

Keeping the Wall Down: Increasing Public Participation in Northwest Territories Pipeline Developments

by *Robin L. Cowling**

In 1974, Mr. Justice Thomas R. Berger was appointed to head the Mackenzie Valley Pipeline Inquiry. He submitted his final report on May 9, 1977 after revolutionizing Canadian inquiry history. Berger's inquiry has been characterized as being "without walls" because of his requirements for informal community-based participation.¹ He visited 35 communities that would have been potentially affected by the proposed pipeline, took the evidence of a thousand witnesses who spoke in seven languages, and broadcast a summary of the day's events in English and aboriginal languages on the CBC Northern Service every day that the Inquiry sat.² His recommendation to postpone the pipeline project for ten years to allow aboriginal claims to be settled, and for the establishment of new programs and institutions,³ helped to place the

pipeline project on what seemed to be an indefinite hold.

This past year, however, has seen the reemergence of a northern pipeline project – the proposed development of a pipeline for the transportation of natural gas reserves from the Mackenzie Delta, Beaufort Sea and Alaskan North Slope to southern markets via the Mackenzie Valley, Northwest Territories. The proposal to construct a northern pipeline in the Northwest Territories will be contentious and result in the public expression of a range of concerns focusing on the project's political, economic and environmental consequences. The issues to be addressed by the project review and regulatory authorities will range from potential environmental impacts and cumulative effects of the project to the socio-economic impacts it could have on northern aboriginal communities.

Résumé

Cet article porte sur les possibilités de participation du public à l'examen de projets et aux processus réglementaires requis pour l'approbation d'un pipeline de gaz naturel dans les Territoires du Nord-Ouest. Les autorités chargées de l'examen et de la réglementation de projets sont en train de négocier en vue de coordonner le processus d'examen des propositions de pipeline. L'article analyse d'abord les dispositions relatives à la participation du public figurant dans quatre des processus qui s'appliqueraient à un tel projet, soit *La Loi canadienne sur l'évaluation environnementale*, *la Loi sur l'Office national de l'énergie*, *la Loi sur la gestion des ressources de la vallée du Mackenzie* et l'Entente finale des Inuvialuit. Les ressemblances et les différences entre ces dispositions sont ensuite examinées. L'article suggère enfin l'incorporation de diverses possibilités de participation du public dans une entente d'harmonisation des quatre processus afin de satisfaire les exigences juridiques et d'adopter les meilleures pratiques de ces processus.

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A pipeline application will also raise concerns about the project review and regulatory processes that it must undergo in order to be approved. The project review and regulatory authorities that have the responsibility to review the application have never worked together on a project of such a magnitude, and some of them have little regulatory experience. There are also concerns regarding the duplication of issues to be addressed in the processes and the inherent waste of resources (time, money) that concurrent regulatory processes would cause.

Therefore, in anticipation of an application, the project review and regulatory authorities have in recent months begun negotiations and the drafting of a harmonization agreement.⁴ A harmonization agreement would consolidate all of the applicable Northwest Territories processes into one joint process, providing regulatory certainty for both the applicant and for those interested persons and organizations wanting to participate in the project review and regulatory process. The overall aim of the project review and regulatory authorities' negotiations should be to create a transparent and inclusive process.

The following discussion examines four of the project review and regulatory processes that are presently being harmonized to ascertain the opportunities that they provide for public participation.⁵ Each of these processes has been selected because it affords significant opportunities for public participation.

The analysis begins with a brief description of each of the processes and the identification of its public

participation opportunities. The similarities and differences of these processes are then assessed and the expectations for the contents of the new harmonized process are discussed.

Project Review and Regulatory Processes

The project review and regulatory processes that have been identified as providing significant opportunities for public involvement are those established by the Canadian Environmental Assessment Act ("CEAA"),⁶ the National Energy Board Act ("NEBA"),⁷ the Mackenzie Valley Resource Management Act ("MVRMA")⁸ and the Inuvialuit Final Agreement ("IFA").⁹ The types of public participation opportunities found in each of these processes will be discussed in turn.

1. CEAA

This process is designed to insert conservation and environmental quality considerations into economic development decision-making. This is accomplished by requiring the prior assessment of the environmental effects of projects before they proceed, and includes a requirement for public participation in the environmental assessment process. The product of this process is a recommendatory report by the review panel for the decision-making authorities.

The CEAA process varies according to the project's potential for environmental harm. In the case of a northern pipeline it is likely that a review panel would be required. An environmental assessment by a review panel has three phases of project analysis,

each with different strategic objectives and opportunities for public participation and funding.

First, the process planning phase provides opportunities for public participation through the review of draft documents, including the terms of reference and project-specific guidelines; access to information in the public registry (which continues throughout the process); participation in issue identification meetings; and access to funding.

In the second phase the environmental impact statement ("EIS") is prepared by the proponent. During this phase interested persons and organizations can provide comments and attend meetings on the draft EIS, have input into the place and timing of the hearings, and have access to funding.

Finally, during the hearing phase, participation is possible at community and/or technical hearings. Funding is also available for intervention during this phase. The CEAA process also provides an opportunity following the panel review for participants to evaluate the review panel process in terms of its operation, management and effectiveness.

2. National Energy Board Act (NEBA)

The National Energy Board ("NEB") is an independent regulatory tribunal, created pursuant to the NEBA. The NEB has jurisdiction over the construction, expansion and extension of pipelines in Canada that cross provincial, territorial or international boundaries. The NEB also has legislative authority under CEAA with respect to environmental and socio-

economic matters as they pertain to pipelines. The end result of this process is a decision by the NEB whether to approve the pipeline project. The NEB does not, however, relinquish its jurisdiction over the pipeline after its approval decision, but retains jurisdiction over the pipeline's operation.

The NEBA process consists of three phases: approval of the project, approval of the route, and granting of leave to open the pipeline. The NEBA process also has the possibility of public participation prior to the filing of the application by the proponent. The public notification program is designed to require the proponent to obtain "meaningful public input at a local and regional level during the planning and design phase of the project", so that those to be affected are notified and provided with an opportunity to express their views, as well as to ensure that public concerns are addressed in the application.¹⁰

During the approval phase the NEB reviews the application for a certificate of public convenience and necessity, and issues a notification of a public hearing. Participation is possible through accessing documentation filed with the NEB; applying for intervenor status; utilizing several pre-hearing opportunities that are limited to parties, including objecting to written interventions and making information requests to other parties; filing a letter of comment with the NEB; and, taking part in the hearing.

If the certificate is granted, the NEB then moves to the second phase of route selection. During this phase, the NEB examines the plan, profile and book of reference for the

pipeline. If objections are received by the NEB from landowners or potentially affected persons, participation in a public hearing to determine the route may be possible.

The final phase is when the NEB grants leave to open the pipeline; there are no opportunities for public participation at this time.

There may, however, be opportunities for participation after the project is operational. Therefore, interested persons or organizations may want to request the NEB to include in the proponent's certificate terms and conditions or operating procedures that require the continuing involvement of these parties.¹¹

3. MVRMA

The MVRMA is a federal statute that applies in the Mackenzie Valley. The MVRMA established the land use planning boards and land and water boards as required under the Gwich'in Comprehensive Land Claim Agreement¹² and the Sahtu Comprehensive Land Claim Agreement.¹³ The MVRMA also established the Mackenzie Valley Environmental Impact Review Board ("MVEIRB") for the Mackenzie Valley and a land and water board for those areas not covered in the land claim settlement areas.

The MVEIRB would assess the project for its environmental impacts, as well as any social, cultural and economic impacts on the residents and communities in the Mackenzie Valley. The product of this process is a recommendatory report by the review panel for the decision-making authorities.

The MVRMA process has three successive stages: a preliminary screening, an environmental assessment, and an environmental impact review.

The preliminary screening is designed to ascertain the development's potential impact on the environment and the potential for public concern. There is no public participation during this phase, although access to documents is possible.

The environmental assessment phase provides greater opportunities for public participation. This phase commences when the project is referred to the MVEIRB for an environmental assessment. Participation can occur through: access to information through the public registry; inclusion on a list of interested persons for distribution of documents for comment, including the terms of reference and environmental assessment; participation in issue identification meetings; comment on identified issues; opportunity to register as an intervenor; opportunity to provide written comments; and participation in the hearing.

If the MVEIRB decides to require an environmental impact review of the project (which is likely in the case of a pipeline), more participation opportunities are available. These include: access to documents and information on a public registry; possible access to intervenor funding, if requested by the MVEIRB from the Department of Indian Affairs and Northern Development; issue identification meetings; commenting on draft documents including the EIS Guidelines; conformity check of EIS; and, participation in community and/or technical hearings.

4. IFA

The Inuvialuit Final Agreement establishes an environmental impact screening and review process for the Inuvialuit Settlement Region ("ISR").¹⁴ The IFA establishes both an Environmental Impact Screening Committee ("EISC") and an Environmental Impact Review Board ("EIRB") for the purpose of reviewing projects for their environmental impacts as well their socio-economic consequences, taking into account cultural and seasonal considerations relevant to aboriginal communities in the ISR. The result of this review is a review panel decision that will recommend whether or not the project should proceed. This report is forwarded to the relevant regulatory authority(s) for their decision-making.

The IFA process has two phases that apply to proposed onshore and offshore developments. These are an environmental screening and an environmental review.

During the environmental screening phase the EISC determines whether a proposed development will have a significant environmental impact. During this phase the proponent must submit a project description to the EISC; these documents are publicly available. Community consultations by the proponent are also required prior to screening. The EISC then makes a decision whether to refer the project to the EIRB for an environmental review.

The EIRB would then hold a public review of the pipeline project. Opportunities to participate during this phase include: registration as a participant and inclusion on mailing

lists; access to information in a public registry; opportunity to provide comments on the draft EIS outline and the draft EIS; opportunity to attend issue identification meetings; opportunity to attend a pre-hearing conference; and opportunity to participate in the hearing.

Similarities and Differences

This analysis reveals that the processes have several similarities and a few key differences in their facilitation of public participation. The elements that influence participation are: the formality of the process; attention to cultural and seasonal considerations; pre-filing public consultation; opportunities to comment on draft documents; existence of a public registry system; and access to intervenor funding.

The processes use different procedural means to achieve public participation goals. On a continuum from formal to informal processes, there is the NEBA, CEAA, MVRMA and IFA. The formality can be gauged from the restrictions placed on the processes through attention to filing deadlines and the development of detailed procedural rules. It is also reflected in the degree of discretion afforded a review body to offer additional opportunities for participation.

When considering sensitivity to local and indigenous knowledge and participation, the formality continuum is effectively reversed (IFA, MVRMA and CEAA and NEBA). This sensitivity is reflected in the need to consider the impacts of season on availability to participate in the process, the inclusion of indigenous knowledge sources, and the facilitation of access

to information through local information officers.

A requirement to communicate with potentially affected communities prior to filing is another key aspect of public participation. For two of these processes, the NEBA and the IFA, public involvement is required before the process is triggered, i.e. before the filing of any documentation with the relevant authority. This is an interesting requirement because it places an onus on proponents to plan with the affected communities and their concerns in mind. It also requires proponents to demonstrate that they have turned their minds to any opposition in their filed documentation.

The ability for interested persons or organizations to comment on draft documents prepared for the review is another element in public participation. The three project review processes, and the NEBA pursuant to the NEB's CEAA jurisdiction, all provide opportunities to comment on the documents that will frame the scope, procedures and issues of the review. This is an important feature because it allows these parties to ensure that issues relevant to them will be addressed by the proponent in its EIS and considered by the project review and regulatory authorities during the hearings.

All four of the processes provide access to documentation pertaining to the review to other participants and/or the public. Under the CEAA, the MVRMA and the IFA this is accomplished by the development of public registries of varying forms of sophistication, as well as by placing interested persons and organizations on mailing lists. Access to informa-

tion through a public registry allows all members of a potentially affected community to become informed, and is an important factor in generating awareness and understanding of the issues to be addressed in a hearing. In contrast, the NEBA provides public access to the application and associated documents at the proponent's business address and at the NEB library. The ability to actually access this information may be difficult for some persons due to their distance from these locations.

A final element is access to funding to facilitate participation. Persons or organizations that wish to intervene or otherwise take part in the NEBA, MVEIRB and IFA processes must be prepared to fund the expenses themselves. Only the CEAA definitively provides for intervenor funding, although the NEB may agree to assist with the service of documents for some intervenors and the MVEIRB may request funding for intervenors.

Harmonized Process

When considering a harmonization of these four processes it is important to reflect upon the relative strengths and weaknesses of each, as well as any legal requirements for harmonization. Of these regimes, the CEAA is the only process that has a legal requirement for public participation in a joint review panel assessment. Given that the CEAA process contains several opportunities for public participation in a panel review, the expectation is that a harmonized agreement would at a minimum meet these requirements.

A review of four previous joint review panel agreements indicates that the

public participation opportunities identified in the preceding analysis are found in these agreements, including the CEAA requirements.¹⁵ Therefore, it is probable that they will also be reflected in the draft harmonization agreement.

Recognizing that a northern pipeline project will attract a variety of individuals who will express a range of concerns, from a community perspective to a technically focused one, the harmonized process must afford them all the opportunity to participate effectively. A harmonized process should therefore include the following key elements to facilitate meaningful public participation:

- A requirement for a pre-filing public notification program;
- A public registry system as well as local information officers;
- Opportunity to register as an intervenor;
- Opportunity to participate as a non-intervenor through letters of comment, etc.;
- Intervenor funding program;
- Consideration of, and sensitivity to, aboriginal, cultural and socio-economic issues throughout the process;
- Opportunities to receive and comment on draft documents such as the terms of reference, environmental assessment, EIS guidelines, EIS, etc.;
- Opportunity to comment on written interventions and letters of comment from other participants;
- Opportunity to request information from other participants;
- Opportunity to attend issue identification meetings regarding the scoping of the project, cumulative effects, etc.;

- Opportunity to attend pre-hearing conferences;
- Opportunities to participate in community and technical hearings;
- Opportunity to provide comments on effectiveness of process after completion of joint review panel duties;
- Opportunity to request on-going public participation after the project is operational.

Just as Berger increased effective community-based participation in 1974, it is time in 2001 to again raise the standard of public participation in northern pipeline developments. We need to ensure that we keep the wall down.

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NOTES

1. F. Bregha, *Bob Blair's Pipeline: The Business and Politics of Northern Energy Development Projects* (Toronto: James Lorimer & Company 1979) at page 116.
2. *Ibid.* at pages 116-7
3. T.R. Berger, Justice, *Northern Frontier Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry: Volume One* (Toronto: James Lorimer & Company, 1977) at page xvii.

4. *Agreement Reached to Develop a Draft Framework for a Single Environmental Assessment Process for Pipeline Proposals*, News Release, Yellowknife, N.W.T., May 24, 2001("Draft Framework") at www.ceaa.gc.ca.

5. The Draft Framework is being drafted by the National Energy Board, Mackenzie Valley Environmental Impact Review Board, Environmental Impact Screening Committee, Environmental Impact Review Board, Canadian Environmental Assessment Agency, Department of Indian and Northern Development, the Mackenzie Valley Land and Water Board, the N.W.T Water Board, the Inuvialuit Land Administration, the Inuvialuit Game Council, the Sahtu Land and Water Board, the Gwich'in Land and Water Board and the Government of the N.W.T.

6. S.C. 1992, c.37, as amended.

7. R.S.C. 1985, c. N-7

8. S.C. 1998, c.25

9. *Inuvialuit Final Agreement*, Between the Committee for Original Peoples' Entitlement, representing the Inuvialuit of the Inuvialuit Settlement Region and the Government of Canada, 5 June 1984, as amended. As "approved, given effect and declared valid" by the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c.24.

10. NEB, *Guidelines for Filing Requirements* dated February 22, 1995, as amended, located at www.neb.gc.ca at section 3.

11. See the environmental agreements

for the Diavik and BHP (Ekati) Diamond Mine. They establish multi-stakeholder monitoring agencies to require on-going involvement of interested persons and organizations in overseeing the operations of the project. The NEB has inserted a condition such as this in the past, when they required a proponent to develop a written protocol of agreement with interested persons regarding ongoing studies and monitoring, see *Union of Nova Scotia Indians v. Maritimes & Northeast Pipeline Management Ltd.* (1999), 249 N.R. 76 (Fed. C.A.).

12. This Agreement was approved, given effect and declared valid by the *Gwich'in Land Claim Settlement Act*, S.C. 1992, c.53.

13. This Agreement was approved, given effect and declared valid by the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C 1994, c.27.

14. This Agreement was approved, given effect and declared valid by the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c.24

15. See *Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Establishment of a Review Panel for the Express Pipeline Project, dated September 13, 1995; Agreement for a Joint Public Review of the Proposed Sable Gas Projects ("Sable Agreement") cited to The Joint Public Review Panel Report: Sable Gas Projects, October 1997, Appendix I at page 111; Memorandum of Understanding on Environmental Assessment of the Proposed Voisey's Bay Mining Development, dated January 30 and 31, 1997; and, Agreement Between the National Energy Board and the Minister of Environment Concerning the Review of the Canadian Millennium Pipeline Project, dated November 15, 1999.*

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