



A Tale of Two Models: the Timing of Major Energy Project Reviews

June 08, 2017

[Jonathan Drance](#), [Glenn Cameron](#), [Kurtis Reed](#)

Last year, we surveyed the time that it took to conduct and complete major energy project reviews in Canada, both at the federal and provincial levels (the Project Survey), for a presentation that we made to the Canadian Energy Law Foundation in June 2016. ^[1]

We found that major energy project reviews at the federal level took materially longer and that the time for completing the review process was less predictable than at the provincial level.^[2]

On further review of the results of the Project Survey, we have noted there is a particularly pronounced contrast between the usual project review process of the federal government and that of the province of British Columbia, both in terms of the time required to complete the process and the nature of their respective and usual public consultation process. The contrasts are pronounced enough that they should be of some interest to the federal government as it conducts the overhaul of its project review process that is currently underway.

The federal timelines for reviewing the various major energy projects included in our Project Survey were as follows:

Project	Project Category	Federal Timeline (months)
Northern Gateway	Pipeline	104
Mackenzie Gas	Pipeline	77
Jackpine Expansion	Oil Sands	77
Joslyn North Mine	Oil Sands	70
Darlington New Nuclear	Generation	68
Muskrat Falls	Generation	64
Labrador-Island Link	Transmission	57
Energy East	Pipeline	54 ^[3]
Trans-Mountain Expansion	Pipeline	43 ^[3]
Pacific NW LNG	LNG	42 ^[3]
Site C	Generation	41
Darlington Refurbishment	Generation	36
Keeyask Hydro	Generation	35
Maritime Link	Transmission	19

The timelines for reviewing these projects varied between 19 to 104 months. The average duration of these federal project reviews was just over 56 months.

The BC timelines for reviewing major energy projects included in our Project Survey were as follows:

Project	Project Category	BC Timeline (months)
Woodfibre	LNG	28
LNG Canada	LNG	27
Westcoast Connector	Pipeline	24
Mica 5 + 6	Generation	24
Coastal Gaslink	Pipeline	22
PRGT	Pipeline	17

The time that it took to conduct these project reviews ranged from 17 to 28 months, compared to the time for conducting the federal project reviews that we surveyed which ranged from 19 to 104 months. The average duration of the BC project reviews was just under 24 months compared to an average of 56 months for federal project reviews.

A comparison of the underlying public record of the federal and the BC-led project reviews reveals some key distinctions.

The lengthiest federal processes have tended to be before Review Panels or the NEB. Each Review Panel has tended to adopt its own practices and procedures depending on its terms of reference and the composition of the particular Panel, which offers little opportunity for consistent adoption of best or most effective practices. In its own internal evaluation, Natural Resources Canada noted that the variations between the terms of reference for Review Panels as well as the variations in their process and procedures resulted in a relatively less predictable project review process.^[4]

Moreover, Review Panels and the NEB tend to conduct their project review process in a quasi-judicial fashion – replete with formal public hearings, oral testimony, often permitting full cross-examination and/or extensive written information requests designed to test evidence as well as entertaining various interim motions to determine process and procedural issues. The Expert Panel on Modernization of the NEB noted that the NEB's traditional quasi-judicial process was found by many participants to be overly rigid and legalistic and not even all that functional in allowing meaningful public engagement and consultation.^[5]

In contrast, the province of BC conducts its project review process principally if not exclusively through the British Columbia Environmental Assessment Office ("BCEAO"), which has evolved a relatively consistent and predictable approach to public consultation and engagement. The BCEAO favours an informal public consultation process involving notice and comment procedures rather than a more fulsome quasi-judicial process. The BCEAO describes its public consultation process as one that encourages participation in public meetings, open houses and other forums, and that encourages the public to review the record and make comments, generally through various in-person and electronic submissions. The BCEAO process also encourages the formation of informal working groups to convene key participants to review and understand core issues and concerns. For each project review, the BCEAO issues a relatively consistent and detailed Section 11 Order specifying the scope, procedures and methods by which the review must be conducted – both during any pre-filing and any formal review stage.^[6] These Orders specify how public consultation must be carried out at all stages with an emphasis on various informal procedures that do not involve formal testimony in lengthy public hearings or the systematic delivery of extensive information requests.

The available evidence suggests that these relatively more informal public consultation processes tend to be more expedited and more predictable than the quasi-judicial processes more widely employed at the federal level.^[7] It is obviously harder to measure the respective qualities of these two models, but it is worth noting that the most recent high-profile judicial cases involving the adequacy of a particular project review process have tended to strike down aspects of the federal project review process more than those conducted by the BCEAO.

The number of major energy project reviews considered in our Project Survey is small and there were many subjective decisions to be made in classifying projects and/or in assessing the duration of any applicable review process. The Project Survey is therefore intended to be more illustrative than definitive and to suggest directions for further and more systematic inquiry rather than to provide definitive answers. However, we believe the Project Survey yields enough prima facie evidence to suggest that a more systematic and comprehensive comparison of different models for conducting project reviews – particularly the less formal and less quasi-judicial model generally adopted by the BCEAO – would be advisable and useful before the federal government completes its current review and settles on the final form of its project review process.

[1] Kurtis Reed, Bradley Grant, Cameron Anderson and Jonathan Drance; Timing of Canadian Project Approvals: A Survey of Major Projects; (2016) 54:2 Alberta Law Review 311 (the "Project Survey"). For the purposes of the Project Survey, major energy projects were those with estimated CAPEX of \$1 billion or more. The Project Survey covered the timelines for major energy project reviews which were completed from and after January 1, 2010 or which were substantially underway as of the effective date of the Project Survey, in June 2016. The Project Survey measured the time between the filing of a project description or equivalent and the issuance of a final decision to authorize a project – usually an environmental assessment certificate or equivalent approval. Our detailed results, together with applicable qualifications and disclaimers, are set out in the Project Survey.

[2] See the Project Survey at 325 and 326. See also The Timing of Major Project Reviews by Jonathan Drance, Glenn Cameron and Kurtis Reed; Stikeman Elliott; Canadian Energy Law, May 11, 2017.

[3] Calculations of applicable timelines were all current as of the date of the Project Survey, in June 2016. The timelines for certain specified projects, including Trans-Mountain Expansion, Energy East and Pacific Northwest LNG were estimated and where the project review process was not complete those results are shown as set out in the Project Survey. Since the Project Survey, the Trans-Mountain Expansion and Pacific Northwest LNG project reviews have each been completed, substantially as estimated in the Project Survey. There is currently no reliable basis to update the estimate for the review of Energy East.

[4] See Natural Resources Canada; Evaluation of the Major Projects Management Office Initiative (Ottawa, NRC, 2012) at 55 and 56.

[5] 'Forward Together', Report of the Expert Panel on the Modernization of the National Energy Board, (2017) at 70 and 71.

[6] See for example the Section 11 Order, dated June 6, 2013, issued by the BCEAO in its review of LNG Canada's proposed LNG Export Terminal. See in particular Part F (Working Groups), Part G (Consultation with Aboriginal Groups) and Part J (Public Consultation). The Section 11 Orders issued for the other major energy projects included in the Project Survey were substantially similar.

[7] The BCEAO process tends to resemble the project reviews conducted by the Federal Energy Regulatory Commission ("FERC"), at least for interstate pipelines and other major gas facilities under its jurisdiction. For these project reviews, FERC tends to use a relatively informal public consultation process including a range of 'notice and comment' procedures, open houses and public meetings. FERC has the power and authority to conduct quasi-judicial 'trial type' hearings in connection with project reviews, but does so infrequently. See FERC, Pre-Filing Environmental Review Process at

www.ferc.gov/resources/processes/flow/Ing-1-text.asp and Paul Performak, Congressional Research Service (R43138); Interstate Natural Gas Pipelines: Process and Timing of FERC Project Application Review (January 16, 2015).

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice.