reducing the role of those regulators in the assessment process and to some extent decoupling the assessment and regulatory processes.

The assessment and regulatory processes are not entirely separated, as proposed section 51 of the impact assessment act requires the review panels to provide conclusions and recommendations to support licensing and other processes under the Canadian energy regulator act and the Nuclear Safety and Control Act. This is for the most part positive, in that the planning or assessment process appears to be at the forefront with the role of informing the regulatory considerations. However, there could be more clarity provided in the act to ensure that review panels under the impact assessment act would not serve as regulatory hearing processes.

Let me move to the petroleum boards. The proposed implementation of the impact assessment act through Bill C-69 creates some confusion for those of us seeking to understand the role of the petroleum boards in impact assessments. As written, the IAA would treat the petroleum boards in a way that is different from the CER and the CNSC initially, but it would subsequently be amended to treat all energy regulators in a similar manner. I'll base my comments on a presumption that the amendments will be passed, but I do seek clarification on why there are provisions in the bill, specific to the petroleum boards, that would come into force at a later date.

In any case, once the amendments are in effect, the impact assessment act would require referral to a review panel for designated activities that are regulated by the petroleum boards. We agree that a review panel should be established for major offshore activities, including exploration and extraction drilling. We also agree with the requirement that the review panel hold public hearings.

As it is written, the review panel must include, at a minimum, two members of the petroleum board, selected from a roster. We do not believe that it is in the best interests of the assessment process, communities, potentially impacted industries, or the environment to have regulators on the review panel. To that end, we would recommend that proposed subsections 46.1(3) and 48.1(3) be deleted.

● (1130)

Regulators have an important role to play in providing expertise to the impact assessment process, and we support consultation and co-operation with the regulator as prescribed in proposed section 21 of the impact assessment act.

However, the assessment process should be conducted independently. Selection of the review panel members should be done on a case-by-case basis with the focus of ensuring that those selected have relevant expertise, local knowledge, no conflict of interest, etc. Limiting the role of the regulators in the assessment process to providing their input and expertise rather than full participation as panel members helps to protect the independence of the assessment process.

I'd like to speak briefly about designated activities. Not all offshore activities are necessarily major energy projects that require a review panel, but many do require independent impact assessments. Under the impact assessment act, energy projects are assessed by a review panel, or they're not assessed at all. We're concerned that this means that designated activities will be limited to the worst of the worst.

Let's take seismic surveys for example. The negative impact of seismic surveys on fish species and marine mammals is not well understood, but recent studies have indicated that seismic survey activities require more thorough scrutiny than they currently receive. We would recommend that seismic surveys be added to the list of designated activities to undergo federal impact assessments; however, there is no path currently in the impact assessment act to assess these activities other than by a review panel. We ask the committee to consider a revision to Bill C-69 to enable offshore activities that may not qualify as a major energy project to be subject to an independent impact assessment by the impact assessment agency.

I'm going to turn the rest of my time over to Mark Butler.

The Chair: You have just over three minutes.

Mr. Mark Butler: Thank you.

Chair and members of Parliament, thank you for the opportunity to present today. I'm the policy director at the Ecology Action Centre. Prior to working at EAC, which is some time ago, I worked in the fishing industry and as a marine consultant.

EAC is a member of the offshore alliance, which is a newly formed coalition made up of environmental, fishing, community groups, as well as indigenous spokespeople. Yesterday, Rod Northey from the EA panel presented. I thought the panel that he was a part of did a good job of consulting with Canadians, including indigenous peoples. I drove to Fredericton through the tail end of a hurricane to present on a more central role for science in impact assessment and on offshore regulation. I spend my precious minutes mentioning this because I was saddened by the lack of uptake by the government of the panel's report. If this becomes a pattern, it engenders cynicism and damages democracy.

The EA panel in their report recognized the value in keeping EA and regulatory processes separate. The panel also recognized that a regulator can get too close to the industry it is regulating, creating regulatory capture, although they did not label it as such. Relevant quotes from the panel's report can be found in our written submission.

When elected, the government promised to make EA credible again. Outside of the petroleum industry, the boards have a credibility problem. When these proposed changes were announced, *The Chronicle Herald, which is a Nova Scotia newspaper, ran a cartoon showing the regulator looking through binoculars that were actually oil barrels. Once again, cartoonist Bruce MacKinnon said it all in one picture.*

Giving the boards more power, such as seats on review panels, was not what we expected and is a step backwards for EA in Atlantic Canada.

Before I close, I have a few words on the witness list. I truly appreciate the opportunity to present along with the East Coast Environmental Law Association today. However, I am concerned that the committee is not hearing from any representatives from the fishing industry in Nova Scotia. As we saw in the Gulf of Mexico and elsewhere, a major blowout or spill can have a devastating impact on the fishing industry and other industries such as tourism. It is not just a direct impact on fish stocks or beaches that affects these industries. It is the damage to the product or brand as a result of the spill.

Thank you very much.

The Chair: Thank you very much.

Just to be clear, we did invite over 150 groups to present briefs. Not everybody has a chance to sit in front of the committee, but the briefs are coming through translation right now, and we will be considering those briefs that have come in.

Next up, who would like to start?

● (1135)

Mr. Duncan Kenyon (Managing Director, Pembina Institute): I'll start.

The Chair: Thank you.

The floor is yours.

Mr. Duncan Kenyon: Good morning, Chair, and committee members. Thank you very much for allowing us to present today on Pembina Institute's recommendations for Bill C-69.

My name is Duncan Kenyon, and I am the director of Pembina Institute's work on responsible fossil fuels. I'm here with my colleague Nichole Dusyk, who is a postdoctoral fellow with Pembina Institute.

The Pembina Institute is a national, non-partisan, non-profit think tank that has over 30 years of experience providing research and recommendations to inform energy policy and regulations in Canada. We have been actively engaged in the environmental law reform process for the last two years, and our submission to the NEB expert panel, a report entitled “Good Governance in the Era of Low Carbon”, was based on original research that involved interviewing 23 experts from around Canada and the world. Our comments today are largely based on that research, and in fact, as energy nerds, it's always a good day when we get to share our perspective on energy policy with decision-makers.

Our involvement to date has focused on mobilizing the National Energy Board, and our comments today will continue in that vein. We will focus our comments on part 2 of the bill pertaining to the Canadian energy regulator.

We believe that the Canadian energy regulator act is a good piece of legislation that will move us toward more credible review processes. It is clear that the government is aware of major issues that have been identified with the NEB and is seeking substantive reform that will address many of those issues. In particular, we support the revised governance regime for the CER, the transfer of authority for impact assessment to the impact assessment agency of Canada, the expanded list of factors that must be considered when issuing a certificate or authorization, the removal of the standing test for public participation, and the emphasis on partnering with indigenous groups and jurisdictions.

However, the act contains significant omissions that will need to be addressed if it is to achieve its intended purpose of providing credible, evidence-based project reviews and ultimately restoring public trust in the federal energy regulatory process.

In our testimony today we will address four issues: climate change, the composition of review panels, public participation, and energy data. We ask you to refer to our written statement for additional recommendations to strengthen the accountability and transparency of CER decision-making, to ensure the CER is diverse and has a range of competencies, and to tighten up the conflict of interest provisions.

Our first recommendation is to include climate considerations. Similarly to Nigel's discussion on that, the CER act makes no reference to climate policy, commitments, or impacts. In fact, the word “climate” does not occur once in the entire act. This is a major omission. If the economy and the environment are to go hand in hand, the federal energy regulator must have the mandate to integrate climate considerations throughout its activities and functions. This includes the climate impacts of energy infrastructure but also the financial and physical risks that climate change poses to energy infrastructure.

We recommend including climate considerations in the purpose of the act, in the reporting and advising responsibilities of the regulator, and in the factors considered in issuing a certificate or authorization under the act.

Our second recommendation is to limit CER representation on project review panels. We strongly support transferring the responsibility for impact assessment to the impact assessment agency of Canada. Having a single agency responsible for conducting all assessments under the impact assessment act will help ensure consistent application of the law for all sectors and projects. We recognize the specific expertise of the life-cycle regulators and feel it is acceptable that the CER and other life-cycle regulators have a seat on review panels. In fact, that's critical. It is not acceptable, however, that they potentially comprise a majority or the entirety of an impact assessment review panel. The existing wording of the impact assessment act allows for this possibility and must be amended to ensure that project review panels have balanced representation and expertise, including representation from relevant regions.

We recommend amending proposed subsection 47(3) in the impact assessment act to limit CER representation to one of three seats.

● (1140)

Our third recommendation is to provide specific mechanisms to ensure meaningful public participation.

We are very pleased to see the removal of the standing test for public participation. While the intent of the bill is clear, removing barriers to participation is not enough to ensure the public has a real voice in major energy projects. The practical need for improving public participation in the assessment of major projects has been noted by the commissioner of the environment and sustainable development as well as both the expert review panels.

We are past the point of acknowledging the need for public and community engagement. We need to make this happen. This requires explicit and careful design from the outset and throughout project life cycles. We believe the best way to ensure this happens is to create a public intervenor office, as recommended by the NEB expert panel, to ensure meaningful public engagement.

We recommend creating a public intervenor office to advise on public engagement activities and ensure public access and representation throughout the project life cycles. We also recommend making the participant funding program mandatory.

Our final recommendation is to create an independent energy agency. We were disappointed to see no specific provisions in the Canadian energy regulator act to improve the state of energy information in Canada or to ensure that federal energy regulation is based on high-quality, independent data and analysis.

The expert panel on NEB modernization stated:

> We feel that the Canadian Energy Information Agency needs to have the mandate and ability to tell it like it is on energy matters, and inform the development of energy policy and strategy, without being involved in the determination of energy policy, or administering energy infrastructure regulation. This will help to assure that information is seen as neutral and credible.

We strongly agree with that statement.

We recommend amendments that would enable and fund the creation of a new Canadian energy information agency and expand energy data collection at Statistics Canada. In addition, we recommend that the new agency be tasked with producing annual scenarios for energy supply and demand, including a reference case that considers domestic and international action on climate change.

Thank you for the opportunity to appear today and we welcome your questions.

The Chair: Thank you.

I want to thank all of you for very detailed briefs and statements today. There are lots of good ideas there, for sure.

I want to recognize a new member at the table. We have MP Dave Van Kesteren. Thank you very much for joining us today.

We'll start questions with Will Amos.

Mr. William Amos (Pontiac, Lib.): Thank you, Madam Chair.

Thank you to our witnesses, both video and live. It's clear you've invested significant time in your presentations. We all know how much you have focused on this issue for the last couple of years. We take that very seriously.

Professor Bankes, I've read with great interest for many years your commentary on energy governance in Canada and on impact assessment. I wanted to give you an opportunity to comment further on sustainability and regional impact assessments. You've written on this topic in the past, and I'd like to know a bit more about where you think this legislation hits the mark, and, more particularly, where it misses it and how it can be fixed.

Prof. Nigel Bankes: Thank you, Mr. Amos.

I think it's a positive step to see that both the IAA panels and the CER are directed to take into account strategic assessments and the like. As you know, I have written on the importance of engaging in strategic environmental assessments. I think there is an integration here.

I also think, if I recall correctly, that there is a provision that allows a party to inquire of the minister to establish a strategic environmental assessment for a particular type of issue and that the minister is required to provide a written response to that. All of that seems to me to be positive in these two bills.

Mr. William Amos: The comment was raised earlier by Mr. Butler that a major debate is happening, particularly on the east coast —that's where I'm hearing it the most—around the appropriate role for the regulator in the context of an impact assessment panel.

Mr. Butler's opinion is one I share, which is that there is an appropriate role and it would be important to have a regulator on a panel, but that having a majority of seats on a panel would not be appropriate. What is your opinion on that matter?

● (1145)

Prof. Nigel Bankes: I guess my opinion—certainly in relation to the CER, which I've thought more about than the offshore boards—is that I would agree with Mr. Kenyon's comments that it's important to have that CER involvement because of the knowledge base that it brings and because it will be the life-cycle regulator for a project, if approved. I'd also support Mr. Kenyon's comment that it shouldn't be a majority. It's an interest and an expertise that's necessary, but I think the whole idea is for this not to be a dominant consideration.

Mr. William Amos: Thank you.

We will move now to the issue of the appropriate role of the judiciary and other dispute settlement entities that could be contemplated in the context of this bill. The panel came with recommendations suggesting that a quasi-judicial entity was important, but this bill doesn't follow that path.

This issue has been discussed by previous witnesses before our committee, including Mr. Northey yesterday, and Mr. Olszynski, your colleague, the day before. Do you have opinions regarding the appropriate role of a non-court entity, some kind of specialized tribunal, to deal with disputes that arise in the context of this?

We also have the cabinet's role, which is integrated into this discussion. I'd like to hear your comments on that.

Prof. Nigel Bankes: I've made one comment, of course, in my brief and remarks this morning about requiring the Federal Court of Appeal to provide reasons to support its decisions. However, you are asking me much more, I think, about the creation of an environmental court or an environmental appeal board as a part of a supervisory scheme. My own view is that I rarely see the value of EABs, those sorts of bodies, in the context of reviewing decisions made by departments rather than by quasi-judicial bodies. I've written in the past about the way in which EABs can shed light on internal decision-making within departments.

I don't see that as being necessary in the context of either panels or the CER. What I want is reasoned decisions and no undue deference to decisions made by the Governor in Council or the minister.

Mr. William Amos: Thank you for that.

This is a very quick follow-up. If you don't think an environmental appeals board type of entity is appropriate in this particular scheme, what do you think is the appropriate role for cabinet in this?

Prof. Nigel Bankes: I am of the view that the final go/no-go decisions in relation to projects are political decisions and are therefore appropriately made at either the ministerial or the cabinet level. I'm also of the view that those decisions, too, need to provide appropriately detailed reasons, which themselves would be subject to review by a court.

The Chair: Thank you very much.

You are next up, Mr. Fast.

Hon. Ed Fast (Abbotsford, CPC): Thank you, and thank you to all the witnesses for appearing today. There was only one witness who actually addressed the issue of competitiveness, the ability of our natural resource sector to actually compete within the global marketplace, and that was Ms. Collins. Thank you for doing that. That is critical. Canada is a rich country in terms of natural resources. The price we get for those resources is dependent upon certainty and upon the competitiveness of the playing field on which Canada competes internationally.

You mentioned, Ms. Collins, that the decision as to what is not in the national interest should be made by political players, which I think has been repeated here at this table a few times. When did you suggest that this decision should be made? Was it in the planning process itself or later?

● (1150)

Ms. Colleen Collins: The opportunity is the planning process, so the decision at the end of the planning process is the national interest decision. That's the time for the political decision.

Hon. Ed Fast: Did I hear you say that a new government should not overturn a decision made by a previous government based on the regulatory review process?

Ms. Colleen Collins: Yes, you did.

Hon. Ed Fast: Can you give me an example of a project where that actually happened, where the new government overturned a project?

Ms. Colleen Collins: I think we saw that with the northern gateway decision, where a project had been approved by the regulator and the previous government and then—

Hon. Ed Fast: Is it your position that the decision by the current government to overturn the northern gateway project has undermined confidence in Canada's regulatory process and our investment environment?

Ms. Colleen Collins: Yes.

Hon. Ed Fast: All right.

You have also suggested that policy debates regarding ongoing climate change and first nations issues and a few other issues should be dealt with before the assessment process begins. Is that correct?

Ms. Colleen Collins: Yes. If there's a decision that we don't want marine traffic on the west coast, that's a policy decision. That's not part of a regulatory decision. If we for some reason decide that we don't want energy development in Canada, then that's part of the policy decisions. That should not be part of a regulatory decision.

Hon. Ed Fast: We presently face a real challenge with respect to the Trans Mountain pipeline expansion, which went through a rigorous regulatory review. After the fact, there was an additional review that was thrown into the mix. It went through that. At the end of the day, the government made a decision to move forward with the project. It is still facing hurdles.

Do you have any words for this committee as to why this is happening?

Ms. Colleen Collins: I think the reason that it's happening is the whole notion that we're running parallel processes. We're running a regulatory process and because there's a political decision at the end of that process, that parallel process continues. You have participation in the regulatory process—that's one layer—but if interests believe that there's something to be gained by continual lobbying and action on the political side, of course they're going to use that process. That only makes sense if the model is built that way.

Hon. Ed Fast: Is it your opinion that Bill C-69, which is before a committee right now, would improve the public's trust and confidence in the regulatory process?

Ms. Colleen Collins: No, because the bill doesn't trust the regulators or the impact assessment committee to make the decisions. As I've said, why would the public trust a process that in fact Bill C-69 doesn't trust?

Hon. Ed Fast: Thank you very much.

Mr. Kenyon, in your testimony you said that you are pleased that the standing test has been removed from the environmental assessment process. Correct?

Mr. Duncan Kenyon: That's correct.

Hon. Ed Fast: Is it your position that there should be no limitations or parameters on who should have standing to appear during the assessment process?

Mr. Duncan Kenyon: No. Specifically, the standing provision, as it was, was quite limiting. It is reasonable to expect that we need to make room in these discussions for those with expertise and knowledge to be able to participate in the process.

Obviously it's not the intent to create a circus by letting everyone into the process, and I think that's actually a really good comment from Dr. Collins, but I don't believe that our existing process was expanded enough to allow full discussion.

Hon. Ed Fast: I'm glad you mentioned that you don't want this to turn into a circus, because that is the fear of the investment community, that a process like the one provided for now in Bill C-69 will indeed result in a circus.

You haven't been specific as to what kinds of limitations you would impose in terms of standing.

● (1155)

Mr. Duncan Kenyon: There's a couple of really good examples —

The Chair: You have a few more seconds.

Mr. Duncan Kenyon: Thank you.

There is the genuine interest test, so you're able to judge participants. Either you are locally involved or you have knowledge on the project or the area. You're looking for people who actually add value to the discussion and there's a test on that.

There's also a case in Alberta, for example, with the Alberta Energy Regulator, where they recently were reviewing tailings management plans. There is quite a restrictive standing test in Alberta but they actually added a provision there to allow genuine interest organizations that had information and knowledge about the tailings interest to come and present knowledge that added to the robustness of their review.

The Chair: Thank you very much.

Ms. Duncan.

Ms. Linda Duncan (Edmonton Strathcona, NDP): I want to thank all the witnesses here today. Regrettably, in this 800-clause bill, where the government refused to divide it, you are the first witnesses who are talking about this part of the bill, so there is a big onus on you. I appreciate all the specific proposals for amendments.

I have lots of questions, but I only have six minutes, unfortunately.

Professor Bankes, it's great to have you here. You're certainly high on my list of recommended witnesses. You've done great work in Alberta and continue to do so.

My question is quite different from what other people might be looking at, and it's the part on certificates for designated international power lines. I know you're probably well aware of the arguments over the MATL line, which went through southern Alberta and was built for export. I understand that there's still ongoing litigation on the constitutionality of it and that the NEB did not get involved in that. Do you think that part of the bill is clarifying it? It simply says that the commission may make recommendations and that the federal entity might get involved in those approvals.

Have you looked at that part of the bill at all?

Prof. Nigel Bankes: Thank you for the question, Ms. Duncan.

I have looked at that part of the bill. My recollection was that there were really few, if any, changes from the current provisions of the National Energy Board Act, so I have two comments on that.

One, I think interprovincial transmission lines should be subject to federal regulation. They are not at the moment unless any such project is designated. I think that's unfortunate given that we probably need to be strengthening the interprovincial grid as part of responding to—

Ms. Linda Duncan: I'm asking about the international lines.

Prof. Nigel Bankes: The international lines are subject to federal regulation, depending upon the proponent's election. The proponent has the ability to run the project through a provincial permitting system rather than the federal permitting system, which is what happened in the MATL line, the Alberta-Montana intertie that you referred to.

You have this sort of strange combination of federal and provincial regulation, which seems odd to me. It's not what we do for pipelines. It's not clear to me why we have different rules for transmission lines.

Ms. Linda Duncan: Thank you very much.

There are really interesting proposals from the Pembina Institute. Thank you for picking up on the expert panel recommendations. You're recommending the creation of a public intervenor office for the second part of the bill. Should that also apply to the impact assessment process?

Dr. Nichole Dusyk (Postdoctoral Fellow, Federal Policy, Pembina Institute): That's a really interesting question and I think it's something we need to consider. It's our opinion that it could be appropriate, thinking about it from the perspective of an energy regulator and the projects that would fall under the energy regulator. It is something we do need to think about.

When we were proposing it, we were not just thinking about the assessment process but about the entire life cycle and the number of places where better public participation is needed along the life cycle. We think that it could work to use it in the impact assessment for projects that would fall under the CER, but that also would need careful consideration. We wouldn't say that is an absolute requirement. Rather, we see it as a value, as a mechanism that could really ensure that we have access and representation all along the entire life cycle of a project.

Ms. Linda Duncan: I'm noting that the witnesses from Pembina, along with quite a few other interveners, are saying that it isn't enough just to say that the public can participate and that the agency may have rules on costs. You're recommending that we need specificity on both of those.

● (1200)

Dr. Nichole Dusyk: That's exactly it. We have had rules around public participation for a long time, but I think what we really need to think about is how we can grow institutional culture that not only allows for public participation but actually values it and understands the role that it can play in improving projects.

I'd like to also speak to the issue around efficiency because it is a concern in terms of the volume of participants. We also think that a public intervenor could play a role in that.

Ms. Linda Duncan: You're talking about a public intervenor office.

Dr. Nichole Dusyk: Yes, exactly, in terms of potentially creating classes, groups of citizens together.

Ms. Linda Duncan: Do you mean as is done in Alberta?

Dr. Nichole Dusyk: Right, and probably a number of people who intervene in these assessments and in projects don't necessarily need to do it individually. It takes a lot of time and a lot of resources. They would be happy to know that their interests are being represented, and they don't necessarily need to be there in person. We think it also would improve the efficiency.

Ms. Linda Duncan: I have one more quick question for you. I know you want this question.

Do you believe in situ should be included on the project list? Do you believe that there should be extensive public consultation, and do you believe the project list should be in place before we do the final reading of this bill?

Mr. Duncan Kenyon: To be very clear on that, over the past 50 years, the development of oil sands has changed the face of Alberta in terms of economic prosperity, but it has also driven massive environmental impacts from tailings to greenhouse gas emissions.

The future of oil sands will be in situ, and if we exclude that type of project from the list, we are, in fact, excluding oil sands from being reviewed.

Ms. Linda Duncan: Absolutely, as well as climate considerations, I guess.

Mr. Duncan Kenyon: One hundred per cent.

The Chair: Thank you very much.

Next up would be Mr. Rogers.

Mr. Churence Rogers (Bonavista—Burin—Trinity, Lib.): Thank you, Madam Chair.

Thank you to all of the presenters today.

I am an MP from Newfoundland and Labrador. I live in a riding where the vast majority of the work in offshore oil and gas occurs, where we have built gravity-based structures over the last couple of decades , and have developed a fairly large offshore oil and gas industry. Of course, the province keeps talking about the potential for the future, in terms of offshore oil and gas.

I'm hearing lots of commentary coming back to me from Newfoundland and Labrador from groups like Noia, CAPP, the province itself, and the energy minister. Most of the lobby effort really is related to offshore oil and gas in terms of this act and what it's going to do in terms of the future process that people will have to follow, in terms of public consultation, and all of these kinds of things. Of course, what they keep talking to me about is how if certain parts of this act are changed or amended, that is going to mean or have some dire consequences for offshore oil and gas.

What I am more interested in today, I guess, is what might be your perspective on this. I know, for example, that under the Atlantic accord there are certain stipulations that are alluded to with regard to the offshore petroleum boards.

I just wonder, Mr. Bankes, if you could maybe comment on what you see as a future role. I know you have talked already about the C-NLOPB with regard to their involvement in the future development of offshore Newfoundland and Labrador in particular.

Prof. Nigel Bankes: I can try, Mr. Rogers, although I suspect both Ms. Mitchell and Mr. Butler might be better placed to answer, because I have principally been looking at part 2 of the bill, dealing with the Canadian energy regulator, and the CER will have really no jurisdiction in relation to offshore oil and gas. It will have jurisdiction in relation to offshore renewables, and it seems to me that is a positive development for both Newfoundland and Nova Scotia, in that it puts in place a regulatory scheme where there was none before. Whether it's the best scheme, I don't know, but it's good to see that gap addressed.

With that, I am going to defer to my east coast colleagues, if that's all right.

● (1205)

Mr. Churence Rogers: Thank you. I appreciate the comments.

Ms. Mitchell, maybe you could comment.

Ms. Lisa Mitchell: Sure. Thank you for the opportunity.

Clearly, the petroleum boards play an enormous role in the regulation of offshore oil and gas exploration and activity off the coast of Nova Scotia and Newfoundland and Labrador. We wouldn't see that changing. This is really about how those projects that are on the list of designated projects or activities would be assessed. The way the impact assessment act changes that is to move those to a review panel process.

The one point we did make, which I think is perhaps relevant, is that we think regulators are better placed to advise on that process than to sit on those review panels.

Mr. Churence Rogers: Thank you very much for that commentary.

Under this proposed Bill C-69, Ms. Mitchell, what are the particular challenges and opportunities? I know you've talked about some of these things, but specifically for Newfoundland and Labrador and Nova Scotia, what are some of the challenges you see that this legislation presents?

Ms. Lisa Mitchell: Do you mean the challenges in terms of the development of the offshore?

Mr. Churence Rogers: Yes.

Ms. Lisa Mitchell: I'll ask Mr. Butler to comment as well, but we will see, for many of the designated activities.... Again, we don't know what the designated activities will be, so this is a bit of an open question. I think particularly relevant when it comes to the offshore is that we don't know if exploratory drilling will be included. We don't know if seismic surveys will be included. We presume production drilling would be included, but we don't know any of that at this stage.

We do know that the only way the projects can be assessed is by a review panel. That indicates to us that there will be a very narrow set of projects assessed. We would like to see projects that would not necessarily fall into that level, if you will, still being assessed by the impact assessment agency.

Maybe Mr. Butler can comment, as well.

Mr. Mark Butler: I'm not an EA expert. Our attention in Nova Scotia has more focus on what this means for other industries out there, such as the fishing industry or the tourism industry, or even some of the new industries that are coming along, like tidal and offshore wind. We recently, I think you might.... For Beothuk Energy, there was a proposal for an over-$1 billion offshore wind project, which is particularly exciting for the region.

Certainly in Nova Scotia—I think we've heard less from Newfoundland—the fishing industry is concerned about the implications of some of these changes and what they might mean for protecting their industry and their competitiveness.

The Chair: Thank you very much.

Mr. Churence Rogers: The other—

The Chair: No, sorry, MP Rogers. You have six minutes and then you are done. It goes really quickly, I know.

Mr. Churence Rogers: I'm sorry. My apologies.

The Chair: Thank you.

Mr. Sopuck, go ahead please.

Mr. Robert Sopuck (Dauphin—Swan River—Neepawa, CPC): Thank you.

Dr. Collins, we had testimony from Chris Bloomer, head of the Canadian Energy Pipeline Association. He described Canada's regulatory environment as “toxic”—a very definitive word. A toxin is a poison.

As a result of the environment we have now, foreign direct investment in Canada has been estimated as going from $71.5 billion in 2013 down 56% to $31.5 billion in 2017. As well, a 2017 study ranked Canada 16th out of 17 countries for business investment, compared with eighth place for the period 2009 to 2014. I'll leave it to people to look at their calendars to realize who was in government at that time.

Do you see this decline, Dr. Collins, in investor confidence continuing or even accelerating if the IAA is passed and implemented?

Ms. Colleen Collins: I think the issue is not with the impact assessments themselves.

Mr. Robert Sopuck: Exactly.

Ms. Colleen Collins: Industry wants impact assessments. It wants them well defined.

The issue is indeterminate timing, decisions that are politically motivated that happen at two points in the process rather than at one. That just creates greater and greater uncertainty.

● (1210)

Mr. Robert Sopuck: Yes, I agree.

Having done pipeline assessments, myself, in the Mackenzie Valley, I know that process basically lasted 20 years and ended up with no pipeline.

Mr. Kenyon, in a very short sentence, maybe one word, are you in the Pembina Institute opposed to the Trans Mountain pipeline?

Mr. Duncan Kenyon: I'm not going to answer that with one word, I'm sorry. It's a complex project. It needs more than just one word.

Mr. Robert Sopuck: Okay.

Many in the activist community have rallied against it. We see colleagues being arrested because of their unlawful activities, and so on. One of the things the activist community is saying is that there's not enough consultation, and all of that.

We had very interesting testimony from Chief Ernie Crey of the Cheam First Nation. He talked about there being “43 First Nations that have mutual benefit agreements with Trans Mountain—reportedly worth more than $300 million—that offer skills training for employment, business and procurement opportunities and improvements to local infrastructure.”

Are those mutual benefit agreements good things in your mind, Mr. Kenyon, when they provide revenue and training opportunities?

Mr. Duncan Kenyon: I think the social issues that our first nations are facing are huge barriers and huge issues, and I would strongly support a country and government and others to address those issues.

I think specifically, projects like pipelines or other types of industrial activities, when designed right, can help with that. But I think there is a whole larger and much more significant suite of issues that need to be addressed.

Mr. Robert Sopuck: I would let Chief Crey speak for himself. I wouldn't dream of interpreting what he said. I'm reporting what he said: the enthusiasm among his people, his constituents, and their anxiousness to get to work are real and specific needs and wants that his community is seeking. He had a deep understanding as well of foreign direct investment, and I was very impressed with his knowledge of the entire Canadian economy and what it means for first nations like his to participate fully.

Mr. Kenyon, I spent time in the oil sands myself, doing environmental assessment work on the Kearl project. I assume you've been to the oil sands many times. Do you ultimately want to see oil development and the oil sands phased out?

Andrew Weaver, the head of the Green Party, sent out a note yesterday saying that he would like to see the oil sands phased out. Is that your view?

Mr. Duncan Kenyon: No. The Pembina Institute is a clean energy organization that believes we have to develop all our resources responsibly. That's both oil sands, and oil and gas, but also our renewable resources.

Mr. Robert Sopuck: Do you think the oil sands are being done responsibly?

Mr. Duncan Kenyon: I think it's not the case. I think we have a lot of work still to do in the oil sands.

Mr. Robert Sopuck: I disagree strongly. I did an environmental assessment there, and the technology that is being applied is remarkable.

Mr. Kenyon again, do you support a transition to a renewable energy economy?

Mr. Duncan Kenyon: I support a transition to a diverse energy economy.

Mr. Robert Sopuck: I would presume that the renewable sector would have an increasing role to play over time?

Mr. Duncan Kenyon: I strongly believe that the market will determine more where the energy sector goes. I think that's the fundamental issue we're facing in this country that we haven't yet woken up to, that market forces are going to impact our existing energy industry, but what's coming down the road could dramatically change what is possible for this country.

Mr. Robert Sopuck: Coming from a renewable energy province myself, Manitoba is one of the leaders in hydroelectricity, it's interesting, many proponents of renewable energy don't realize how long it will take.

A study by the International Energy Agency, new policies scenario, 2017, showed that in 24 years of effort and work, from 2016 to 2040, there will be just a 6% increase in renewable energy, so we have a long way to go on that.

The Chair: Mr. Sopuck, I have to cut you off, unfortunately.

Mr. Robert Sopuck: Okay. Thank you very much.

The Chair: We can pick that up on your next questions.

Mr. Bossio.

Mr. Mike Bossio (Hastings—Lennox and Addington, Lib.): Thank you, Chair.

Thank you, all, today for your presentations, your briefs, and the hard work you've put toward helping us figure out the best way to move forward with this bill.

Many of you have spoken about meaningful public participation and I'd like to hear from each of you. How would you define "meaningful public participation"?

In your view, how would that best be represented in this bill?

● (1215)

Dr. Nichole Dusyk: Are you asking a particular participant?

Mr. Mike Bossio: Whoever would like to go first, go ahead. I'd like to hear what everyone has to say on it.

Dr. Nichole Dusyk: Okay.

I am going to quote John Sinclair, who has a submission on impact assessment, because he has a definition in his submission.

> Meaningful public participation establishes the needs, values, and concerns of the public, provides a genuine opportunity to influence decisions, and uses multiple and customized methods of engagement that promote and sustain fair and open two-way dialogue.

I think that's a really good definition.

In our written brief we list a number of components that are required as part of that, things like access to information, to expertise, to legal counsel, and to funding, those sorts of things that are required to enact meaningful public participation.

Mr. Mike Bossio: Would anyone like to add to that?

Ms. Colleen Collins: No, other than that clearly a process needs to be established, so an adjudicator's office would be one idea. There has to be some way to establish exactly which groups have common commentaries and group them together. People need to know in advance what that process is so that needs to be part of the bill, not just part of its culture but also part of this bill.

Mr. Mike Bossio: Duncan or Mark...?

Mr. Mark Butler: Lisa might be better equipped to answer this question because she has studied this longer and deeper than I have.

I would mention, just to reiterate an earlier point, that I found the public consultation that the EA panel organized to be very respectful, very thoughtful, and quite efficient, too.

Lisa, do you have some general comments on this?

Ms. Lisa Mitchell: Sure. Thanks, Mark.

It's interesting that Nichole mentioned John Sinclair. John Sinclair and I wrote an article together following our engagement with the Emera Brunswick pipeline substitution process a number of years ago. I would say, from all of the little things that we drew from that, meaningful public participation is when members of the public who do seek to participate in a process feel that they've been heard and have had the opportunity not just to hear what the project is about but to actually influence the direction that it might take.

Mr. Mike Bossio: Thank you.

Nigel, is there anything you'd like to add that's different from what has already been said?

Prof. Nigel Bankes: I don't think so. I think Ms. Dusyk really caught the essentials. I guess one thing I would say is that by removing the standing test from part 2, we are effectively punting to the regulator the responsibility to develop rules that will determine who actually appears. I think Mr. Kenyon's reference to the genuine interest test is probably a good starting point for those rules.

Mr. Mike Bossio: Rather than punting it down to the regulator, do you think that definition should actually be embedded within the act ?

Prof. Nigel Bankes: I think it's probably a good idea not to have it in the act. It then leaves it organic and capable of changing over time rather than becoming fossilized, which is what we see in some jurisdictions, including in my home jurisdiction of Alberta.

Mr. Mike Bossio: Would the rest of you agree with that, or do you think that there should be a clearer definition within the act as to what meaningful participation should look like?

Dr. Nichole Dusyk: I won't comment directly on that, but I will say that there is definitely a need for flexibility and for understanding that public participation will look different for different projects. In that sense, I don't necessarily see a harm in including a definition of meaningful public participation, but I do think that we need to ensure that what we're legislating makes room for flexibility and adjustment from project to project so that it's something that can be applied in different circumstances and, as Mr. Bankes said, potentially evolve.

Mr. Mike Bossio: Okay.

Nigel, I wanted to throw this out there as well. I know you talked about the regulator sitting on the IAA, and the impact that could have. I know that the advisory panel originally had said that there shouldn't be any regulators on the panel. Then Rod Northey said yesterday that, actually, they would probably revise that and say it would have one regulator who is not the chair. Would you agree with that view?

● (1220)

Prof. Nigel Bankes: Yes, I would because I think it's an important perspective and knowledge base that needs to be brought to bear.

Mr. Mike Bossio: At the same time, it should be communicated that there would be no majority of regulators on the panel and that they would not be the chair.

Prof. Nigel Bankes: Correct. I think I already said that in earlier comments. I very much support Mr. Kenyon's comments on that.

Mr. Mike Bossio: I know you commented on that as well. Would you agree with that position?

The Chair: You have a couple of seconds.

Mr. Duncan Kenyon: I'd agree with that. I think there are some specific differences, though, between the CER and potential offshore issues, so I'd reserve that comment for the CER context.

The Chair: Okey-doke. Next up is Mr. Fast.

Hon. Ed Fast: Ms. Collins, you heard Mr. Kenyon and, I believe, most of the other witnesses as well applaud the elimination of the standing test. Does that improve predictability and certainty in the resource industry?

Ms. Colleen Collins: I don't think it's a question of the standing test alone. I think that an appropriate process to replace the standing test, where that process is well known and understood, is not a problem. I don't think the standing test alone is the issue here.

Hon. Ed Fast: The standing test is being eliminated.

Ms. Colleen Collins: Yes.

Hon. Ed Fast: Right now it's not officially being replaced with anything.

Ms. Colleen Collins: And it should.

Hon. Ed Fast: It should. Okay.

Ms. Colleen Collins: It should. I mean, what's adding to the uncertainty is that, consultation, instead of serving its process of ensuring that people are heard and have an ability to influence the decision, has the ability to just become a barrier.

Hon. Ed Fast: I think you also used the term “indeterminate timing”.

Ms. Colleen Collins: Yes.

Hon. Ed Fast: You talked about where during a process political decisions are made. Can you be more specific about the concerns you have on the timing of these political decisions that get made throughout the process?

Ms. Colleen Collins: There are two issues. One is the actual timeline allotted for each of the phases. Especially in the front end, there's a lot of room where it's this many days and it can be extended 90 days, to another 90 days, and to another, kind of ad infinitum. There should be less ability to extend the process in terms of timing. Overall, this timing is longer than what we currently experience in most cases.

Then there's the notion of where the go or no-go decisions are made.

Hon. Ed Fast: Bill C-69 significantly expands the factors that must be considered in coming to a decision on any particular project, including the impact the project will have on Canada's greenhouse gas emission targets.

Do you believe that the expanded list of factors will improve the process, slow down the process...? What impact will that have on resource projects in Canada?

Ms. Colleen Collins: I don't think the expanded factors is an issue, because right now they are looking at expanded factors. I think what has been the issue so far is that the scope has not been clear of what's required in this process. De facto, these processes currently are looking at a broader range of issues rather than the specific environmental ones. They are looking at social, cultural, and other issues as well.

Hon. Ed Fast: Are there other provisions in Bill C-69 that you believe undermine Canada's competitiveness in the resource sector?

Ms. Colleen Collins: As I said, I don't think rigorous assessment is unwelcome. Canada right now has one of the most rigorous assessment processes in the world. The challenge is the implementation of that process and what that means. The fact that decisions are revisited and revisited and revisited makes it an impossibility for anyone to make an investment decision.

Hon. Ed Fast: Mr. Kenyon, just a couple of minutes ago you made a statement, which I'll just paraphrase. I hope I don't have you wrong. I would like some comments on what you meant by it. You said that there were much larger issues at play than first nations participating in pipeline projects.

● (1225)

Mr. Duncan Kenyon: The much larger issues that first nations are facing in this country are social and economic issues. That's what I'm referring to there, with no reference to the pipeline issue.

Hon. Ed Fast: You don't believe that economic opportunity is a big issue for first nations?

Mr. Duncan Kenyon: I absolutely entirely believe that economic opportunity is a great part of it. For example, Pembina Institute is working with northern first nation communities who are looking at bringing energy self-sufficiency to their communities. We've been running this process for three years. We had 200 people at a conference in Yellowknife discussing this and in Whitehorse in the last two years. This is about empowering and enabling first nations to choose their own direction when it comes to energy as well as economic and social self-sufficiency.

Hon. Ed Fast: All right.

We had Mr. Ernie Crey here. My colleague Mr. Sopuck referred to his testimony. He highlighted the fact that the Kinder Morgan Trans Mountain expansion project represents very significant economic opportunity, yet we have groups in British Columbia and across the country who are opposing the pipeline basically for ideological reasons. I think earlier you mentioned that you believe it's not only wind energy, solar energy, and other alternative clean energy that must be considered. You talked about the whole mix of energy generation in Canada; we have to look at it in a holisitic way.

Could you expand a bit on what you meant by that?

Mr. Duncan Kenyon: We're at a nexus point globally when it comes to energy. We're at a point where we have revolutionary new technologies for extracting gas and oil through hydraulic fracturing. We also have revolutionary technologies coming from renewables, batteries, and merging technologies. My children will have things that we never had in terms of options for energy.

What we're struggling with in this country is what our current economy is based on and how we make that transition possible without leaving ourselves behind and leaving a lot of people behind, because in all fairness, there are a lot of people in this country who absolutely make a good living from our economy and our energy sector. What we really need to be debating instead of particular projects is where this country is going when it comes to energy and how we adapt.

I'm seeing a red card, which usually gets me trumped off the field in soccer.

The Chair: It's one minute over. I've been incredibly generous.

Mr. Duncan Kenyon: Did you want me to tear off my jersey and have a temper tantrum?

Voices: Oh, oh!

The Chair: No, you're all good. Thank you.

Mr. Amos.

Mr. William Amos: Thank you, Madam Chair.

I just want to start by setting the record straight, at least on the Kearl oil sands project, and perhaps Mr. Kenyon would have comments in this regard.

I appreciate that Mr. Sopuck did environmental assessment work for the proponent on that file. I believe it was Imperial, and my understanding is that it went to federal court. The panel decision was overturned, and the panel decision was one that approved the project. I'm not sure what the subsequent developments were in that, but I would expect it may have been appealed further.

My understanding was that the Canadian courts found significant problems, and really, what this brings us to is a helpful kind of thought process. We're trying to fix proceedings that aren't working for the environment and for Canadians. I wonder if you could comment on that, Mr. Kenyon.

Mr. Duncan Kenyon: That would be for Mr. Bankes. I don't remember the specifics of that, to be honest. It predates my day in the discussions on oil sands. I think significantly, though, when we look at the role for us to review bad decisions, or potentially mistakes on the decisions..... For example, on the northern gateway decision, that was a case where the courts found that there was not proper consultation with first nations. It was not a political decision. It was about a justice issue. I would like to point that out.

Mr. Bankes, you can comment on Kearl specifically.

● (1230)

Prof. Nigel Bankes: My recollection of Kearl is that it was a case brought by Pembina, and yes, it did result in the review going back to the panel and it rectified the omissions in its assessment.

Mr. William Amos: Thank you. I appreciate that, and I appreciate also the clarification that the northern gateway decision was not a political one. It was a judicial one.

In any event, I'll move on because I think there's more evidence that should be put on the record in relation to achieving clarity around the decision-making criteria for a cabinet decision. There have been a number of interventions by several witnesses, several organizations, who were seeking more specificity on what the proper basis of a cabinet decision should be. Obviously that would enable the courts, if they are to do their job at a subsequent stage, to evaluate the reasonableness of such a decision.

I appreciate this is sort of a direction that the Canada West Foundation has led us in, but I would like to direct this to Mr. Bankes in particular.

What is your assessment of the public interest test and the criteria that are attached?

Prof. Nigel Bankes: I think that is a very interesting question. It's interesting to look at the differences between the IAA legislation and the CER legislation.

For the CER legislation, what we have now is an expanded list of the criteria that are found in the National Energy Board Act. I think that the expanded list does clarify, in fact it largely reflects, the practice of the board, which has been to take into account a broader range of considerations. What's missing in the CER legislation is any specific reference to climate change, and we've already discussed that.

What's more interesting, actually, is the direction given to the Governor in Council in the CER legislation, because the CER legislation is completely silent on that question. It doesn't tell us how the cabinet is to be making those decisions. By contrast, under the IAA legislation, there are three or four specific considerations that the minister or the Governor in Council must direct their minds to.

One of the things I say in my brief is, why aren't we following that same approach in the context of the CER? In other words, why aren't we giving cabinet more explicit direction and then, as you say, making it possible to have a more objective review of that decision by a court, if necessary? That adds to transparency, accountability, and public trust.

Mr. William Amos: I appreciate that comment. I would agree that some criteria to put a frame around cabinet decision-making is entirely appropriate, and certainly better than none.

I'll invite the other witnesses to engage on this one, because what we've been told is that the criteria that have been advanced for the impact assessment aspect, they, themselves, are not specific enough and clear enough, and they don't really put enough of a framework around it.

Perhaps the Pembina Institute would be willing to comment. I know this is an issue that your organization has focused on in the past.

Dr. Nichole Dusyk: Yes. In our written brief, we did make a recommendation along those lines. The factors that we thought would be important to consider would be climate impacts, indigenous rights, and impacts on indigenous peoples, as well as public input. We would like to see that included in a parameter around the decision that goes into making a decision.

I agree with the critiques that perhaps what's in the impact assessment act doesn't go far enough, but what we are asking for in the CER act is basically to at least, at the very least, have something that somehow mirrors that, so that we can avoid the situation where we have decision statements that say, "We considered it and we made our decision" and they don't actually explain how things were considered, to what extent they were considered, or what factors were weighed in.

● (1235)

The Chair: We're going to have it cut it off there.

Next up is Ms. Duncan.

You're going to get six minutes.

Ms. Linda Duncan: There is so much to talk about and so little time. I really appreciate everybody's input, particularly the fact that you are also talking about the Canadian energy regulator. It's insane that we're also reviewing that act. We don't even report to that minister.

One of the things that I think has been left confused, and probably Professor Bankes can speak to this, and also the representative from East Coast Environmental Law, is that there seems to be confusion about the expert panel recommending a permanent tribunal as opposed to ad hoc appointments to a panel. I think people are getting confused about that permanent tribunal versus judicial review.

Maybe it would be good if the lawyers who are testifying to us would explain that. Those are two totally different things. I can relate to one of the reasons the expert panel recommended a permanent tribunal, because I'm from Alberta and we're used to a permanent energy review panel. They are used to people coming forward. They're used to sitting down with participants and saying, "Can you get together with those other groups and combine and hire one lawyer and one engineering expert?"

The problem is that, with this bill, nobody ever knows how their project is going to be reviewed. It might never be reviewed at all as a result of the so-called planning process. It might be reviewed by the agency. It might be reviewed by some type of panel. It's not really clear what the participation rights are under any of those. There is a need for clarification. If there are participation rules, those rules should apply across the board, including probably to the CER.

There have been a couple of suggestions, some that might actually be put in the statute, or on the other hand, are actually under the regulation power of the cabinet, that the cabinet be required to issue regulations that state those rights. One thing I would point out, and I would be interested for people to comment, is that under the environmental co-operation agreement to NAFTA, Canada long ago signed on to deliver, for the rights before tribunals, the right to present evidence and the right to cross-examine, so it is odd that none of this is in there.

I'm troubled by the suggestions of throwing in something like an adjective for "meaningful" participation, and then feeling that there's a need to define what meaningful participation is. You're cutting off the opportunity to actually have clear guidelines as to what the rights are. I would appreciate some feedback on that and who you think should best decide what those participation rights should be and what the access to costs should be. Where should those be laid out?

Would anybody like to comment on that?

The Chair: You have three minutes to answer that very complicated question.

Go ahead. Who's up first?

Ms. Linda Duncan: Somebody talk. The clock is ticking.

The Chair: Yes, the time is running out.

Ms. Linda Duncan: Okay, I'll ask another question.

I notice that Pembina has recommended that UNDRIP be specifically referenced. We did have a number of other first nation leaders appear, and we're having more. Each of them seems to be echoing what you're saying, that UNDRIP should be specifically referenced.

You might want to clarify one of the concerns that some people have raised, that this Bill C-69 appears to be premised on the Conservative reiteration of CEAA, not the original iteration. That's where there's some confusion. The Conservative iteration of CEAA was that the decision is by cabinet, not by the panel, so I find it puzzling that the Conservatives are raising the concern that in this bill the decision is left at the political level. In other words, it's the same—

Voices: Oh, oh!

The Chair: You'll have another chance. She has the floor.

Ms. Linda Duncan: It used to be that way. They introduced that. What do you think? Do you think the final decision on a major project should be by the review panel or at the political level?

Nigel?

Prof. Nigel Bankes: That's a political decision.

Ms. Linda Duncan: Yes. Do you like the way CEAA was before, or did you like it under the Conservative regime? Which way should it go?

Prof. Nigel Bankes: I'm focusing more directly on the CER legislation. The decision should be a political decision, but as we've just talked about with Mr. Amos, there should be some guidance provided. There should be reasons given by cabinet or the minister, and that decision should be reviewable by a court.

I'm not just saying it's political and therefore anything goes. It's political within those constraints.

● (1240)

Ms. Linda Duncan: Thanks.

The Chair: You have a minute, Linda.

Ms. Linda Duncan: I would like to hear a little more about those two recommendations by Pembina, including for the Canadian energy information agency and the rationale for how that is critical.

Dr. Nichole Dusyk: Basically there are two functions we look at when we're looking at energy information, and this is important because good decision-making has to be based on good data and based on high-quality data that is bias-free. What we have suggested is expanding the role of Stats Canada in terms of its energy data collection capacities, utilizing its existing expertise, and then creating a separate small body housed under NRCan that would do analysis.

That said, I will say that there are a lot of different proposals out there for how this could be organized. Rather than actually being wed to any particular institutional structure, we really want to see energy data collection and analysis separated from both regulatory and policy functions.

The Chair: Thank you very much. I have to cut you off there. My apologies.

Mr. Sopuck.

Mr. Robert Sopuck: Just for the record, the northern gateway project was killed by a political decision after a rigorous proposal process, and for Mr. Amos's benefit, here's the picture of the Kearl project. The project passed all the reviews and was built and is generating jobs and income for Albertans and all of Canada.

Mr. Butler or Ms. Mitchell, I would presume that biodiversity conservation is in the Ecology Action Centre's wheelhouse in terms of the activities you do.

Mr. Mark Butler: Yes.

Mr. Robert Sopuck: Good. Renewable energy is being developed off the east coast at a fairly rapid rate. I'm thinking in terms of wind energy and also tidal energy. Is that a fair comment?

Mr. Mark Butler: They're working hard on tidal. There are some challenges, but I'm hopeful. I think it's an incredible resource.

We also have a major offshore wind opportunity in the form of Beothuk Energy. They have the European capital to move ahead, but I understand there have been some obstacles, not from environmentalists but perhaps from our provincial utility in terms of hooking up to the grid.

Mr. Robert Sopuck: Just to clear the record up, I'm a fisheries biologist by training and I have a lot of difficulty with tidal energy and wind energy. The environmental problems with tidal and wind are always glossed over.

For example, in Ontario, every year there are over 41,000 bat deaths caused by wind turbines, 14,000 bird deaths, and 462 raptor deaths. In terms of the bats, three of them are SARA-listed species under the Endangered Species Act, but it seems that wind energy and all renewables get away from any environmental assessment whatsoever. It's in the mandate of the Minister of Environment to enforce the Species at Risk Act, yet at the same time the Ontario government ran roughshod over local communities in Ontario and eliminated their right of appeal in terms of assessing wind turbines and wind project developments.

Mr. Butler or Ms. Mitchell, should renewable energy projects be subject to the impact assessment act when it's passed?

Mr. Mark Butler: That's an interesting question. I wondered if somebody was going to bring it up. I would say yes.

Siting is obviously important whatever you're talking about, but we recognize too that renewable energy is addressing a serious problem we have, which is climate change. We've just come out of a winter in Nova Scotia in which we've had more storms and more damage to coastal infrastructure, including roads and wharves, and the cost of that is really starting to mount.

Mr. Robert Sopuck: Shouldn't the provisions of the Species at Risk Act be brought in to assess wind turbines? They're getting away scot-free. I'm a birder and we have bats in our community and on our farm, and we enjoy these species immensely. The mortality rate is astonishing, yet it gets a free pass. Why is that?

Mr. Mark Butler: I don't know if it's getting a free pass. I think we're hearing more about it and about having too many in the wrong place. I'm a birder too. I know that habitat loss is the top impact on birds and that actually the top two causes of direct mortality for birds are cats and windows, which you wouldn't think, but it's actually true. Over 300 million birds are killed each year by cats in Canada. Sometimes when people complain about wind turbines and birds, even though they have some profile in their community, they often need to look in their own backyard.

● (1245)

Mr. Robert Sopuck: Cats don't kill raptors or bats. I've heard that excuse before and I don't buy it for a minute.

In terms of tidal energy, what has the Ecology Action Centre learned about the impacts on fish populations?

Mr. Mark Butler: I wrote about this 25 years ago. I've been following it. Tidal barrages across rivers, like the Annapolis one, have clearly killed fish. They kind of slice and dice them. In-stream holds a lot more potential. It's tough though, because it's really hard to study and monitor. Picking the Bay of Fundy, for example, you have the waters moving at three or four knots.

I think we're going to find a way to develop tidal that will have a relatively small impact, given the overall biomass, on fish.

Mr. Robert Sopuck: Mr. Kenyon talks about the move to renewables, and you're saying it could do better over time, but there are existing renewable energy projects in place right now. Should they be subject to rigorous environmental assessment and community approval?

Mr. Mark Butler: Yes. No project should get a free pass, but tidal is getting more scrutiny and more attention than any other energy development has ever had, because on the technical side, we have to figure out lots of things but also because there is concern from fishers about the impacts. We also have concerns. If we start finding harbour porpoises chopped up on the beach, or sea bass, or whatever, then we will have a problem.

So far, we haven't determined there's a major problem with in-stream tidal.

Mr. Robert Sopuck: Thank you. I appreciate it.

The Chair: Thank you very much.

Mr. Amos, you are the last questioner and you have six minutes.

Mr. William Amos: Today, we have not discussed to any extent the issue of federal-provincial collaboration in assessments, the issue of appropriateness of substitution, nor the terms upon which equivalency is determined. I want to open this up, particularly to Professor Bankes and to the Pembina representatives. I want to hear your views on how that is most appropriately done.

Fortunately, or unfortunately, we've entered a very politicized environment around the Trans Mountain issue, which has sort of framed the question, but we need to take a step back from that and look more broadly at how we want a coherent federal-provincial assessment regime to function. That's what I'm thinking about now, so I'd love to hear your views on that.

Prof. Nigel Bankes: I'm going to let Mr. Kenyon start.

Mr. Duncan Kenyon: Thanks, Nigel.

Ironically, I'm living and breathing some of the equivalency issues right now, for example, with the federal and the provincial methane regulations. The equivalency piece is quite lacking in terms of clarity and what will be the judgment for that. I'm not as strong on or as able to speak about that in the environmental assessment context, but there are some very strong principles and guidance that need to be established to make really clear how equivalency works.

Also, quite critically, when we're looking at the federation and how our country works, we really want to be clear about creating collaboration and processes that encourage the federal and provincial governments to work together. The more we discourage that type of work, the more territorial we risk becoming. Specifically, when we're starting to deal with some pretty large energy projects, or some politicized aspects, you can see how that can take away from the spirit of collaboration that we need to establish.

● (1250)

Prof. Nigel Bankes: I'll jump in with two comments. First, we should be trying to avoid duplication in review. That's inefficient. I don't think it's in anyone's interest. Second, we have to recognize that, even where we have a federally regulated project like Trans Mountain, there will be a legitimate provincial interest. I think that provincial interest doesn't amount to a veto, that the province is not in a position to undermine a federal approval, but the process has to be able to take into account legitimate provincial and municipal concerns.

It actually seems to me the Kinder Morgan review process did that. Condition number one of the Trans Mountain certificate is that it's obliged to live by provincial and municipal permits. The challenge has been that Trans Mountain has found that Burnaby has not been acting in good faith in terms of proceeding with the permitting processes.

I haven't really thought that much about the substitution issues, to tell you the truth, Mr. Amos.

Mr. William Amos: Thank you for that. In a sense, I feel that I'm also signalling to other witnesses to come, and to our own government and my colleagues, that I'm looking for a stronger regime around the determination of equivalency.

In my estimation, a system of determining equivalency premised solely on unfettered discretion is not the direction to go in. I totally agree with the idea that we want one assessment. We want collaborative federalism so that governments are working together on environmental assessments. However, that can't be achieved through a unilateral, unfettered discretion to simply say that the provincial assessment is equivalent to what is required under federal law.

What I'm looking for in the future is some real guidance on this. I signal that to our witnesses today and to others who may be paying attention to these hearings.

The Chair: You have one minute, Will.

Mr. William Amos: Have I?

I'll hand that time off to my colleague Mr. Bossio, as he may have another question. If not, then maybe the chair has a question.

The Chair: Then I'll take it and use it for administrative stuff.

Mr. Mike Bossio: That's okay.

The Chair: If I could have the forbearance of the panel, I want to do a bit of administrative stuff. If I suspend, the time all goes to everybody's coming up and having a chat with you, because I know there will be interest in that.

I want to thank each of you for taking the time to come. You've given us a lot to think about. You've helped us drill down on some of the concerns we've had. If you wouldn't mind staying with us for a few minutes, I want to do some administrative things and make suggestions for the committee.

I want to first acknowledge and recognize our clerk for the hard work he's been doing trying to get all the panels coordinated. We have two panels on Tuesday, two more on Wednesday, and one panel.... Next week is going to reflect this week, so that everybody understands what we're trying to work toward.

Out of the 48 we asked, only five declined. We have one we're still waiting to get a response from, and then we'll have all of our spaces full as a result. More than 150 briefs have come in, and they are working their way as fast as possible through translation.

We appreciate all of the hard work you've done to try to make this work successfully. It has been a good week, adding to the previous weeks of testimony.

Our analysts have been busy trying to figure out how to help us, and they've given us some reports to assist. They have some thoughts on where we might want to look at some things.

Hon. Ed Fast: Madam Chair, can you dismiss the witnesses?

The Chair: No, I just went through that. I was asking their forbearance to stand by for a minute, because then we'll end the meeting. That's why I mentioned it.

We'll just quickly do the details, if we can have your forbearance for a minute, because I know people are going to want to come up and talk to you.

Please go ahead, Alex.

Mr. Alexandre Lavoie (Committee Researcher): I want to take the opportunity to point out that I've prepared a note regarding some of the potential issues that could be raised by indigenous groups. That note was distributed to you on Monday. There's a bit of background on indigenous rights and some of the potential issues. If you have additional questions, you can ask and I'll try to answer.

There are three things on indigenous rights and the non-derogation clause, which was raised also earlier this week. Among specific issues regarding treaty obligations, the Crees have pointed out some. As well, there is implementation of the United Nations Declaration on the Rights of Indigenous Peoples, which was also discussed this week.

I don't know whether we have additional indigenous groups who are coming, but—

● (1255)

The Chair: Yes, we have indigenous groups still coming before us.

We had some very detailed testimony this week, so it would be good to review what our analysts have prepared for us.

I think that's it. I will end by wishing everyone a good weekend, and we'll be back at it again next Tuesday.

Thank you. The meeting is adjourned.