

Highlights from the National Energy Board modernization report

May 23, 2017

On May 15, 2017, the Expert Panel on the Modernization of the National Energy Board (NEB) delivered its report, *Forward, Together: Enabling Canada's Clean, Safe, and Secure Energy Future* (Report). The Panel was appointed in the fall of 2016 by Canada's Minister of Natural Resources to meet one of the priorities identified in the mandate letter issued to the Minister by the Prime Minister. The Panel was tasked with reviewing the structure, role and mandate of the NEB. This Report comes following a separate report by another expert panel as part of a review of the Canadian environmental assessment process.

New licencing and information gathering bodies

The NEB's current core functions include lifecycle regulation of interprovincial and international oil and gas pipelines, international power lines, and designated interprovincial power lines. The NEB is also responsible for publishing information on Canada's energy markets.

The Panel recommends separating these functions by creating two new entities: the Canadian Energy Transmission Commission (CETC) and the Canadian Energy Information Agency (CEIA) to preserve the perceived credibility of the information and to ensure that the new agency can "tell it like it is" on energy matters. The Panel recommends that the CEIA be located close to Statistics Canada, Natural Resources, and Environment and Climate Change Canada, in Ottawa.

The Panel recommends that the CETC inherit the NEB's role as an independent, quasi-judicial body with authority to approve or deny projects based on technical criteria and environmental assessments. The proposed CETC would conduct its review of "major projects" and "significant projects" within its jurisdiction jointly with the Canadian Environmental Assessment Agency (CEA Agency). The proposed review process is examined in greater detail below. Like the NEB, the CETC would be responsible for energy imports and exports, as well as compliance verification, enforcement action and emergency response oversight.

The Panel also makes a number of recommendations related to the governance of the CETC and the appointment of hearing commissioners. The Report highlights that a number of parties expressed concern with the National Energy Board Act, RSC 1985, c N-7 (NEB Act) requirement that the NEB head office be located in Calgary, and that any NEB member reside in or within a reasonable commuting distant of Calgary. Participants suggested these requirements raised concerns about the NEB's independence. The Panel resisted suggestions to relocate the **entire** organization of the CETC to Ottawa. However, the Panel did recommend that the CETC board of directors, as well as staff and resources related to electricity transmission, be based in Ottawa. The Panel also recommends removing the residency requirement for hearing commissions in favour of a "transparent competency model".

Changes to the project review process

Arguably the most significant recommendations in the Report relate to the proposed changes to the process for reviewing new project applications. According to the Panel, the nature of the review should depend to some extent on the nature of the proposed project. The Report identifies three different categories of projects for determining the appropriate review process, with no discussion of the distinction between each category of project:

1. **"Major projects" or "projects of national consequence" would need to complete a two-stage review process.** First, a proposed major project would need to receive a "national interest" determination from the Governor in Council (GIC), commonly known as the Federal Cabinet. Following that decision, the proposed major project would need to be licenced following a technical review and environmental assessment conducted jointly by the CETC and the CEA Agency.

In the first stage of the review, the GIC would decide whether the proposed project was in the "national interest". At a high level, the Panel suggests that a single office (such as the existing Major Projects Management Office) would coordinate a "strategic level" review of the proposed project (i.e. not focused on reviewing detailed design or environmental impacts) by all relevant government departments. The Major Projects Management Office (or other coordinating body) would also carry out consultation with potentially affected Indigenous groups during this review. Following that review process, the Minister of Natural Resources would make a recommendation to the GIC on whether the project aligns with the national interest. The Panel envisions that the time from initial filing to recommendation from the Minister would be about nine months.

The GIC would make the ultimate determination on whether the proposed project aligns with the national interest after weighing a number of criteria such as net economic benefits, the acceptability of the proposed route, alignment with national policies, among others. The Panel envisions that the GIC would typically need three months from the time it receives the Minister's recommendation to make a decision.

The Panel explains that a "yes" to a proposed project from the GIC at the first stage means, "yes, subject to further regulatory approval after a detailed project review"; and "no" means "NO".

Assuming a proposed project receives a positive "national interest" determination from the GIC, the project would then proceed to the second stage: a detailed regulatory review and environmental assessment to be carried out by a joint panel of hearing commissioners appointed by the CETC (2), CEA Agency (2), and a fifth "independent" hearing commissioner. It is unclear how the "independent" hearing commissioner would be appointed. The joint panel would conduct widespread engagement and would be informed by Indigenous consultation carried out by the Crown's representative (suggested to be the Major Projects Management Office). The joint panel would address issues including detailed environmental risks and mitigation measures, emergency preparedness plans, Aboriginal and treaty rights, and engineering details. The joint panel would not consider national interest or policy arguments already addressed in the preliminary GIC decision. The joint panel would have the ability to issue or deny a licence, and to impose conditions on a licence. The Panel expects this second stage of the review to take two years to complete.

2. **"Significant projects" would only be subject to a single review.** The Report does not address the demarcation point between a "major project" and a "significant project", presumably leaving that distinction to Parliament or to the GIC. From a review process standpoint, the critical difference between "major projects" and "significant projects" is that the latter would not need a preliminary GIC "national interest" determination. Significant projects would only need to go through the licencing process, including detailed regulatory review and environmental

assessment carried out by a joint panel comprised of hearing commissioners, as described above.

3. **"Smaller-scale" or "lower risk" projects would be reviewed only by the CETC as part of the licencing process.** Once again, the line between a "smaller-scale" project and a "significant project" is not addressed in the Report. In any case, smaller-scale projects would not require a preliminary "national interest" determination by the GIC. They would still need to be licenced by the CETC, and following a review and environmental assessment, commensurate with the risks and impacts of the project. These smaller scale projects would be reviewed by the CETC and not a full joint hearing panel. The Panel recommends repealing section 58(1) of the NEB Act which gave the NEB discretion to exempt shorter pipelines (less than 40 km long) from the certification and GIC approval requirements that apply to longer pipelines. The recommended process for "smaller-scale" projects would be the successor to the section 58(1) process.

Improving Indigenous consultation

The Report includes a number of recommendations to improve relationships with Indigenous peoples, including a recommendation that the government establish and fund a new Indigenous Major Projects Office (IMPO) under the governance of Indigenous peoples. The IMPO would define processes, guidelines and accountabilities for formal consultation. It would also oversee the conduct of consultation and accommodation by the Crown, and be responsible for "assessing compliance" with consultation guidelines.

The Panel states that Crown delegates responsible for consultation with Indigenous groups "must" represent the government and that project proponents should not be delegated responsibilities for formal consultation. The Panel also states that, "the CETC, as the regulator, should not be the agent for the Crown for the purposes of Consultation, and that the Major Projects Management Office is positioned to perform the role."

Improving public engagement

The NEB Act requires the NEB to consider representations from any person considered to be "directly affected" by an application or who has relevant information or expertise. The Panel recommends repealing those standing criteria and allowing every interested party a "reasonable opportunity to participate". The Panel dismissed concerns that well-organized groups might organize thousands of individuals to flood hearings and disrupt processes.

In the spirit of facilitating public participation in CETC hearing processes, the Panel recommends creating a Public Intervenor Office to inform participants on the mechanics of the hearing process, directly represent their interests, and coordinate scientific and technical studies.

Unanswered questions

Divergence from the Canadian environmental assessment expert panel report

The Panel recommends that the GIC make a preliminary national interest determination on a proposed project at the beginning of the review process, before detailed design, regulatory review, and environmental assessments are completed. By contrast, the expert panel reviewing the environmental assessment process recommends that the GIC be involved only at the end of the process to hear any appeals from the environmental assessment authority's decision.

The Panel also recommends a single detailed regulatory review process for "major projects" and "significant projects"

that integrates the CEA Agency-led environmental assessment with the CETC-led technical review, rather than parallel review processes. The expert panel reviewing the environmental assessment process recommends the opposite approach: that responsibility for environmental assessments (or "impact assessments") be separated from the technical review.

In considering the recommendations in both reports, the government will need to consider how to reconcile these different approaches to conducting project-level environmental assessments.

When is a "national interest" determination required?

As noted above, the Panel recommends that "major projects" or "projects of national consequence" be subject to a preliminary national interest determination by the GIC, while "significant projects" and "smaller-scale" or "lower risk" projects will not require such a preliminary determination. That recommendation, if adopted, would be a significant departure from the existing process where broader policy concerns are frequently raised in NEB proceedings and ultimately considered by the GIC at the end of the process.

At this stage, it is not clear what will trigger the need for a preliminary national interest determination or how such a determination will be made when triggered. Proponents will want to know with some certainty which projects will require the two-stage review process.

What level of information is required for a "national interest" determination?

One of the potential benefits of performing the national interest determination early in the regulatory process is efficiency and cost savings to project proponents. The Panel envisioned that the national interest determination would be performed "before the specific technical details of any project are even developed". However, the Panel suggests criteria such as net economic benefits, impact on and accommodation of Indigenous rights, significant or unique environmental effects, cumulative effects, and climate tests will be considered by the GIC in its national interest determination. Evaluating these criteria and conducting meaningful nation-to-nation consultation with Indigenous groups will require a certain level of information about the project and its potential impacts. It's not clear yet what level of detail might be required to make those determinations or how this information will be provided.

Transition

Presumably a large liquids pipeline, such as the proposed Energy East Project, would be considered a "major project" or a "project of national consequence". There may be benefits to this type of project proceeding through the new process where the GIC decision is made early in the process as opposed to the end of the process. This may prevent significant resources being devoted to project review processes by Indigenous groups, the Canadian public, and proponents where, regardless of the merits of the project, the end result may be a political "No". The Report does not address the process for transitioning from the current regime to the proposed new regime and it is unclear how long it may take before the government decides how to implement the Panel's recommendations.

Next steps

The Government of Canada is accepting comments on the report until June 14, 2017. The Government of Canada will review the Report over the coming months along with reports from other recently-completed environmental and regulatory reviews, and consider potential legislative reform. According to its website, the Government of Canada will also work with Indigenous groups to ensure their feedback informs any potential legislative reform.

Dentons' Energy Regulatory group will continue to monitor developments relating to both the NEB and the environmental assessment reviews and will provide further updates in due course.

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