Completion Risk, Legal Uncertainty and Federal Energy Projects

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- Recent studies have shown a high level of completion risk for energy projects subject to federal jurisdiction.
- By some measures, up to 40% of all projects seeking federal approvals are withdrawn or terminated by sponsors or rejected by regulators.
- For the largest and most controversial energy projects, the overall completion risk may be even higher.
- We explore the ways in which legal uncertainty contributes to this risk.

Completion Risk: Background

In The Fate of Projects, by Marla Orenstein, the Director of the Natural Resources Centre at the Canada West Foundation, it is clear the completion risk for projects in Canada that are subject to federal project reviews is significant. See Marla Orenstein, “What Now? The Fate of Projects”, Canada West Foundation, November 2018.

Orenstein reviewed 86 projects (including energy projects) filed under the Canadian Environmental Assessment Act, 2012 and found that just over a third of them (29/86) were either abandoned, terminated or withdrawn by proponents or were rejected by the regulators. These 29 projects included 5 abandoned by proponents prior to initiation of any formal project review, 21 terminated by proponents after initiation but prior to completion of any project review and 3 rejected by regulators.

Orenstein noted that, for projects that were terminated by proponents, review times ranged up to 102 months (or roughly 8.5 years) and averaged 41 months (roughly 3.5 years). For projects that were rejected, the timelines ranged up to 124 months (or 10.3 years) and averaged 41 months (or roughly 3.5 years).

Finally, Orenstein found the rate of terminations and rejections of these projects has been increasing. Prior to 2015, only 5 project applications were terminated or rejected out of the 31 projects that she reviewed - roughly a rate of 16%. During and after 2015, 20 project applications were terminated or rejected out of the 50 projects she reviewed – a rate of 40%.

A similar pattern was described in a recent study by Messrs. Bishop and Sprague for the C.D. Howe Institute, “A Crisis of Our Own Making: Prospects for Major Natural Resource Projects in Canada”, C.D. Howe Institute, Commentary No. 534, February 2019. The authors surveyed 20 energy projects –

together with 7 mining projects – each with an estimated cost of more than $500 million. Six of the 20 energy project applications that they surveyed (or 30%) were abandoned, terminated or withdrawn before completion of project reviews.

We also participated in a Project Survey that included14 major energy project reviews under federal jurisdiction and control. See Kurtis Reed, Bradley Grant, Cameron Anderson and Jonathan Drance, "Timing of Canadian Project Approvals: A Survey of Major Projects", (2016) 54:2 Alberta L. Rev. 311,. Of the 14 federal projects initially included in our Project Survey:

- two (2) project applications (Northern Gateway and Energy East) were abandoned, terminated or withdrawn and one (1) further project (TMX) was fundamentally restructured and/or effectively nationalized during the review process; and

- three (3) projects (Mackenzie Valley Gas, Darlington New Nuclear and Pacific NW LNG) received approvals but were abandoned, terminated or withdrawn prior to commencing construction.

Five (5) other projects (the Site C Dam, the Keeyask Dam and the Muskrat Falls Dam, together with two (2) associated transmission projects – the Labrador Island Link and the Maritime Link) faced "near-death" experiences after receiving approvals but while still under construction. Each of the dam project sponsors was a Crown Corporation and each of the three (3) projects became a provincial election issue. Newly elected provincial governments in each case replaced management and subjected the projects to public enquiries or other review processes to determine whether the projects should be completed or cancelled. While in each case the decision was ultimately made to proceed, each project faced a material risk to completion while the applicable review process was being conducted.

Indeed, of the 14 federal energy projects that were in our Project Survey, only three (3) proceeded to physical completion without being terminated, abandoned or facing some form of existential crisis.Moreover, two (2) of those completed projects were oil sands mines (the Jackpine Expansion and Joslyn North). Each took so long to receive regulatory approvals that the operating and strategic environment had materially changed since inception. Each project has been subsequently shuttered and/or sold.

That left a single federal project (Darlington Nuclear Refurbishment) in our Project Survey that has progressed more or less in line with the project sponsor's initial expectations.

To be fair, this degree of over-all completion risk cannot be attributed solely to any particular federal regulatory process or to the federal government as a whole. As Orenstein noted:

Role of Legal Uncertainty

Changing global economic conditions, shifts in energy markets and project economics seem likely to account for the largest share of completion risk. But regulatory issues and litigation appear also to have added to the costs and/or extended timelines – and hence contributed in some degree to completion risk. Legal uncertainty may have contributed in the following ways:

Absence of Timely Policy Guidance

In the view of some key project sponsors and prominent commentators, there has been an absence of timely, consistent and specific policy guidance by the federal government with respect to the energy industry generally and major projects in particular. See Canadian Association of Petroleum Producers, "Submission of the Expert Panel Review of the Canadian Environmental Assessment Act", December 2016; Canadian Energy Pipeline Association, "Submission to the National Energy Board Modernization Expert Panel", March 2017, and the Business Council of British Columbia, "Submission to the Expert

Panel Review of the Canadian Environmental Assessment Act", December 2016. In this environment, each major project review can become in effect a proxy war about decisions on national energy policy - which really ought to have been settled by Parliament and Cabinet well before individual project reviews were conducted at the regulatory level. The Canada West Foundation has put this point well:

There is at least some evidence that jurisdictions with a high degree of clear policy direction have been able to design processes to carry out project reviews in a relatively more timely and predictable manner. Project review processes in British Columbia (for LNG and BC Hydro projects), by FERC in the United States (for gas pipelines, distribution facilities and LNG) and for Nationally Significant Infrastructure Projects in the United Kingdom (for low-carbon power projects including on-shore and off-shore wind, biofuels and even nuclear) are examples that come to mind. In each case clear and timely policy guidance has facilitated effective project reviews and the relatively predictable development of energy projects consistent with government policy. For evidence on timing of energy reviews in different jurisdictions see: Jonathan Drance, Glenn Cameron and Rachel Hutton, "A Tale of Two Models: The Timing of Major Energy Project Reviews", SE Energy, June 8, 2017; and Nathaniel Lichfield and Partners, "DCO: Friend or Foe? – Does the Nationally Significant Infrastructure Projects Regime Deliver Fast-Track Consents?", November 2015.

Process and Procedures

Federal review processes, particularly of major and controversial energy projects, have tended to adopt quasi-judicial procedures that are more burdensome and that produce outcomes that are less predictable, at least in terms of timing, than the procedures adopted in some other peer jurisdictions. In the United Kingdom review procedures have been specifically designed to avoid formal trial-type hearings or extensive written discovery-type procedures. Moreover, the scope of individual project reviews is specifically designed to avoid re-litigating issues already determined by government policies adopted in accordance with project review legislation. As to the approach to process and procedural steps for project reviews in the United Kingdom, see background analysis to the evaluation of the process for reviewing the UK's Nationally Significant Infrastructure Projects in by Dr. Ben Clifford and Professor Janice Morphet, "Infrastructure Delivery: the DCO Process in Context", June 2017. In Canada, virtually all energy industry submissions on Bill C-69 emphasized the importance of taking further steps to ensure that the federal project review process was subject to reasonable time-lines and greater schedule discipline.

Evolving Standards for Aboriginal Consultation

There has been progress in recent years in determining in what circumstances the Crown has duties to consult and if necessary to accommodate the claims and rights of Indigenous peoples. However, it is much less clear what specific steps must be taken once those duties are engaged. See David Wright, "Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments", Bernard Roth, "Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence", 2018 83 S.C.L.R. (2d); and David J. Mullan, "2018 Developments in Administrative Law Relevant to Energy Law and Regulation", Energy Regulation Quarterly, 7:1 (2019). Issues regarding the adequacy of consultation and accommodation have proven particularly acute for the largest and most politically controversial projects, including linear energy projects such as pipelines and transmissions lines. These linear facilities can cross the territory of many different Aboriginal bands and issues of whether the consultation with each band has been sufficient have proven to be extraordinarily difficult to properly manage.

Lack of Constitutional Clarity

There is persistent uncertainty regarding the scope, content and exclusiveness of powers to regulate federal works and undertakings – particularly in light of recent and evolving judicial theories of co-operative federalism. Over the years, and at various different times, several distinct lines of authority have been adopted by the Supreme Court. See Peter Hogg, "Constitutional Law of Canada" V.1 (5th ed); Peter Hogg, and Rahat Gadil, "Narrowing Interjurisdictional Immunity", 42 Osgoode Hall Law Review, (2008);

and Scott Carrière, "Not Your Grandfather's Co-Operative Federalism: Constitutional Themes at the Supreme Court Hearing of Redwater", ABlawg.ca, April 2, 2018. In some cases the Court has applied a doctrine of interjurisdictional immunity to protect an exclusive federal core of jurisdiction, and to exclude or diminish any exercise of provincial jurisdiction which could affect a federal work or undertaking. But the dominant trend in the recent cases has been to apply notions based on co-operative federalism and to allow relatively more provincial legislation to stand, at least in the absence of a clear and material legislative conflict. Lines of authority may have become blurred. For a sense of the conflicting strains in the recent case-law regarding jurisdiction over federal works and undertakings, see Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34 at paras 41 to 76 and Reference re Environmental Management Act (British Columbia), 2019 BCCA 181 at paras 65 to 91.

Unclear Standards for Judicial Review

In the views of many Canadian courts and commentators it is currently not sufficiently clear what the appropriate standard is for judicial review of administrative action. See Shaun Fluker, "The Great Divide on Standard of Review in Canadian Administrative Law", ABlawg.ca, July 23, 2018; and Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law - Recent Cases on Standard of Review and Reasonableness", (2016) 62:2 McGill LJ 527. This lack of clarity includes whether and under what circumstances the courts are to apply a correctness standard or a more deferential reasonableness standard in conducting a judicial review of administrative actions. At issue also is the proper application of any such standard in specific instances. These administrative law issues are of no little moment for federal energy projects. In recent years, a number of administrative approvals by the NEB and/or other federal agencies have been varied, overturned or reversed because courts subsequently applied a correctness standard of review or notionally applied a reasonableness standard but may in fact have applied a "correctness standard in disguise" instead.

Prospects

We stand at an interesting inflection point.

With the recent passage of the Impact Assessment Act the federal government has fresh opportunities to re-consider and re-fashion their approaches to both policy and procedures affecting project approvals. While the passage of the Act has foreclosed the introduction of further or other institutional design options, such as those in the United Kingdom relating to Nationally Significant Infrastructure, the federal government still has a number of choices to make in implementing its impact assessment regime. Of course, the federal government always has the power to make explicit new choices about national energy policy and about the general types of projects that are to be encouraged or facilitated. To the extent the federal government has the will to adopt coherent, explicit and thoughtful policies, and to judiciously use its power to procedurally facilitate federal approvals of projects consistent with those policies, predictability and consistency of federal project reviews could increase over time and completion risk could correspondingly diminish.

For its part, the Supreme Court is in a position to make key choices, in the fairly near future, about various legal matters of direct relevance to energy projects:

- The adequacy of Aboriginal consultation in the Trans-Mountain Expansion case brought by the Tsleil-Waututh appears likely to go to the Supreme Court. To the extent that the consultation process followed by the federal government in that case is approved, that could provide the clearest guidance to date about what is required for sufficient Aboriginal consultation of the deepest and most rigorous kind and for projects of the greatest national significance.

- The extent and scope of jurisdiction over federal works and undertakings could well come before the Supreme Court in the Trans-Mountain Expansion case regarding the application of the Environmental Management Act (BC) to a federal pipeline. The Supreme Court could

take this opportunity to clarify any lingering issues over the scope and content of powers to regulate federal works and undertakings and to help define the application of evolving doctrines of paramountcy, interjurisdictional immunity and co-operative federalism.

- Finally, the Supreme Court has reserved judgment in a number of recent cases raising the issue of the appropriate standard of judicial review. If the Court, over time, embraces and even expands the reasonableness standard and/or prescribes clear guidelines for conducting such a reasonableness review, that could tend to enhance the finality of federal decision-making and reduce completion risk.

Conclusion

It is not just that various forms of legal uncertainty put significant, prospective capital expenditures on energy projects at risk. If projections about the need for deep decarbonization by mid-century are correct, Canada may need to significantly increase – and maybe even double – the electricity it generates over the next 30 years as many significant end uses currently powered by fossil fuels may have to be converted to low-carbon electricity. See: Environment and Climate Change Canada, "Canada's Mid-Century Long-Term Low-Greenhouse Gas Development Strategy", (2016), p.23 – 32.

This would require the development of a much expanded portfolio of low-carbon energy sources, likely including major new hydro facilities, new or at least refurbished nuclear plants and various renewables – many of which may be situated on federal lands or in federal waters or otherwise subject to federal jurisdiction – and which will likely be subject to some form of federal project review process. Accordingly, the need for an efficient and effective federal project review process, with fewer legal uncertainties, will only increase over time. Moreover, the costs of any failure to develop such a process in the future will likely be measured not just in dollars but in the health and well-being of Canadians.