



Timelines, Completion Risk and Federal Project Reviews

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How significant are the delays in obtaining federal approvals for proposed energy projects in Canada? And what are the completion risks that result from these delays?

- Traditionally the declaratory policy of the Canadian federal government, key provinces and peer jurisdictions has been to complete project reviews in 24 to 30 months (+/-6) – or roughly between 18 to 36 months.
- In practice the Canadian federal government has tended to complete reviews within this time frame only for – or principally for - smaller, more routine and/or relatively uncontroversial energy projects.
- Larger and more controversial projects have tended to take longer: some of the most strategically significant federal project reviews have taken 60 months (or 5 years) more or less and several key project reviews have taken the better part of a decade to complete.
- By contrast, other jurisdictions both within Canada and outside it have been able to design project review processes that more frequently meet usual and customary timelines and their own declaratory policies.

Background

There are widespread concerns about how long it takes for Canadian federal regulators to review applications for approvals of proposed major energy projects. These concerns have been expressed by:

- industry participants^[1],
- public policy institutes and foundations in studies or position papers prepared by or for them^[2],
- governmental commissions^[3] and
- organizations representing the Canadian business community generally^[4].

While there may be differences in emphasis, analysis and assessments of causation, these various studies all tend to the position that the relatively lengthy duration of federal project reviews, if not changed, has been and will be a risk factor for new investment in future Canadian energy projects.

Standard Timelines

In preparing to analyze timelines for project approvals, it is worth identifying what is usual and/or standard in conducting project reviews in Canada and in peer jurisdictions, such as the United States, the United Kingdom and Australia.

There would be little reasonable grounds for criticism or concern if the time to complete federal reviews was consistent with legislative objectives and consistent with the time that it takes for these reviews in comparable jurisdictions.

Some key indicators of usual and standard project review timelines in Canada include:

- various federal governments have, traditionally, adopted declaratory policies, whether in budget or policy announcements, applicable regulations or service standards and in legislative provisions (such as in the *Canadian Environmental Assessment Act*, 2012) of between 24 to 30 months, for completing project reviews^[5];
- the timeline for the pure regulatory portion of the new Impact Assessment system proposed by the federal government in Bill C-69 , at least for the largest and most controversial projects, ranges up to 870 days – or just under 30 months^[6];
- in practice, across a wide variety of energy projects, there is considerable evidence that the median period for a federal project review lies between 24 to 36 months (or roughly 2 to 3 years) – though the more significant and controversial reviews can take much longer; many over 42 months (3.5 years, a number over 60 months (or 5 years) and in some cases up to a decade or more^[7];
- at the provincial level, and in particular in BC and Alberta in recent years, timelines for reviewing major energy projects have generally fallen within a range of 18 to 36 months^[8].

In the United States:

- the US federal government has adopted a declaratory policy aimed at completing all types of infrastructure project reviews (including for energy projects) within an average of 24 months^[9];
- the Federal Energy Regulatory Commission (FERC), one of the principal energy regulators in the US, has a record of completing project reviews for gas pipelines and related facilities, for LNG terminals and for certain power plants under its jurisdiction within a 24 to 36 month window^[10];
- the Department of Energy has a historical record of conducting reviews of private sector energy projects in just under 24 months^[11]

As for Australia and Britain:

- Australian reviews of proposed oil and gas facilities, LNG terminals and pipelines generally take between 24 to 36 months^[12];
- in Britain, the period generally required for the formal governmental review of nationally significant infrastructure projects (including energy projects) is less than 24 months; even adding any usual pre-filing consultation process conducted by the project proponent boosts the median timeline for these major project reviews in Britain only to 33 months or just under 3 years^[13].

Inevitably, under every project review process and in every jurisdiction there are some projects that take longer to review than the usual timelines. The principal issue for determining whether these delayed or extended reviews have any measurable adverse impact on the overall investment climate is the degree and significance of these delays. There is reasonable evidence that these delays in provincial jurisdictions within Canada, or in peer jurisdictions outside it, are relatively less common and that they less frequently affect domestic energy projects of national significance.

Our Project Survey

Some years ago, various colleagues in the Calgary and Vancouver offices of Stikeman Elliott initiated a survey (the “Project Survey”) of the time that it takes for various Canadian regulators to review major energy projects^[14].

For the Project Survey^[15] we canvassed over 50 project review processes at both the federal and provincial levels. We selected over 30 for detailed analysis – of which 14 were project reviews principally undertaken or controlled by federal regulators^[16].

The Project Survey covered the actual time that it took to complete regulatory reviews of energy projects with values in excess of \$1 billion. The Project Survey measured the time between the initial material filing for approval of a project – usually a project description or equivalent – and the issuance of a final decision regarding that project – usually an environment assessment certification or equivalent.

The Project Survey involved a relatively small number of projects and we inevitably had to make some judgement calls about how to measure both the starting and end points, as well as the effective duration of, specific project reviews. While the Project Survey provided a set of useful data points to help analyze the timelines for conducting reviews of major projects, it was suggestive and illustrative, not definitive.

We found that the timelines for the conduct of federal project reviews, at least for the major energy projects in the Project Survey, was markedly longer than the time required to conduct provincial reviews of substantially equivalent projects. The lengthiest 10 project reviews in the Project Survey were all federal reviews or at least conducted under federal rules. Virtually all of the federal reviews in the Project Survey took longer than 36 months while virtually none of the provincial reviews did. Overall the time required to conduct these federal project reviews averaged 56 months while provincial reviews generally took 26.5 months.

The timelines for the federal project reviews included in our Project Survey, broken down by project category, were as follows:

Project Category	Number	Timeline (months)	
		Range	Average
Pipelines	4	43-104	70
Oil Sands	2	70-77	74
LNG	1	42	42
Generation	5	35-68	49
Transmission	2	19-57	38

For individual projects included in the Project Survey, the timelines ranged widely – from 19 to 104 months. Virtually all of the federal project reviews (11 of 14) took longer than 18 to 36 months. Many reviews were significantly longer – for instance 10 of these project reviews took 42 months or more (3.5 years), 6 of them took more than 60 months (5 years) and a few key project reviews took the better part of a decade to complete^[17].

Other Studies

Several other studies of federal project timelines have recently been published.

In November 2018, Canada West published **What Now?: The Fate of Projects**, a Policy Brief authored by Marla Orenstein, which analyzed all of the projects listed on the Canadian Environmental Assessment Registry as of October 1, 2018. The analysis focused on 86 projects, including but not limited to energy projects, where there was a decision by the Canadian Environmental Assessment Agency or where the assessment was terminated by the proponent prior to completion of the review.

The principal findings in the Orenstein study^[18] were:

- the vast majority of projects that completed the federal project review process (57 of 60, or 95%) were approved; and
- on average it took 41 months (roughly 3.5 years) for a project to receive approval (or for the proponent to withdraw or otherwise terminate the project review) and the range of timelines was large (up to 124 months or 10.3 years at the high end).

In the words of the Orenstein study: “moving through the federal project review process takes time – a LOT of time”. Moreover, Orenstein notes that the pattern of project reviews may be changing, with adverse outcomes occurring more frequently in recent years. Since 2015, almost 40% of concluded project reviews (roughly 20 of 50) appear to have been terminated by the proponent or rejected by federal regulators. Significantly, one critical project (Northern Gateway) was approved and then had its approval withdrawn while another (Trans Mountain Expansion) had its initial approval vacated on judicial review and has just been re-considered.

In February 2019, the C.D. Howe Institute published **A Crisis of Our Own Making: Prospects for Major Natural Resource Projects in Canada**, by Grant Bishop and Grant Sprague. The Bishop and Sprague study, among other things, reviewed in considerable detail the timelines for approximately 20 energy projects (together with a lesser number of mining projects), each with a minimum value of \$500 million.

On the issue of the duration of federal reviews of major natural resource projects, the principal conclusions of Bishop and Sprague^[19] were as follows:

- most federal reviews of the particular natural resource projects they studied were completed within 3 years; and the median length of time was 2.6 years;
- however many larger, and more strategically important, natural resource projects faced much longer review periods – the longest was in excess of 10 years and several of those project reviews took the better part of a decade to complete; and
- Canadian timelines for reviews of natural resource projects have generally exceeded those of comparable jurisdictions – specifically the United States and Australia – and, generally speaking, the duration of the longest Canadian federal project reviews has tended to exceed the longest time it took to review these kinds of projects in other jurisdictions.

The timelines for federal project reviews for the specific projects in our Project Survey were generally consistent with the findings in the Orenstein and the Bishop and Sprague studies. However, each of the Orenstein and Bishop and Sprague studies was completed 2 or 3 years after our Project Survey – which has prompted us to update our key results to reflect events subsequent to the Project Survey.

Project Review Timelines – An Update

Dealing with timelines for completion of federal project reviews, our Project Survey identified certain strategic energy projects that had particularly long review times – at a minimum, in excess of 42 months (3.5 years). The table below shows the timelines for these project reviews, updated with information available from the various studies and sources cited in this post.

Project Survey

<u>Project</u>	Extended Timelines	
	Original (<u>June</u> <u>2016</u>)	Updates (<u>March</u> <u>2019</u>)
Northern Gateway	107	128
Mackenzie Gas	77	88
Jackpine Expansion	77	-
Joslyn North Mine	70	-
Darlington New Nuclear	68	-
Muskrat Falls	64	-
Labrador-Island Link	57	-
Energy East	54 (E)	35
Trans Mountain Expansion	43 (E)	72 (E)
Pacific NW LNG	42 (E)	43

These updates included the impact of:

- various judicial interventions and any resulting regulatory deferrals or terminations occurring subsequent to the Project Survey (in the case of Northern Gateway and the Trans Mountain Expansion),
- fresh and more detailed information made available subsequent to the Project Survey about the commencement date of the project approval process (in the case of Mackenzie Gas),
- the withdrawal, after the Project Survey, of any applications for project approval (in the case of Energy East) and
- the final resolution of project reviews after our Project Survey (in the case of Pacific NW LNG).

The timelines for these selected project reviews are unusually lengthy by any standard. For the most part they easily exceed the usual period for project reviews in the normal course both by Canadian federal and provincial authorities. Moreover, the timelines for these project reviews generally exceed comparable periods for reviews of similar projects in other jurisdictions^[20].

It is not just that extended project reviews are more costly and inconvenient for project proponents. Time itself can be a material risk factor for completing projects. The longer the time between project conception and completion, the greater the likelihood that there could be adverse changes to:

- project costs and/or revenues
- regulatory requirements (including concerns over carbon and climate)
- relevant government policies (or even governments themselves).

Each of these changes can materially affect the prospects for a particular project and increase the risk that it will not be completed.

For example, by the time that some of the projects in our Project Survey (such as Northern Gateway, Trans Mountain Expansion and Energy East) were in a position to receive final regulatory approvals, changes in economic conditions, regulatory policies and/or political support resulted in the termination, abandonment or withdrawal of applications for approval or in a fundamental restructuring of applications for approvals. By the time several other key projects (such as Mackenzie Gas and Darlington New Nuclear) were approved, the dynamics of relevant North American energy markets had significantly

changed – resulting in those projects being deferred indefinitely and/or effectively becoming inactive prior to commencing construction.

It is not so much that the federal regulatory process directly caused any of these adverse developments. Rather, extended regulatory processes – including the time required to do the engineering and environmental field study work prior to regulatory filings, and to satisfy conditions after receipt of formal regulatory approvals –inevitably contribute to the risk that material changes could occur that could adversely affect the fortunes of a project during the course of project development.

Conclusion

Many federal project reviews of strategically important energy infrastructure have taken longer to complete than usual and standard practice in Canada. There is also evidence that the timelines for the longest federal reviews are also longer than would be expected for similar projects in peer jurisdictions outside Canada.

Moreover, there is at least some degree of correlation between particularly extended project reviews and completion risk. A significant number of the projects subjected to particularly prolonged federal review processes have been cancelled or terminated during the regulatory process or prior to construction.

At the very least there is a plausible factual basis for concerns over the timeliness and competitiveness of the Canadian federal review process, particularly as it applies to major and controversial energy projects.

[1] Canadian Association of Petroleum Producers, "Submission to the Expert Panel Review of the Canadian Environmental Assessment Process", December 2016; Canadian Energy Pipeline Association, "Submission to the National Energy Board Modernization Expert Panel", March 2017; Enbridge, "Submission to the Expert Panel Review of Environmental Assessment Processes", December 2016; Business Council of British Columbia, "Submission to the Expert Panel Review of Canadian Environmental Assessment Act and Process", December 2016.

[2] Includes references to Joseph Doucet, "Unclogging the Pipes: Pipeline Reviews and Energy Policy", C.D. Howe Institute, Commentary No. 342, February 2012; Benjamin Dachis, "Death by a Thousand Cuts? Western Canada's Oil and Natural Gas Policy Competitiveness Scorecard" C.D. Howe Institute, Commentary No. 501, February 2018; IHS Markit "Pipelines, Prices and Promises: The Story of Western Canadian Market Access", April 2017; Martha Hall Findlay, et al. "Unstuck: Reforming Canada's Regulatory Process for Energy Projects", *Canada West Foundation*, May 2018.

[3] Advisory Council on Economic Growth, "Investing in a Resilient Canadian Economy", December 2017

[4] The Canadian Chamber of Commerce, "Death by 130,000 Cuts: Improving Canada's Regulatory Competitiveness", May 2018.

[5] Jonathan Drance, Glenn Cameron and Rachel Hutton; "Federal Energy Project Reviews: Timelines in Practice", *Energy Regulation Quarterly*, Volume 6, Issue 3, 2018, p. 25.

[6] Government of Canada; "The Proposed Impact Assessment System – A Technical Guide", August 14, 2018. at p. 4.

[7] Kurtis Reed, Bradley Grant, Cameron Anderson and Jonathan Drance, "Timing of Canadian Project Approvals: A Survey of Major Projects", *Alberta Law Review*, (2016) 54:2 pp. 311-350; Marla Orenstein, "What Now?: The Fate of Projects", *Canada West Foundation Policy Brief*, November 2018, at p. 1; Grant

Bishop and Grant Sprague, "A Crisis of Our Own Making: Prospects for Major Natural Resource Projects in Canada", C.D. Howe Institute, Commentary No. 534, February 2019 at p. 24-25.

[8] See Drance, Cameron and Hutton, *supra* note 5, p. 26.

[9] Executive Order 13-1807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"; Federal Register Vol. 82 No. 163, August 24, 2017. See particularly section 4(a)(i)(B).

[10] Paul Parfomak, "Interstate National Gas Pipelines: Process and Timing of FERC Permit Application Review", January 16, 2015, Congressional Research Service, 7-5700, R43137 at pages 8 and 10. See also Bishop and Sprague, *supra* note 7, at p. 30, figure 18.

[11] United States Department of Energy; "Measuring DoE's EIS Process", Lessons Learned, September 2017, Issue No. 92 at 6.

[12] Bishop and Sprague, *supra* note 7, at p. 30, figure 18.

[13] Nathaniel Lichfield and Partners, "Development Control Orders: Friend or Foe?", November 2015, p. 6-10.

[14] See Reed et al, *supra* note 7.

[15] See Reed et al, *supra* note 7, at p. 321-326.

[16] Drance, Cameron and Hutton, *supra* note 5, at p. 24.

[17] Drance, Cameron and Hutton; *supra* note 5, at p. 24.

[18] Orenstein, *supra* note 7, at p. 1 and 4.

[19] Bishop and Sprague, *supra* note 7, at p. 24-25 and p. 30.

[20] Drance, Cameron and Hutton, *supra* note 5, at p. 24 and p. 26-27. See also Bishop and Sprague, *supra* note 7, at p. 30.

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