Legal Backgrounder

The National Energy Board Act (1985)

Overview

The *National Energy Board Act* (NEB Act) is the governing legislation for the National Energy Board (NEB or Board). The NEB is an independent federal agency established in 1959 by Parliament to regulate international and interprovincial aspects of the oil, gas and electric utility industries. The NEB is accountable to Parliament through the Minister of Natural Resources Canada.

In addition to its responsibilities under the NEB Act, the Board also has responsibilities under the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, the *Canadian Environmental Assessment Act,* SC 1992, c 37 (CEA Act), the *Northern Pipeline Act*, RSC 1985, c N-26 and certain provisions of the *Canada Petroleum Resources Act*, RSC 1985, c C-36 (2nd Supp). As a result of the *Canada Transportation Act*, SC 1996, c C-10, which came into effect on 1 July 1996, the Board's jurisdiction has been broadened to also include pipelines that transport commodities other than oil or natural gas.

The Act establishes a comprehensive regulatory process to ensure that certain energy projects in Canada are only developed when such development is in the public interest. The Act establishes the National Energy Board, which regulates:

- the construction and operation of interprovincial and international pipelines;
- the construction and operation of designated interprovincial and international power lines;
- pipeline traffic, tolls and tariffs;
- the export and import of natural gas;
- the export of oil and electricity; and
- frontier oil and gas activities.

For example, the NEB regulates over 45,000 kilometres of pipelines in Canada.[1] The Board also has advisory responsibilities that include:

- providing advice to the Minister of Natural Resources in areas where the Board has expertise;
- monitoring energy markets and issuing public reports on energy issues;
- carrying out studies and preparing reports when requested by the Minister; and
- monitoring current and future supplies of Canada's major energy commodities.

[1] http://www.neb-one.gc.ca/clf-nsi/rpblctn/spchsndprsnttn/2005/nbxprnc/nbxprnc-eng.html

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The Board's vision is “to protect and enable in the Canadian public interest.” It considers itself as enabling the development of responsible energy infrastructure and protecting individual rights, environmental integrity, public safety and shipper rights.[2]

How does the law work?

The Board deals with approximately 750 applications annually. All major applications are adjudicated through public hearings, where applicants and interested parties can participate. For example, currently there are about seven applications that are the subject of an NEB hearing. Examples include pipeline projects or expansions, toll and tariff applications for certain facilities, or export licences for liquefied natural gas.

NEB hearings are quasi-judicial, meaning generally that the Board operates as a court of record, very similar to a civil court. There are nine Board members who are appointed by Cabinet for a term of seven years. The powers of the Board include the swearing in and examination of witnesses and the taking of evidence. Hearings can be either written or oral proceedings and are usually held at locations across Canada where there is a particular interest in the application and which will be most affected by the Board's decision. Before a hearing, individuals, interest groups, companies and other organizations are given an opportunity to register as interveners or interested parties and in this way actively participate in the process. Normally, a panel consisting of three Board Members is assigned to hear applications. At the end of the process, the Board will make a decision in the same manner as a court.

For major applications, such as the Enbridge Northern Gateway Pipeline Project, the Board must issue a “certificate of public convenience and necessity.” This means that after reviewing an application and holding a hearing, the Board must be satisfied that the proposed project is economically necessary and that markets exist for the product. The Board must also be satisfied that that the project will operate in the public interest. In determining the public interest, the Board generally applies a test that involves balancing the burdens and the benefits of the proposed project.

Under the existing section 52 of the NEB Act, the NEB’s approval of a project is subject to federal Cabinet approval. If the NEB does not approve a project that is generally the end of the matter as there is no favourable decision for Cabinet to approve or reject. Bill C-38 will do away with this approval process (see below). Further, pursuant to sections 2 and 115 of the NEB Act, the Government could still pass a “Special Act” approving any project and overriding the provisions of parts of the NEB Act, thereby avoiding some provisions and possibly overruling the NEB.

The current NEB regulatory review process allows the public to provide feedback on a project application in a number of ways. First, the NEB requires an applicant to demonstrate in its application that they engaged and consulted with people, including First Nations, most likely to be impacted by its project. The public can now get involved in the hearing process in one of three ways: by submitting a letter of comment; by making an oral statement; or becoming an intervener. These options are helpful as they

[2] http://www.neb-one.gc.ca/clf-nsi/rpblctn/spchsndprsnttn/2005/nbxprnc/nbxprnc-eng.html

allow for tailored levels of public involvement. Bill C-38 will narrow these options significantly (see below).

In addition to major project proposals, the NEB conducts hearings on different company proposals, such as detailed route hearings for pipelines or to ensure that energy production and shipping is conducted fairly between companies. The NEB also grants authorizations such as annual export licences for oil and gas shipments.

Why is this law important?
The NEB is the forum by which major energy projects are evaluated in Canada. Major energy projects, such as the Enbridge Northern Gateway Project, are of increasing concern nationally. Through its regulatory hearings, the NEB has provided an important venue to address public concerns, share information, and help companies secure a social licence to operate.

The previous system prior to Bill C-38 was important because:

1. **In some cases, a project triggered both NEBA and *Canadian Environmental Assessment Act* (CEAA) requirements.**
   Provisions in the two laws had mechanisms to ensure that they operate efficiently and are not duplicative. Indeed, it is arguable that the NEB process creates efficiencies because it is a standing tribunal with expertise, with a well-established infrastructure. As a responsible authority under CEAA, the NEB conducted about 20-30 screening-level environmental assessments per year, and has conducted several higher-level assessments, including comprehensive studies, joint review panels and a substituted review panel. CEAA also allowed for "substitution" meaning regulatory tribunals such as the NEB can deliver certain federal environmental assessment requirements through their public hearing process. However, Bill C-38 will fundamentally change this system.

2. **Whereas a CEAA review made a determination about whether a project will have "significant adverse environmental effects" (and whether they are justified in the circumstances), the NEB review ultimately determines whether major projects are in the public interest.**
   It is noteworthy that the approach used by the NEB is broader than just environmental effects, and can incorporate a broader set of issues that Canadians face in terms of energy development. In making determinations about the public interest, the NEB seeks to balance the "burdens" and the "benefits" of proposed projects. This analytical approach affords an opportunity for the Board to hear evidence about the many and diverse implications of energy projects. We do not know whether the Board will continue to be guided by this approach, and it may well be more difficult to do so given the new requirements for persons to be directly affected in order to participate.

3. **Amendments to the existing *Canadian Environmental Assessment Act* in July 2010 made the National Energy Board and the Canadian**

Nuclear Safety Commission (CNSC) solely responsible for conducting comprehensive studies of proposed projects within their jurisdiction.
Previously such studies were the joint responsibility of the Canadian Environmental Assessment Agency and the responsible authority. While these amendments may be viewed as an appropriate streamlining of the review process, there is concern about whether the NEB and the CNSC processes are equivalent to the CEAA processes and whether these agencies have the necessary resources and environmental expertise to conduct these studies. Such issues are even more of a concern given the introduction of Bill C-38 (see below).

The NEB Act in action

One example of the NEB in action is that in 2004, the Board rejected an application by Sumas Energy 2 Inc. to construct an international power line near Abbotsford, British Columbia, on the basis that the power line would not be in Canadians' interests. The Board determined that the burdens would outweigh the benefits, particularly the air quality impacts on local communities.

Another example is the recently completed Arctic Offshore Drilling Review, which the NEB initiated as a result of the BP Deepwater Horizon oil spill in 2010. After two rounds of written submissions, many community meetings and five days of roundtable meetings in Inuvik, the NEB made recommendations that indicate it is making every effort as a regulator to reduce the risks associated with Arctic offshore drilling. In particular, the NEB said that "any company planning to drill in the Canadian Arctic offshore must demonstrate to us that they can drill safely while protecting the environment. If the company can't do this, they can't drill." This review process was particularly important as it is an example of the NEB taking steps to proactively understand, consult and explain to Canadians how it intends to approach a complex northern development issue.

What changes are being proposed to the law?

The federal government's 2012 Budget made clear that reducing environmental protections afforded by project review processes will be done. The proposed changes announced in the 2012 Budget are found in Bill C-38, a 431 page omnibus bill that amends virtually all major environmental laws in Canada, particularly those that helped regulate resource development. The repeal and replacement of the Canadian Environmental Assessment Act is described in a separate backgrounder. Changes to the NEBA include:

1. **The NEB is stripped of its decision-making power for major projects.**
   The NEB will no longer have decision making powers regarding Certificates of Public Convenience and Necessity under section 52 of the Act. The changes will strip the Board of its power, leaving the final decision to approve or reject a project in the hands of Cabinet. The problem with this is that politicians lack the objectivity and the expertise to gather, synthesize and analyse the vast amount of data that must be considered when examining the merits and weaknesses of major energy projects. Shifting the decision for major energy projects from the

Board to to Cabinet will politicize what was an otherwise independent regulatory process.

2. **Participation at NEB hearings will be significantly narrowed.**
   The Board's mandate to regulate in the public interest has generally meant that public participation is welcome. The changes will narrow opportunities for people to engage by stipulating that "any person who, in the Board's opinion, is directly affected" shall be heard by the NEB. Thus, anyone who wants to make a submission regarding an application, must first establish, to the satisfaction of the NEB, that he or she will be affected by the proposal before they can be heard. The Board may also hear representations from persons who have information or expertise, but this is not required.

3. **The factors in granting approvals are also narrowed.**
   The scope of factors considered by the NEB in making its recommendation on a Certificate of Public Convenience and Necessity for pipelines are also narrowed. The NEB will now only consider factors "directly related to the pipeline", and not more broadly factors that it considers to be relevant. This change appears to directly address arguments that have been put forth by participants at the Enbridge Norethern Gateway Joint Review Panel, who have argued that the induced upstream impacts of pipeline development should be considered as part of the panel deliberations.

4. **Increased authority where Navigable Waters Protection Act applied.**
   The NEB Act will exempt interprovincial and international pipelines and power lines from the operation of the *Navigable Waters Protection Act* and give the NEB jurisdiction to issue authorizations where pipelines or powerlines under its jurisdiction cross navigable waters.

5. **Time limits for NEB hearings established.**
   Under Bill C-38, the NEB must make a report and recommendation on an application for a Certificate of Public Convenience and Necessity within 15 months from the date a complete application is submitted, with some allowance for the Board to extend the timelines where the proponent may require.

6. **Species at Risk Act exemption.**
   Previously under the *Species at Risk Act*, the NEB could only issue a permit allowing the destruction of critical habitat after consulting with the Minister of the Environment. The NEB will now be exempt from this requirement and will be able to issue a permit without consulting the Minister of Environment.

7. **Establishment of administrative monetary penalties.**
   The amendments establish administrative penalties of up to $25,000 for individuals and up to $100,000 for corporations for certain violations under *NEBA*. The violations for which administrative penalties will apply will be established in regulations. The mere existence of penalties is a start, implementation and enforcement is key.

Under the CEAA 2012 changes, there will be no more joint review panels, such as the Enbridge Northern Gateway Project. In cases where a CEAA eligible project also falls under the NEB's jurisdiction, the NEB process will prevail. So for example, should Kinder Morgan pursue its Transmountain Pipeline expansion plans, there will not be a joint review panel.

Further, these changes are expected to apply to the Enbridge Northern Gateway Project as well. Notably, we can expect:

- That Cabinet, and no longer the NEB, will become the decision maker for the project;
- That new time limits may apply to the hearing process;
- That the NEB could limit further participation in the JRP to "interested parties"

What is the impetus for these changes?

Since January, and likely in direct response to the level of public concern about the Enbridge Northern Gateway Joint Review Panel (which is a CEAA and NEB Joint Review Panel), the Minister of Natural Resources has made clear his intention to streamline regulatory processes so that major energy projects can be approved more expeditiously. Issues and delays associated with major energy projects feature prominently in the 2012 Budget, supporting the government's intention to streamline the process.

Ecojustice is supportive of streamlining environmental review processes to ensure efficiency and equivalent, or increased environmental safeguards. We are gravely concerned that the direction of proposed changes will be disproportionate and will roll back environmental protection requirements.

What are the potential impacts of these recommended changes?

The proposed changes are significant, and mean that energy projects will be approved more quickly, and likely with less in terms of community input and environmental protection.

The changes cast a dark shadow over the NEB hearing process because Cabinet now has the right to approve a project regardless of the outcome of an NEB hearing. It is possible that the NEB will still be able to put stringent terms and conditions on project approvals, but even these terms and conditions will need to be approved by Cabinet.

By reducing the ability of the public to get involved in hearings – such as the thousands of concerned citizens who are worried about the Enbridge Northern Gateway Pipeline – the changes shut people out who otherwise would have had an opportunity to share their views and concerns.

Finally, by adding responsibility for *Navigable Waters Protection Act* permits, and making the NEB one of only three responsible authorities under CEAA 2012, the workload of the NEB will increase. In order to be effective, these measures will need to ensure that the NEB is able to develop additional expertise and be adequately resources in these areas, which remains to be seen.

Why is this law important to Ecojustice's work?
Ecojustice has represented clients in numerous National Energy Board hearings and processes, including the Sumas Energy 2 project, the current Enbridge Northern Gateway Pipeline Joint Review Panel, the Mackenzie Gas Project, the Arctic Offshore Drilling Review and the forthcoming Enbridge Line 9 reversal hearing set for May in Ontario.

What Ecojustice cases/victories could be impacted by changes to this law?
Bill C-38 makes clear that some of the changes proposed will affect the final decision making structure and the timeline for reviewing Enbridge's Northern Gateway Project. This could undermine the effort our clients — and all participants, including First Nations — have put into participating in the review process. We remain concerned about these changes and are unable to fully assess them until more details are made available.

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