

THE EXPANDED ROLE OF THE FEDERAL CABINET IN PIPELINE PROJECTS: A CASE STUDY OF TC ENERGY'S 2021 NGTL SYSTEM EXPANSION

Author

Rowland Harrison, Q.C.; Positive Energy Faculty Affiliate

Study in Brief

Two developments in the past decade have fundamentally transformed the federal Canadian framework for reviewing proposals for interprovincial and international pipeline projects. First are the changes made in 2012 to the role of the National Energy Board (NEB) from making decisions on proposed pipeline projects to making recommendations. In 2019, the NEB was abolished and the Canada Energy Regulator (CER) was established. While the structure of the CER is significantly different from that of the NEB, its role in reviewing proposed federal pipeline projects is similar to the NEB's new role between 2012 and 2019. Specifically, the CER Commission is to make recommendations to cabinet.

The transfer of decision-making authority to cabinet – and the relegation of the role of the NEB (post-2012) and the CER Commission (since 2019) to making a recommendation on proposed pipeline projects – immediately presented several questions:

- What process would (should) cabinet follow in moving from the regulator's recommendation to cabinet's decision?
- Would cabinet consider additional information?
- Would cabinet undertake further consultations?
- If so, what are the implications for the transparency and integrity of the overall regulatory framework?
- What are the implications for respecting the principles of procedural fairness?

This study considers the implications of these changes via a case study of the federal government's recent approval of a large expansion of TC Energy's NGTL System, which connects most of the natural gas production in western Canada to domestic and export markets. The 2021 NGTL System Expansion is a \$2.3 billion project beginning in northwest Alberta along the west path of the NGTL System. The anticipated in-service date is the 2nd quarter of 2022.

IN BRIEF

Key Findings

In approving the 2021 NGTL's System Expansion Project, cabinet made significant amendments to five of the conditions proposed in the CER's Recommendation Report and added a further condition. These conditions addressed an issue that had been reviewed extensively during the CER Commission's review in an open and comprehensive process. Further, the subject-matter of the conditions – the protection of caribou habitat – might reasonably be considered to be within the broad expertise of the CER Commission.

Cabinet, however, was clearly of the view that the CER's proposed conditions were not good enough and saw fit to "strengthen" them, in effect rejecting the advice of a specialist tribunal specifically established to consider such matters. Cabinet also added a condition that had been considered and explicitly rejected by a majority of the CER Commission. Cabinet rejected the recommendation of the majority and instead adopted the view of and condition proposed by the dissenting commissioner.

These condition amendments and the addition of a further condition were made by cabinet without adopting any public review process. Furthermore, the burden of the additional requirements was imposed directly on NGTL, as the Project proponent. So far as is known, NGTL was not provided an opportunity to make any submission following the release of the Recommendation Report and prior to cabinet's decision.

The NEB Act (post-2012) established a formal process by which cabinet could refer the NEB's recommendation back to the Board for reconsideration. The NEB Act does not prescribe the process to be followed in undertaking such a reconsideration. However, it would have been open to the CER Commission to establish a process that could have provided NGTL with an opportunity to comment on the proposed condition amendments and the additional condition. Cabinet chose not to invoke the reconsideration process, presumably out of concern about the additional time that would be required. Regulatory delays had already slowed the commencement of the Project by a year.

Discussion and Implications

To this point, the legitimacy of cabinet's changes to the recommendations of the CER Commission is questionable – on substantive, procedural and policy grounds, and specifically in relation to maintaining the integrity and transparency of the regulatory process.

In the absence of a public or formal process for cabinet's consideration of the CER's recommendation, it is reasonable to ask how the basis for cabinet's decision is to be judged – what facts, what science, what Indigenous knowledge, what concerns about potentially impacted communities and about wildlife? What of procedural fairness? Cabinet appears to have concluded that the CER Commission's proposed conditions fell short of what cabinet determined was necessary to satisfy the Crown's duty to consult and accommodate.

Relevance for Decision-Makers

Analysis of cabinet's review and ultimate disposition of the CER Commission's Recommendation Report on the 2021 NGTL System Expansion Project suggests that tension may arise between two fundamental public responsibilities in the context of reviewing proposals for major resource development projects. The first of these is to fulfill, and respect, the requirements of the constitutional duty of the Crown to consult and, where appropriate, accommodate Indigenous peoples. The second is to maintain the integrity and effectiveness of the applicable regulatory framework, particularly by being transparent, and by complying with the requirements of procedural fairness. When considered exclusively in terms of maintaining the integrity of the regulatory process, the NGTL case raises several serious concerns, particularly with respect to a lack of transparency. Transparency is a bedrock principle for maintaining a robust, effective regulatory framework. Without transparency, there is no effective means of holding decision-makers to account.

Next Steps for Positive Energy

In the coming months, Positive Energy will release additional studies on how Canada can strengthen public and investor confidence in infrastructure project decisions, and effectively clarify and strengthen the relationships between policymakers, regulators and the courts on energy and environmental decisions.

[Link to the full report](#)