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A Guide to The Canada Energy Regulator

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1. Introduction

This Guide is a resource for citizens interested in or who intend to interact with the Canada Energy Regulator (CER). The CER is very much attuned to citizen interest and involvement in its various activities and decisions. It has posted informative and useful material on its website.[1]

The CER has published an online Guide. What is the purpose of another citizens' guide? This guide is not intended to merely synthesize the CER information. Rather, it takes another perspective, differing from the CER website in two main ways:

1. It has a more explicit legal basis in statute and general law. Not only does it describe the CER's powers, structure, and activities, it identifies the relevant legal authority – particularly the legal basis for citizen participation and involvement in these CER decisions and actions. It identifies but does not go into detail on the special constitutional status of Indigenous rights and consultation.
2. It is directed at citizens and intended to be broadly educational, explaining what the CER does, including a brief look at its history and the constitutional, statutory, and general law context in which it operates.

The Guide does not provide legal advice. Nor is it comprehensive. It is a guide for citizens, not a treatise.[2] The focus is on public participation and involvement. While some legal and historical context is included, it is limited to a sketch that does not reach many details of the CER's legal and policy context.

Nor is the Guide intended to be an advocacy document. It assumes as a matter of democratic legitimacy (including accountability, transparency and public confidence), as does the CER itself, that public engagement – information, consultation, and involvement – is a good thing. The focus then is on how to achieve these goals.

The Guide begins with what the CER is - its core objectives, how it has developed, and how public engagement fits into its mandate. Then legal rights to participate are identified. This leads to greater detail about the CER's regulatory process with focus on citizen participation and involvement. Included are constitutionally supported Indigenous rights. The spotlight is on approval processes for major energy projects, particularly interprovincial and international pipelines.

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[1] CER <Canada Energy Regulator (cer-rec.gc.ca)>.

[2] For such a Treatise see Nickie Nikolaou, and Allan Ingelson, eds, Canada Energy Law Service, Federal, Vol 1 (Thomson Reuters Loose leaf) particularly Section VII Practice and Procedure [CELS].

Hearings, a central feature of these processes are given particular attention. But other forms of dispute resolution are also discussed. These regulatory assessment and approval processes are distinguished from the CER powers concerning land acquisition for approved energy facilities. Citizen rights to appeal or seek judicial review of CER decisions are reviewed. Finally, the CER has powers to inform and consult affected persons or the general public for various purposes such as process reforms and policy development. These include emergent issues such as public health emergencies, and climate change.

2 What is the CER?

The CER regulates interprovincial and international pipelines and powerlines as well as oil and gas exploration, development, production, and transportation in Canada's northern territories and certain offshore areas, and even some offshore renewable energy facilities. Its pipeline and powerline powers include the facilities themselves, as well as the rates, tariffs, and tolls charged to producers for their use.

It is a federal government agency created in 2019 by the *Canadian Energy Regulator Act* (*CERA*)[3] to replace the National Energy Board which dated from 1959. The CER is an administrative and quasi-judicial body with decision making, research, rule making, and public communication functions. For major projects, including pipelines over 75 km in length, there is an integrated process involving Review Panels with the Impact Assessment Agency of Canada under the *Impact Assessment Act* (*IAA*).[4] The CER regulates over 73,000 kilometres of international and interprovincial pipelines, 48,000 kilometers of operating gas pipelines, and 1,400 kilometres of international power lines as well as Canadian oil, gas, and electricity imports and exports. It is funded by the government of Canada, which recovers nearly 100% of this through a levy on regulated energy industry companies.[5]

NOTE ON "QUASI-JUDICIAL"

Quasi-judicial means independent and partly judicial in character with legal power to hold hearings and make authorized decisions in a manner similar to that of courts.

When the CER was launched, according to the Canadian Federal Government,[6] the CER was intended to help restore investor confidence, rebuild public trust, and advance indigenous reconciliation. It will amplify the federal government's efforts to diversify Canada's energy

[3] SC 2019, c 28, s 10 <https://canlii.ca/t/54cq3> [*CERA*].
[4] Impact Assessment Agency of Canada <Impact Assessment Agency of Canada - Canada.ca>.
[5] *National Energy Board Cost Recovery Regulations*, SOR/ 91-7 <https://canlii.ca/t/l90d>.
[6] Canada, "A Modern, New and World-Class Federal Energy Regulator for the 21st Century. The New Canadian Energy Regulator Handbook" pg. 2 online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/neb-handbook-e.pdf>.

markets, expand energy infrastructure, drive economic growth, enhance public participation, advance Indigenous reconciliation, and protect the environment for this and future generations.

The Regulator supports public participation and Indigenous peoples' consultation. It aims to secure Free, Prior, and Informed Consent in line with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Regulatory reviews will be more accessible, inclusive, and transparent, allowing for greater public participation. For this purpose, the *National Energy Board Act*'s (*NEB Act*) "directly affected" standing requirement for citizen hearing process participation was eliminated.

More specifically, the CER regulates:

1. Oil & Gas Pipelines – Construction, operation, and abandonment of interprovincial and international pipelines and related tolls and tariffs.

2. Electricity Transmission – Construction and operation of international power lines and designated interprovincial power lines.

3. Imports, Exports & Energy Markets – Imports and exports of certain energy products; monitoring aspects of energy supply, demand, production, development, and trade.

4. Exploration & Production – Oil and gas exploration and production activities in the offshore and on frontier lands not covered by an accord. [with Nova Scotia, and Newfoundland and Labrador]

5. Offshore Renewables – Offshore renewable projects and offshore power lines.

The CER also:

1. Reviews applications for new projects and upgrades to current ones,

2. Provides oversight of oil and gas exploration and activities on frontier lands and offshore not otherwise regulated under territorial law or joint federal/provincial accord,

3. Decides what can be transported in pipelines and how much companies are allowed to charge for their services,

4. Approves the export and import of natural gas and the export of oil,

5. Provides people with energy statistics, analysis, and information they can trust.

2.1 CER History

The CER is descended from the National Energy Board established by the federal government in 1959 under the *NEB Act*. Prior to this, major pipeline projects were regulated by the Board of

Transport Commissioners under the *Railway Act*. Since 2018, its governing statute has been the *CERA*. In broad terms, there has been relatively little change in the Regulator's legal authority between 1959 and the present. The changes have been mainly in the evolution of factors relevant to the Regulator's exercise of its statutory powers. Neither Indigenous rights nor climate change, for example, had any place in NEB decisions in 1959.

The overriding purpose of Parliament in establishing the NEB in 1959 was to entrench an independent, quasi-judicial, expert tribunal that would be insulated from political influence. This intention was reflected in several features of the *NEB Act* as originally enacted and as largely continued until 2012. For example, the Board was established as a court of record and its members could only be removed by the Governor in Council (GIC) "on address of the Senate and House of Commons." The focus of the NEB under the 1959 Act was on the regulation of interprovincial and export oil and gas pipelines and powerlines, and export of oil, gas, and electricity to the US. The Board also functioned as a public utility regulator (this continues under the *CERA*) and as such establishes or approves just and reasonable tolls as well as terms and conditions and rules. Under the original *NEB Act*, the final approval for new pipelines was reserved for the GIC, though the NEB could reject pipeline applications and approve or reject electricity import or export applications.


NOTE ON "COURT OF RECORD"

This means that a record of CER proceedings is recorded and publicly accessible.

In 2012, the *NEB Act* was amended. By the 2012 amendment, the role of the NEB in reviewing proposed energy infrastructure projects was changed from that of decision-maker to instead making recommendations to the GIC, which was empowered to make a final decision. The 2012 amendments to the *NEB Act* also introduced requirements with respect to time limits for the Board's proceedings, some of which empowered the Chairperson, to ensure, for example, that a specific pipeline application was dealt with in a timely manner, including directives to the members of individual Board panels in specific proceedings. The structure of the Board remained as it had been before, with the Board (and its members) responsible only for its mandate under the *NEB Act*, without direct government oversight. However, under the amended Act the GIC had the power to make final certificate decisions (including after reconsideration by the Board) and the power to add or modify conditions to NEB certificate recommendations in all cases. [7]


NOTE ON "GOVERNOR-IN-COUNCIL" (GIC)

[7] This was confirmed by the Federal Court of Appeal in *Gitxaala Nation v Canada (National Energy Board)*, 2016 FCA 187 <https://canlii.ca/t/gscxq> [*Gitxaala Nation*].

Technically, this is the Governor General acting on advice from the Privy Council for Canada. Practically it means the Federal Cabinet.

2018 saw more fundamental change. The Trudeau government, again started the process of 'revamping and modernizing' the NEB. On 28 August 2019, the NEB and the NEB Act were replaced by the Canadian *Energy Regulator Act* and the Canada Energy Regulator, with the enactment of Bill C-69. Integrated environmental assessment with the Impact Assessment Agency of Canada was established.[8]


NOTE ON CER NAME

While the Act refers to the "Canadian" Energy Regulator, the CER's formal name is **Canada** Energy Regulator.

2.2 Structure of the Canada Energy Regulator

The CER reports through the Minister of Natural Resources. The Minister is the principal government authority with respect to the CER but does not engage in the operation and management of the Regulator. However, the CER is ultimately accountable to this Minister who is then accountable to Cabinet and to Parliament for the CER's overall performance.

The *CERA*, which created the CER, provides a clear separation between the Regulator's adjudicative function and its executive (including compliance, research, and communications) functions. The Chief Executive Officer is separate from the Board of Directors, and the CEO cannot serve on the Board.


NOTE ON "ADJUDICATIVE"

This means statutory power to decide disputed matters in the general manner of courts. For the CER, this includes matters under the CERA concerning pipelines and powerlines.

The **Board of Directors**[9] oversees the governance of the CER, which includes providing strategic advice and direction to the CER as well as approving CER reports to be presented to Parliament. The Board does not normally engage in routine/daily operations, which is the role of the Chief Executive Officer (CEO). It oversees the daily operations of the CER. The Board works closely with the CEO, who provides the Board with the information and support needed to do its work. The CER's Board is comprised of between five (5) and nine (9) Directors, including the Chairperson and the Vice-Chairperson. At least one of the Directors is required to be an Indigenous person. All Directors are appointed by GIC to serve part-time for a term of up to six years, with

[8] See Section 3 below.
[9] The sections on Board of Directors, CEO, and Commissioners are based on, CER, "Who we are and what we do" <CER – Who we are and what we do (cer-rec.gc.ca)>.

the possibility of renewal for an additional four years. The Board holds quarterly regular meetings and posts a synopsis of each meeting on the CER website.

The **Chief Executive Officer (CEO)** is responsible for the management and daily operations and affairs of the CER, including the supervision of its employees and their work. Under the *Financial Administration Act*, the CEO is the accounting officer for the CER and is responsible to appear before committees of the House of Commons and Senate regarding stewardship of the CER. The CEO works closely with the Board and provides both the Board and the Commission (below) with the support needed to carry out their respective responsibilities. The CEO is appointed by the GIC on the recommendation of the Minister following consultation with the Board. The CEO serves full-time, at pleasure for a term of up to six years and may be reappointed but may serve a maximum of 10 years in total.

NOTE ON "AT PLEASURE"

An appointment "at pleasure" means during the pleasure of the GIC and it can be revoked by the GIC.

The **Commission** is responsible for adjudicative decisions, operating as a quasi-judicial body that is arm's length from other parts of the CER governance structure and the federal department, Natural Resources Canada.

It is comprised of up to 7 full-time Commissioners, including the Lead Commissioner and Deputy Lead Commissioner and may also include part-time Commissioners. The Commissioners are appointed by the GIC. They serve on good behaviour for renewable terms of up to six years (for a maximum total service of 10 years). At least one full-time Commissioner must be an Indigenous person.

The Commission makes regulatory decisions and recommendations independently as set out in the *CER Act* and other legislation. Its Independence is vital to its mandate. The Commission is a Court of record and must discharge its adjudicative functions consistent with the purpose and provisions of the *CER Act*, s. 35 of the *Constitution Act, 1982*, Part III of the *Official Languages Act*, the common law rules of natural justice/ procedural fairness, and other applicable legislation and binding policy direction.

For the CER these often-interchangeable common law terms mean that in its hearing and decision processes it is required to give reasonable notice to affected persons, treat those persons fairly, and act independently and impartially. Whether specific procedures are required depends on the process circumstances, including how much the proceedings are like those of a court making a specific decision, whether a tribunal has legal power to set its own procedures, as the CER does, and the impact on individuals affected. There may be technical conferences in particular cases to discuss appropriate procedures.

For example, the Federal Court of Appeal (FCA) in *Gitxaala Nation v Canada (National Energy Board)*,[10] held that in the pipeline certificate rehearing circumstances, the Regulator was not required to hold an oral hearing or permit cross-examination. . In *Tsleil-Waututh Nation v Canada*,[11] the Court confirmed that the duty of fairness depended on the context and circumstances, and that the duty of fairness does not always require cross-examination. In the latter case, there was a written questions process and an opportunity for oral Indigenous traditional knowledge evidence.

The Commission's responsibilities include: adjudicating (including on its own initiative) on any matter where a person has done or failed to do anything required by the *CER Act*; inquiring into any accident involving a pipeline or other CER-regulated facility; making orders and prohibitions for the enforcement of its decisions; making rules for carrying out its work and managing its internal affairs concerning adjudication, including rules respecting the powers, duties and functions of Commissioners, its procedures and practices, its sittings, and its decisions, orders, and recommendations.

In line with the commitment contained in the preamble to *CERA*, section 57 of the *CERA* provides that the CER must establish an Indigenous Advisory Committee for the purpose of enhancing the involvement of the Indigenous peoples of Canada and Indigenous organizations in CER activities and processes.

The Indigenous Advisory Committee (IAC) has the mandate of advising the Board on how the CER can build a new relationship with Indigenous peoples. The IAC plays a key advisory role by advising the CER on how best to enhance the involvement of Indigenous peoples and organizations in respect of CER-regulated infrastructure and other matters.

The IAC holds Regular quarterly meetings and posts a summary of every meeting. The IAC is comprised of 9 Members, led by a chairperson selected by the IAC. Three IAC Members are directly nominated by national Indigenous organizations: The Assembly of First Nations, Métis National Council, and Inuit Tapiriit Kanatami. For the remaining IAC members, the CER puts out an invitation for expressions of interest.

3 Interaction with the *Impact Assessment Act* and Review Panels

Projects designated under the *IAA*, including pipelines more than 75 km in length, are reviewed not by the CER, but by Review Panels created under the *IAA* that make recommendations directly to the GIC on whether certificates should be granted. The Environment Minister in consultation with the CER Chief Commissioner and the Assessment Agency, appoints the chairperson and at

[10] *Gitxaala Nation*, above, note 7.
[11] 2018 FCA 153 at para 245 <https://canlii.ca/t/htq8p> [*Tsleil-Waututh Nation*].

least two other members to each Panel. At least one Panel member must be appointed from a roster of CER Commissioners.[12]

Terms of reference are established (by the Environment Minister in consultation with the CER Chief Commissioner) for each Review Panel, which then conducts an impact assessment, holds hearings "in a manner that offers the public an opportunity to participate," and prepares a report to the Minister. The report sets out potential effects, particularly adverse effects and their significance, how Indigenous knowledge was used, a summary of public comments, and the Panel's "rationale, conclusions and recommendations". The Minister (in consultation with the CER responsible Minister) then refers the matter to the GIC which decides whether the adverse effects identified are in the public interest taking into account **five factors**: 1. whether adverse effects are "significant," 2. "the extent to which the project contributes to sustainability," 3. mitigation measures, 4. impacts on Indigenous rights, and 5. "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[13]

The result is that the *IAA* creates a designated project assessment and decision process in which the Environment Minister and Review Panels exercise powers normally given to Commissioners and exclusively to the CER-responsible Minister under the *CERA*.

4 Legal Rights to Participate

The CER has expressed its commitment to more inclusive public engagement. The term "public engagement" is broad, including public involvement clearly embedded in the *CERA* and regulations, and extending to discretionary public consultation on proposed CER policies, as well as enforcement and compliance matters and proposed new or revised regulatory rules. Essentially, there is public **participation** of various types in the regulatory process that includes applications for major new or expanded pipelines or powerlines; and public **consultation** on policy development and rule making including proposed changes to the Regulator's Filing Manual.[14] The practice is that this type of consultation involves public notice and opportunity to provide written comments.

4.1 Are There Firm Legal Rights to Participate?

There is no general common law right to public consultation or participation. However, there may be participatory rights limited to persons directly affected by proposed CER decisions based on common law natural justice/procedural fairness principles (Notes in section 2.3 above and Section 4.4 below). These are essentially displaced by the public participation provisions in the *CER Act*

[12] *Impact Assessment Act*, SC 2019, c 28, s 1, ss 47-56 <https://canlii.ca/t/543j0> [*IAA*].
[13] *Ibid*, s 63.
[14] CER Filing Manual <https://www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/filing-manual.pdf>. The CER Filing Manual is an important guidance document that provides detailed filing requirements for different types of applications.

and regulations, leaving only the possibility that the latter may be augmented by specific common law rights including notice, fair hearing, and impartial decision makers.

But courts have also recognized discretion in decision makers, that would include CER hearing commissioners, to choose procedures that are appropriate for effective and efficient exercise of their statutory powers.[15] The bottom line is that citizens have participatory rights in some *CERA* decision processes, particularly hearings; but these are broad enough to give the CER a discretion to choose particular procedures, such as written rather than oral hearings for certificate application hearings, and whether there will be any public consultation at all on policy issues.

Constitutional rights to participate, based on *Canadian Charter of Rights and Freedom* rights, including life and security of the person,[16] and equality,[17] have been claimed with little success.[18] Only Indigenous rights to consultation and accommodation under the *Constitution Act 1982* s. 35 have been recognized.

4.2 Indigenous Consultation and Accommodation Rights

The Supreme Court of Canada (SCC) has recognized that these "Aboriginal and Treaty Rights" impose on federal and provincial governments (the Crown) a duty to consult and potentially accommodate Indigenous people affected by decisions of government officials and agencies including the CER. Their rights are not limited to being participants in hearings.

CER Commission or *IAA* review panel proceedings must be specific in relation to affected First Nations and Indigenous persons. Under the *CERA*, this means that the CER does this as agent of the Crown. Additional consultation may be carried out by the Crown – that is, by the Government of Canada. But it is the CER that does this consultation as agent of the Crown so that the CER has a dual role as regulatory decision maker and as Crown agent for Indigenous consultation.

This is a complex legal field. But a good example is the result of the FCA decision in *Tsleil-Waututh Nation.*[19] The FCA held GIC approval of the Trans Mountain Expansion (TMX) pipeline valid following FCA invalidation of an earlier GIC approval, a CER rehearing, additional government of Canada Indigenous consultation (and consultation report), a new positive CER recommendation, and ultimate GIC approval.

4.3 Public Participation in the Major Pipeline and Powerline Certificate Application Process

Here, the CER Commission or alternatively an *IAA* Review Panel (Section 3 above) is making regulatory decisions including whether or not to approve proposed new interjurisdictional pipelines or powerlines. The *CERA* describes these approvals as "certificates." It will prepare a

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[15] *Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817, <https://canlii.ca/t/1fqlk> [*Baker*].
[16] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7 <https://canlii.ca/t/ldsx>.
[17] *Ibid*, s 15.
[18] See *Forest Ethics Advocacy Association v Canada (National Energy Board),* 2014 FCA 245 <https://canlii.ca/t/gf4vc> [*Forest Ethics*].
[19] *Tsleil-Waututh Nation*, above, note 11.

public report to the minister recommending whether or not to grant the certificate and conditions that it "considers necessary or in the public interest." According to the *CERA*, it must:

> "… make its recommendation taking into account — in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including
>
> - **(a)** the environmental effects, including any cumulative environmental effects;
> - **(b)** the safety and security of persons and the protection of property and the environment;
> - **(c)** the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
> - **(d)** the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
> - **(e)** the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
> - **(f)** the availability of oil, gas or any other commodity to the pipeline;
> - **(g)** the existence of actual or potential markets;
> - **(h)** the economic feasibility of the pipeline;
> - **(i)** the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;
> - **(j)** the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
> - **(k)** any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act*; and
> - **(l)** any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application."[20]

[20] *CERA*, above, note 3, s 183(2).

Applicant companies proposing a certificate application (not involving *IAA* assessment) have **pre-application consultation** obligations. These include early engagement through information, meetings and workshops etc., with Indigenous rights holders, landowners, and other persons likely to be affected by projects.[21] The next steps are notification by the CER that an application is complete, and a hearing order.

The CER *Rules of Practice and Procedure* (note below) refer to "Representations by the Public". This says: "Any member of the public may, **in a manner specified by the Commission,** make representations with respect to an application for a certificate." Note the Commission's discretion as to the manner of participation. This is also applied to Review Panels under the *IAA*.[22] Discretion here means that these decisions must be within the parameters of the *CERA* and regulations, and reasonable in terms of justification, intelligibility, and transparency (Section 14 below). Section 4 (1) of the CER *Rules* empowers the CER to dispense with or vary its rules of practice and procedure.

NOTE ON RULES OF PRACTICE AND PROCEDURE

As of January 1, 2022, The *National Energy Board Rules of Practice and Procedure* continue to apply to the CER. This is a transitional situation authorized by the federal *Interpretation Act. T*hese are referred to in this Guide as the "CER Rules*"*.

4.4 Procedural Fairness

Procedural fairness requires that decision makers comply with statutory requirements concerning reasonable notice, a fair hearing, and impartial decision makers.[23] Unless clearly excluded, these statutory requirements for environmental assessment and energy regulatory agency processes are augmented by common law notice, fair hearing, and decision maker impartiality principles.[24] *Baker v Canada (Minister of Citizenship and Immigration)* sets out a series of contextual factors, including the nature of the statutory scheme, the process adopted by the decision maker, and the importance of the decision for persons affected. Any remedies awarded are procedural, potentially resulting in additional and sometimes completely new proceedings. Nevertheless, these augmented or redone factors of notice, hearings, or decision maker impartiality can complicate and delay proceedings.

In *Gitxaala Nation*,[25] concerning the proposed (and now abandoned) Northern Gateway pipeline, in light of the full application hearing process and the Review Panel's recommendations based on wide ranging or subjective criteria and, as the FCA said, "shaped by…public interest," there was

[21] CER Application Manual, Guide L - Early Engagement <CER – Early Engagement Guide – CER Expectations for Companies during the Early Engagement Phase (cer-rec.gc.ca)>.
[22] *IAA*, above, note 12, s 185.
[23] *Baker*, above, note 15.
[24] *Ibid*, at paras 23–28.
[25] *Gitxaala Nation*, above, note 7.

no requirement to provide broader oral hearings, cross-examination, or opportunity to respond to denial of information requests. The overall procedure adopted must be fair and reasonable in this sense.

5 Types of Hearings

The type of hearing is significant in determining the procedural requirements. There are two main types of CER hearings: 1. Application hearings, and 2. Land hearings including those concerning detailed route, land entry, and compensation for land acquisition and damage to land. In the discretion of the Commission, hearings of applications for smaller projects may be in writing. There may also be hearings about pipeline toll complaints and about issues concerning pipeline abandonment.

6 Forms of Participation.

Any citizen claiming to be affected by a proposed project can file a Statement of Concern with the CER. This must be done within 30 days of an application filing. It is important that citizens check CER notice materials for specific deadlines. If the Regulator issues a hearing order setting the application down for hearing and advertising the hearing, persons interested in participating in the hearing must register with the CER.

6.1 Early Engagement

Initially, there may be a **pre-application meeting** between a prospective applicant and CER staff. These are orientation meetings about resources, filing requirements and the process generally. Broad public participation is not intended, though meeting notes are available to the public upon request.

In the pre-application period, applicants are expected to carry out Early Engagement with potentially affected persons and communities by various means. Particular attention is given to Indigenous persons and communities. This involves providing information including potential acquisition or lease of lands, potential workspaces, and persons potentially affected by construction and operation noise, dust or traffic, such as park and other recreational users, and users of hunting, trapping, guiding or fishing areas. Applicants must explain how they will receive and respond to public input. CER expectations are outlined in the Regulator's Early Engagement Guide.[26] The CER may also provide Alternative Dispute Resolution (ADR) (Section 6.6 below) assistance, if requested. Details of application filing notifications will be determined.

[26] CER, Early Engagement Guide <CER – Early Engagement Guide – CER Expectations for Companies during the Early Engagement Phase (cer-rec.gc.ca)>.

Hearings

There are two alternative public participant hearing roles: 1. **Commentator**, and 2. **Intervenor**. The term "party" is also used. The CER *Rules of Practice and Procedure* define "party" to mean, "… in respect of a proceeding, a person who makes an application or intervenor."[27] "Proceeding" means "a written or oral hearing," beginning with an application filing.[28] Interventions or letters of comment must be filed within the time specified in a hearing order.

6.2. **Commentators** are persons recognized by the Commission as interested persons and can submit letters of comment stating views and concerns.[29] This must include a description of the person's interest in the proceedings, comments on the application and its subject matter, and supporting information.

These letters become part of the formal record of the proceedings. There is also opportunity available to any member of the public, to attend and observe hearings and review the hearing record. But commentators have no opportunity to present evidence or to question the applicant or other parties. Nor is there access to funding for the participation. There is access to a CER **Process Advisor** who can answer questions about the hearing process before and during the hearing, and provide support for online systems, as well as samples and templates. However, these are advisors only. They cannot act on participants' behalf concerning evidence or the substance of letters of comment.

6.3. Intervenors are "interested person[s]" who establish a recognized interest in a proceeding pursuant to section 28 of the CER *Rules of Practice and Procedure*. They must "establish [es] that the interest justifies intervenor status in the proceeding."[30] Intervenors are expected to be committed over the entire hearing process if they want to be involved.

All participants should expect a formal procedure. But is not always necessary to have legal representation. Like commentators, intervenors can get help from the CER Process Advisors. Participation costs to cover intervenors' time spent, travel, and communication (Section 6.4 below) may be available upon application. Intervenors can present evidence (to support views) in hearings and can question applicants and other parties.

A third alternative that has been used by the CER Commission in some hearings is permitting participants to make brief oral statements without becoming intervenors. The applicant or other parties may question them.[31]

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[27] *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208, s 2 <https://canlii.ca/t/l9fv> [CER *Rules*].
[28] *Ibid*.
[29] *Ibid*, s 30.
[30] *Ibid*, s 28(1)(c).
[31] See CELS, above, note 2, at 10-1126.18.

6.4 Hearing Order

There is a generally recognized template for hearing steps, though for each hearing, these and other matters will be specified in a hearing order. This template is broadly similar to those used by other energy regulators including the Alberta Energy Regulator (AER).

To summarize:

1. Presiding Commissioner makes an opening statement, then parties are formally registered.
2. Applicant presents its case – its witnesses are cross-examined by the parties including intervenors.
3. Intervenors and other parties present their cases - their witnesses are cross-examined.
4. Applicant can reply to new matters that came up during cross-examination.
5. Comments by parties on draft conditions issued by the Commission.
6. Parties, beginning with the applicant, then Intervenors, present final argument.
7. Applicant makes a final reply argument.

6.5 Participant Funding

For individual citizen and group intervenors, funding may be available to cover participation in major pipeline applications[32] and land damage and compensation matters.[33, 34] This includes personal preparation, and evidence presentation including reviewing the application and the written record, preparing submissions, hearing time, coordination (where more than one interest is represented), legal and expert witness fees, and travel expenses. There is emphasis on relevance, and coordination to avoid duplication of funded participation.

This funding program is not the same as cost awards to successful parties in judicial proceedings.[35] CER funding is a public program ultimately supported by the industry that assists public participants regardless of outcomes.

Funding will be in the form of a contribution agreement. Advance funding may be provided but is limited to current year estimated cash flow requirements or 75% of the total funding provided. There are overall limits (December 31, 2021) of $12,000 for individuals and $80,000 for groups.

[32] See CERA, Participant Funding <https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/participant-funding-program/participant-funding-guide.html>; CERA, above, note 3, ss, 52, 75, 243(3).
[33] *Ibid*.
[34] *CERA*, above, note 3, s 241(3).
[35] CER has no authority to award costs: *Reference re National Energy Board Act (Canada)*, [1986] 3 FC 275 (FCA) <https://canlii.ca/t/gb6kf>.

6.6. Alternative Dispute Resolution

Instead of proceeding to a hearing, parties to a proceeding may, at the instance of parties or the CER, agree instead to engage the CER's Alternative Dispute Resolution Process.[36] This may be to address a complaint at any time during the life of a project - from construction to operation, reclamation and abandonment. Examples include property damage and land reclamation.

It is a form of mediated negotiation with a mediator chosen from a roster maintained by the CER. After agreement to use ADR, it begins with a pre-ADR meeting to identify issues and discuss costs, to which companies normally contribute. This leads to an agreement to mediate. Parties will present their positions and the mediator will consider alternatives raised and ultimately issue a decision binding on the parties. This may be incorporated in a CER decision or recommendations.

7 Commission Report and Governor in Council Decision

After receiving and considering the Commission's report on a certificate application, the GIC makes the final decision, either accepting an approval recommendation, referring it back to the Commission for reconsideration, or rejecting the approval recommendation and directing the Commission to dismiss the application. Similarly, it may accept or reject a recommendation not to issue a certificate. In either case, **the GIC must set out reasons**, that, "demonstrate that the GIC took into account all the considerations referred to in subsection 183(2) that appeared to the Governor in Council to be relevant and directly related to the pipeline."[37] This recommendation must take into account whether the pipeline "is and will be required by the present and future public convenience and necessity…"[38] It must be reasonable, providing a basis for the final GIC decision.[39]

At this political level, the GIC will not hold a public hearing or otherwise offer opportunities for participation. But there must be at least brief reasons that show a reasonable basis for the decision.[40]

8 Land Requirements

Land issues have received considerable attention. After a certificate is granted, if affected landowners who oppose a proposed detailed pipeline route, or other persons who anticipate that their lands may be adversely affected, file a written statement explaining their interest and grounds for their opposition, the Regulator must hold a public hearing.[41] These persons have a right to be heard, to receive a notice of the decision and reasons, and to have their participation costs paid by

[36] CER, Alternative Dispute Resolution <CER – Alternative Dispute Resolution (cer-rec.gc.ca)>.
[37] *CERA*, above, note 3, s 186(2).
[38] *Ibid*, s 183(1)(a).
[39] See *Tsleil-Waututh Nation*, above, note 11. Reasons for this recommendation must be given: *ibid*.
[40] *CERA*, *Ibid*.
[41] *Ibid*, ss 202(3)-(4).

the pipeline company.[42] Increasingly, there have been hearings on applications for pipeline and related facilities abandonment.

The CER has a land matters advisory service, a Land Matters Guide,[43] and a "Guidance on Land Related Compensation Disputes" document for landowners whose land is or is likely to be affected by a pipeline or powerline project. There is a land compensation scheme with a system for fairly compensating affected landowners for damage caused by pipeline construction, operation, and abandonment. This includes Commission power to issue right of entry orders subject to advance compensation where a landowner and a company have not yet agreed on final compensation and signed an acquisition or lease agreement.[44]

A **Land Matters Group** (LMG) is intended to exchange information with the CER. Members of the public can register with the LMG indicating interests as a landowner, association or group, government, regulated company, land professional, or subject expert. There is also a **Land Matters Group Advisory Committee** (LMG AC) LMG consisting of up to 12 members in government or industry senior management, or land professional roles.

9 Reasons for Decision

As noted in section 7 above, for certificate decisions,[45] the Commission (or the *IAA-CERA* Joint Review Panel) must provide reasons for certificate recommendations. Reasons are also required for detailed routing decisions.[46] They must clearly show that the Regulator has exercised its powers under the *CERA* and has considered and weighed the evidence.[47] The GIC will release brief reasons.[48]

10 Discretionary Policy Development and Rule Making Consultation

The CER Commission has a broad inquiry power. It may, on its own initiative, inquire into, hear, and determine any matter under the *Act*.[49] This includes accidents involving pipelines, powerlines, or other facilities. It can then make recommendations or decisions it has the power to make under the *Act*.[50] This includes the power to decide all matters of law or fact.[51]

Inquiries can be broad public consultations, such as the late 2021 *Onshore Pipeline Regulations* renewal online consultations. They can also be more specific like the 2021 Request for Comment

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[42] *Ibid*, ss 205-206.
[43] CER Land Matters Guide <CER – Land Matters Guide (cer-rec.gc.ca)>.
[44] *CERA*, above, note 3, ss 324-325.
[45] *Ibid*, s 183(1)(a).
[46] *Ibid*, s 205.
[47] *Flint Hills Resources Ltd v Canada (National Energy Board)*, 2006 FCA 320 <https://canlii.ca/t/1prx3>.
[48] See *Tsleil-Waututh Nation*, above, note 11.
[49] *CERA*, above, note 3, s 33.
[50] *Ibid*, ss 32-33.
[51] *Ibid*, s 32(3).

on the regulatory proposal concerning Regulator cost recovery for powerlines, or very specific concerning, for example, pipeline accidents and spills.

In these inquiry and public consultation processes, there is discretion to hold public hearings using procedures the Regulator chooses. This includes written submissions only, without procedural fairness procedures relevant to certificate hearings, except potentially for parties likely to be directly affected by inquiry findings and recommendations.

11 Judicial Review and Appeal Rights

Under section 188(1) of the *CERA*, a GIC order on a pipeline certificate application is subject to judicial review by the FCA with leave (sought within 30 days of the issue arising) of a judge of that Court. This could include substantive grounds such as alleged statutory interpretation errors as well as alleged denial of procedural fairness. There is also a right of appeal to the FCA with leave of that Court from Commission decisions on questions of law or jurisdiction.[52] In principle, this would include, for example, hearing process decisions restricting the scope of participants' evidence, or specific procedural fairness issues such as production of information by parties. Not all decisions can be judicially reviewed. Where there has been a GIC decision on a pipeline certificate, only that decision and not the Commission or Review Panel recommendation can be challenged.[53] A difference between appeals and judicial review is that for the latter, the standard of review is deferential reasonableness rather than the more intrusive correctness standard that SCC cases suggest applies to appeals (Section 13 below).[54]

An example is *Raincoast Conservation Foundation v Canada (AG)*,[55] which was a judicial review application under the *NEB Act* to the FCA challenging the GIC's decision to approve the Trans Mountain Expansion pipeline for a second time following a reconsideration hearing. This was after certificate invalidation by the FCA. In *Raincoast*, Justice Stratas noted that "leave must be sought quickly so that projects approved by the Governor in Council will not be unnecessarily held up."[56] Criteria for granting leave can be deduced from relevant statutory provisions and Parliament's purpose in requiring leave.[57] According to Justice Stratas,[58] a party seeking leave must show:

[52] *Ibid*, s 72.
[53] *Gitxaala Nation*, above, *note* 7.
[54] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) <https://canlii.ca/t/j46kb> [*Vavilov*].
[55] 2019 FCA 224 <https://canlii.ca/t/j28lp> [*Raincoast*].
[56] *Ibid*, at para 11.
[57] *Ibid*, at para 9. Justice Stratas stated, "Parliament's purpose is plain: a project is not to be hamstrung by multiple, unnecessary, long forays through the judicial system."; *Ibid*, at para 12.
[58] In the absence of specific statutory criteria. *Ibid*, at para 9.

A "fairly arguable case" that warrants "a full review of the administrative decision, [with all] the [available] procedural rights, investigative techniques and, if applicable and necessary, [all the] evidence-gathering techniques [that are] available."[59]

In assessing whether parties' presented a "fairly arguable case," Justice Stratas explained the extent of judicial deference, "margin of appreciation" or "leeway factor," that must be taken into account.[60] The Court expanded this, noting that three ideas must be kept in mind: "fulfilment of the gatekeeping function," "the role of deference," and "practicality matters," including whether alleged flaws are minor and whether it is clear that should the decision be overturned the same decision would be made.[61]

The GIC decision, for standard of review purposes, was characterized, as "discretionary … based on the widest considerations of policy and public interest."[62] Further, the general law barring relitigation played a role. Parties should not be permitted to raise essentially the same issues about the original GIC decision that they litigated in *Tsleil-Waututh Nation*.[63] In particular, the CER (NEB), in its reconsideration process, did fully consider and report to the GIC on the project related marine shipping impacts and related environmental matters that the *Tsleil-Waututh Nation* Court found that the Board had failed to assess.[64]

It is noteworthy that FCA practice has been to normally not give reasons for denial of leave to appeal. However, in the *Tsleil-Waututh Nation* leave application, Trans Mountain and supporting AGs took no position on leave, so that the Court was left without contrary arguments. The Court encouraged AGs to participate as intervenors, and Alberta (but not BC) did so. In these circumstances the Court explained that it issued reasons as a matter of discretion.[65]

NOTE ON JUDICIAL REVIEW AND APPEAL

Under the *CERA*, CER procedural decisions and some other decisions may he appealed (with leave) to the FCA,[66] while GIC final certificate decisions,[67] and some other Commission decisions and orders, such as detailed routing decisions, may be challenged by judicial review (with leave) in the FCA. In a sense this can be a kind of formal citizen involvement through the judicial process. Because both forms of challenge are limited to **questions of law and jurisdiction** (and not, for example, factual matters), unless palpable and overriding error is alleged, potential appeal or

[59] *Ibid*.
[60] *Ibid*, at para 17 (discussed below).
[61] *Ibid*, at para 16.
[62] *Ibid*, at para 19, citing *Tsleil-Waututh Nation*, above, note 11 at paras 206–223 and *Gitxaala Nation,* above, note7 at paras 140-144.
[63] *Ibid*, at para 25.
[64] *Ibid*, at para 64.
[65] *Ibid*, at para 6.
[66] *CERA*, above, note 3, s 72.
[67] *Ibid*, s 188.

judicial review grounds will be very similar. However, in principle, the scope of common law judicial review may be broader because appeal rights come only from statutes.

There may also be internal appeals including review and variance applications,[68] and appeals from decisions of inspection officers to the Commission.[69]

12 Standing

There are two standing situations for potential citizen participants. First, in CER proceedings standing is based on the *CERA*, the CER *Rules*, and Panel decisions in specific hearings as discussed above (Section (6.1)). This is why the *CERA* language, much more inclusive than the "adversely affected" test in the predecessor statute, is so important.

Second, for standing to appeal or to seek judicial review, citizens must have a "sufficient connection" with the matter in issue. Active participation in the Commission or Review Panel hearing process is a significant factor, as is the relative importance of citizen rights affected. There is also potential for discretionary public interest standing where citizens can demonstrate a genuine interest in the matter, and there is no better way to get the matter before a court.[70]

An example is *Forest Ethics Advocacy Association v Canada (National Energy Board)*,[71] where the FCA denied standing to Forest Ethics, an environmental advocacy group, on the ground that the NEB decisions did not affect its rights, impose legal obligations on it, or prejudicially affect it. Nor did it have public interest standing based on having a "genuine interest" where there was no other reasonable and effective way to bring the matter before the court. The Court characterized Forest Ethics as a "classic busybody," adding:

"Forest Ethics asks this court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions."[72]

However, when standing was raised in relation to three NGOs challenging GIC approval of the proposed Northern Gateway pipeline in *Gitxaala Nation*,[73] the FCA reviewed *Forest Ethics* and concluded that "the circumstances are completely different in the case at bar."[74] This was based on the parties having "legal or practical issues sufficient to maintain proceedings." In particular, they were active intervenors before the NEB/Federal Environmental Assessment Review Office Joint Review Panel, and each had sufficient involvement in relation to the pipeline.

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[68] *Ibid*, s 69.
[69] *Ibid*, s 71.
[70] See *Forest Ethics*, above, note 18.
[71] *Ibid*.
[72] *Ibid*, at para 33.
[73] *Gitxaala Nation,* above*,* note 7.
[74] *Forest Ethics*, above, note 18 at para 87.

13 Standard of Review

In administrative law, the standard of review is the extent of deference a reviewing court gives to the findings and conclusions of statutory decision makers including those of the CER and the GIC. For energy tribunals like the CER that are technically, and procedurally sophisticated bodies authorized under their home statutes to make a range of decisions, this means that the usual standard for judicial review for substantive issues has been deferential "reasonableness" rather than the more intrusive "correctness." This includes ministerial and GIC decisions that are part of the statutory decision-making framework.

For natural Justice or procedural fairness issues, the standard has been fairness, taking into account the choice of procedures by bodies like the CER Commission and the GIC and the importance of decisions to affected persons. Where reasons are required, as under the *CERA*, they become a primary source for assessing a decision both in terms of procedural fairness and substantive reasonableness.

In 2019, the SCC[75] endorsed the idea that judicial deference should be presumed for agencies like the CER that operate under a home statute such as the *CERA*. Decisions that are established exceptions (and thus for which the standard is correctness) to this general reasonableness standard include constitutional questions, issues of central importance to the overall legal system, and jurisdictional boundaries between tribunals,[76] but they do not include questions of "jurisdiction," a slippery concept that can include virtually any issue concerning a tribunal's legal authority.[77]

[75] *Vavilov*, above, note 54.
[76] *Ibid*, at para 69.
[77] *Ibid*, at para 65-68.