

June 11, 2019

The Honourable Catherine McKenna
Minister of Environment
Government of Canada
Ottawa, Ontario

Dear Minister McKenna,

The Senate has recommended an amendment to Bill C-69, proposed by the oil industry, that would impose a restrictive 'privative clause' and an onerous process for seeking legal redress under Canada's most important environmental law. We are very concerned that this amendment would undermine access to justice and the rule of law, by impeding the ability of citizens and Indigenous Peoples to seek judicial review of assessments of major projects – ones that could significantly affect our health and environment. As Law Professors from across Canada, we urge that this amendment be rejected.

Bill C-69 proposes to reform Canada's approach to environmental assessment by "implementing an impact assessment and regulatory system that Canadians trust". Access to justice is a critical component of public trust. Canadians must be assured that, when there has been a legal error in the exercise of public duties, they can bring their case to a court without undue expense, impediments and burden. The Senate's (and oil industry's) proposed amendment would create the following problems for access to justice:

- 1. Requiring applicants to seek leave from the Federal Court of Appeal in order to proceed with a judicial review.** Litigation is extremely expensive and becoming more so, particularly for citizens and community groups. Canada already ranks behind its peers in access to civil justice, according to the World Justice Project. Parliament should not erect additional barriers that make access to the courts more costly and difficult – especially when it involves environmental matters of public importance (major projects on public land) that are likely to affect many Canadians. When those decisions are not lawful, access to the courts should be facilitated instead of hindered.
- 2. Mandating that determinations under the IAA are "final and binding".** This language reduces the long-standing ability of the courts to correct legal errors by suggesting that they must defer to the interpretations of administrative decision-makers (the Impact Assessment Agency or a review panel). At best the provision is redundant, since the Supreme Court has already confirmed that "expert" bodies are entitled to latitude in interpreting their "home" statutes. At worst, such "privative" language can make courts hesitant to step in, where appropriate, and correct unlawful decisions.
- 3. Denying applicants oral hearings.** The leave requirement is even more troubling because the amendment specifies that the determination would be made in a summary way and normally without personal appearance. This provision would deny citizens their "day in court" and invite decisions to be issued without proper reasons, which would diminish public confidence in the judicial process.
- 4. Imposing unworkable timelines for court procedures.** A requirement to hold a hearing within 60 days is unworkable given the heavy caseload of the courts, and interferes with the Court's

ability to control its own process. This is particularly true of the Federal Court of Appeal, already one of the most overworked courts in Canada. Judicial independence is vital and extends to scheduling, which judges must determine taking into account all the circumstances of the case.

This draconian amendment is a solution in search of a problem. There have only been a handful of judicial review applications each year for environmental assessments across Canada, and only the most egregious errors have been overturned.

Access to justice is a cornerstone of our democracy. As Parliament considers important new environmental legislation aimed at restoring public trust, we urge that it not create further barriers for citizens seeking to ensure that legal rules and procedures are respected. Accordingly, the proposed “privative” amendment should be deleted.

Sincerely,

[signed by]

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