



Federal Energy Project Reviews: Timelines in Practice

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[Jonathan Drance](#), [Glenn Cameron](#), [Rachel V. Hutton](#)

In recent years the timelines to complete Canadian regulatory reviews of proposed major projects – and particularly environmental assessments which are the key part of the project review process – have become a major political issue. Over the last decade or so, project proponents have consistently raised concerns about the lack of speed and the lack of predictability of the results of project review processes – principally at the federal level. Complaints have also been made, and lawsuits have been commenced, by opponents of those projects including environmental groups, First Nations bands, and other interested parties alleging procedural and other flaws in the project review process – again principally at the federal level.

Motivated by many of the same concerns, we participated in a survey of the timelines to review major energy projects – those with estimated CAPEX of \$1 billion or more – for a presentation to the Canadian Energy Law Foundation in 2016. See [Kurtis Reed, Bradley Grant, Cameron Anderson and Jonathan S. Drance: "Timing of Canadian Project Approvals: A Survey of Major Projects." Alberta Law Review, vol. 54, no. 2, 2016, pp.311-350](#) (the "Project Survey").

Also, in response to these concerns and complaints, and given the significant impact of these projects on the economy, the Canadian federal government, in June 2016, directed the Minister of the Environment and Climate Change to "immediately review Canada's environmental assessment processes to regain public trust and help get resources to market".

In February 2018 the federal government introduced Bill C-69 to create the Impact Assessment Agency of Canada (the "Agency") which would replace the existing Canadian Environmental Assessment Agency ("CEAA"). Bill C-69 would also reform and rename the National Energy Board to create the Canadian Energy Regulator and would amend certain provisions of related federal project review legislation.

In its [Consultation Paper on Information Requirements and Time Management Regulations](#) (the "Consultation Paper") released contemporaneously with Bill C-69, the federal government envisages two principal types of project review. In the ordinary course most reviews would be conducted by the Agency with a rough timeline of 510 days. For projects governed under the proposed Canadian Energy Regulator legislation (such as interprovincial or international pipelines and transmission lines) or the *Nuclear Facilities Control Act* (such as nuclear power plants) or which are likely to generate significant controversy and public concern, project reviews would be carried out by specifically appointed panels ("Review Panels") with a rough timeline of 870 days.

These timelines – falling roughly 18 to 30 months after the filing of an Initial Project Description by a proponent – would, if actually implemented and adhered to, be in line with other project review processes currently employed by various Canadian provinces and by similar jurisdictions in other countries.

However, these timelines are ambitious in relation to the actual prior experience and practice of the federal government.

In this piece we look at recent actual experience with federal project review timelines to give some context for assessing the timeline proposals in Bill C-69.

Results from the Project Survey

The Project Survey covered the actual timelines for major energy project reviews at the federal and/or provincial levels 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 itself.

We would note at the outset that our Project Survey necessarily involved a relatively small number of projects; that there are judgement calls about which projects should be included and how to measure both the starting and end points as well as the effective duration, of specific project reviews. The Project Survey provides a set of useful data points to help analyze the timelines for conducting reviews of major energy projects – but at the end of the day it is suggestive and illustrative, not definitive.

Federal Timelines in Practice

The federal projects covered in our Project Survey were as follows:

Project	Project Category	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

Trans-Mountain	Pipeline	43
Pacific NW LNG	LNG	42
Site C	Generation	41
Darlington Refurbishment	Generation	36
Keeyask Hydro	Generation	35
Maritime Link	Transmission	19

Overall, the time for conducting federal project reviews of major energy projects ranged from 19 to 104 months and averaged 56 months.

These federal timelines in practice are much longer than under applicable federal declaratory policy. Over time the federal government has adopted various methods to try to complete project reviews over a roughly 24 to 36 month period. To date, none of the initiatives have been successful in materially improving the timelines of the federal project review process.

The federal timelines for project reviews appear to be materially longer than provincial timelines for reviews of roughly equivalent projects. Provincial project reviews in our Project Survey included pipelines, transmission lines, electrical generation facilities, oil sands plants and LNG terminals – all in excess of the billion-dollar threshold. The provincial project reviews in our Project Survey averaged 26.5 months to complete and virtually all were completed in less than 36 months. Broken down by project category the comparison between federal and provincial timelines was as follows:

Project Category	Average (months)	
	Federal	Provincial
Pipelines	70	21
Oil Sands	74	33
LNG	42	28
Generation	49	22

Independent estimates confirm a reasonable expectation that the time to complete a provincial project review is generally in the range of 18-24 months – and almost certainly is unlikely to take longer than 24 months (+/- 6).

Finally, though sample sizes were small, there is no clear evidence that the various timeline limits adopted either before or after the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") have had any material effect – at least not yet. Several major projects undergoing project review subsequent to the adoption of CEAA 2012 faced material delays beyond the "mandatory" maximum legislated timelines. Project reviews were either late in starting or had the "clock stopped" for various reasons including compliance with new rules, responding to requests for fresh information from federal regulators or dealing with various federal legal or procedural mis-steps.

The data from the Project Survey was at least consistent with the following conclusions:

1. Federal timelines for major energy project reviews have generally been longer than 36 months and many have been substantially longer.
2. The mandatory timelines introduced in the CEAA 2012 have not yet materially reduced federal timelines for major energy project reviews, at least not consistently down to a 24 month (+/-6) range – though the sample size for these types of project reviews is so far extremely limited.
3. Provincial timelines for major energy project reviews appear both materially shorter and more predictable than federal timelines and fall generally within a 24 month (+/-6) range.
4. There is a substantial correlation between the length of the review process and its level of judicialization, in terms of the nature and intensity of hearings and the procedural complexity of the review process.

These general conclusions found support in submissions filed by the proponent community during the recent federal review of its projects review process.

It was palpably and powerfully felt by members of the proponent community that federal project reviews were too long and were uncompetitive, that the legislated timelines in CEAA 2012 were ineffective but that much more strictly enforced timelines could play a useful role; and that various provincial project review processes were generally more efficiently administered.

Prospects for Reform

This is then the background for assessing Bill C-69.

Bill C-69 contemplates a project review process divided into three segments: a planning phase, an assessment phase and a decision phase. In the ordinary course both initial planning and the assessment of a proposed project would be done by the Agency and a final decision would be made by the Minister. For certain designated projects such as interprovincial or international pipelines and transmission lines, for nuclear facilities or other high-profile and controversial projects any assessment would be carried out by a specially appointed Review Panel with the final decision likely taken by Cabinet.

The timelines (in days) for each of these alternative processes is proposed to be as follows:

	Agency	Review Panel
Planning	180	180
Assessment	300	600
Decision	30	90
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	510	870

For several reasons, these time frames could well prove to be more aspirational than real and reliable, particularly for the largest and most controversial projects. First, these timelines ignore some of the actual procedural periods that would apply, for example to govern referrals to a Review Panel. Second, they ignore the timing of the detailed procedural steps that must be taken to move from phase to phase under Bill C-69. More importantly though, each of the timelines in Bill C-69 is accompanied by a Praetorian guard of exceptions which can effectively "stop the clock" and extend the real and effective period for a project review. Any timeline can be extended by the Minister for 90 days and by the Cabinet for virtually any amount of time. Moreover, for projects referred to a Review Panel at the end of the early planning phase, the Minister can, right from the very outset, vary the timeline for the Review Panel to assess and report on the proposed project.

The design of the project review process in Bill C-69 places a great deal of emphasis on the early planning phase as a means to try to establish early consensus and allow meaningful dialogue about projects early enough so that they can be changed to reflect public concerns before too many expensive and irrevocable steps have been taken and commitments made.

As described in the Consultation Paper, proponents would initiate the project review process by filing a bare-bones Initial Project Description. This would be used by the Agency as the basis for consulting with affected stakeholders, particularly Indigenous peoples. Following a process of initial consultation, analysis by the Agency and feedback to the proponent, a more detailed Project Description would be filed with the Agency to allow a determination to be made about whether a formal project review is required and, if so, whether by the Agency or a Review Panel.

This may be a realistic time frame for smaller or even mid-size projects, but for larger and more controversial energy projects with CAPEX likely in the \$5-\$10 billion range and up, this seems like a very ambitious (likely unachievable) schedule.

Moreover, for the largest and most controversial projects the whole notion that this will materially improve dialogue and understanding could well be more wishful thinking than realistic.

Indeed, particularly for large and environmentally impactful energy projects, the real dynamics affecting the project have to be looked at in a broader context than just the formal project review process. The internal planning process for a major energy project can easily take 18 to 36 months. Before any meaningful Project Description is filed, a further 18 to 36 months can be required for analytical work, preliminary engineering and design and environmental field studies just to be in a position to file a proper Project Description. By the time any material initial filing is made, the proponents may have spent up to 5 years or more in investigating and analyzing the project. Expenditures for projects of this scale and significance can be material before any single document is filed to trigger any form of project review. At

the point of filing of even an Initial Project Description as anticipated in the Consultation Paper, much planning by the proponent will already have occurred – modifications can be expensive to make and can challenge assumptions that may already be deeply embedded in the proponent's analysis. The essential point is that what the Consultation Paper assumes is an early planning stage may in fact be early only for regulatory purposes – not in reality.

Proponents are also likely to take only cold comfort from the "legislative timelines" in Bill C-69. Legislative timelines were embedded in CEAA 2012 but in a number of controversial and high profile energy projects they have not been a meaningful constraint on an unduly prolonged federal project review process.

The Consultation Paper invites comments on a code of conduct to govern when the federal time clock can be stopped – a major concern of project proponents. There will be a natural limit however to the impact that even an enhanced code of conduct can have on starting or stopping the clock for purposes of effectively controlling timelines. Virtually all jurisdictions which have accepted timelines or limits on project reviews permit stoppages where supplemental information is required by regulators or where new laws or regulations require fresh or enhanced disclosure or analysis. At the end of the day, regulatory and political attitudes and the application of a common sense "rule of reason" in the conduct and administration of the project review process is just as important as, and maybe even more important than, any formal timeline rules.

The proposals in Bill C-69 and the prospects for realistic reform in the timing of federal project reviews need to be considered in light of history.

There have been 25 years of virtually continuous complaints from the proponent community about the speed of federal project reviews. There have been more than a decade's worth of federal directives, policies, service standards and even legislated timelines, all attempting – so far, unsuccessfully – to speed the federal project review process along.

At some point, one cannot sensibly either continue to blame, or attach too much hope to, any specific timeline legislation or regulation. It may just be that the political realities and incentives facing the federal government are insufficient to make it a priority to push project reviews to completion in a timely fashion. If so, formal rules will continue to be insufficient and ineffective to induce greater federal efficiency in project reviews. We may well have reached the point where major project proponents will have to lobby for, or campaign to bring about, a political change at the federal level that is more conducive and receptive to timely project approvals and promoting economic growth. Either that, or just choose to invest in other, more pro-growth, jurisdictions.

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