ENVIRONMENTAL ASSESSMENT PROCESS SUBSTITUTION: A PARTICIPANT'S VIEW

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INTRODUCTION

Panel reviews, rightly or wrongly, are often seen as the ultimate safeguard of public interest in the federal environmental assessment process. These reviews are almost always administered by the Canadian Environmental Assessment Agency, a branch of Environment Canada.

The *Canadian Environmental Assessment Act* provides the federal Minister of the Environment with the power to allow a Review Panel to be substituted by another authority. The Minister first chose to exercise these powers in 2006 amidst pressure to streamline the environmental assessment process from regulatory authorities, provincial and territorial governments and the nuclear, oil and gas industries.

This paper explores the concept of substitution and why Canadians need to look closely at any future move toward increased reliance on substitution as a means of streamlining an environmental assessment. The paper touches briefly on the different ways that the federal government is allowed to work with other jurisdictions, such as joint panel assessments. Since it is the first true substitution of its kind, the 2006 Emera Brunswick Pipeline panel review is looked at in greater detail, especially in view of the public participation aspects of the process. The paper also considers options for changes to environmental assessment in the future and how these may effect public participation.

BACKGROUND

The federal government proclaimed the *Canadian Environmental Assessment Act* (CEAA) on January 19, 1995, with the following objectives:

* To ensure that the environmental effects of projects receive careful consideration before Responsible Authorities (RAs) take action;
* To encourage RAs to take actions that promote sustainable development, thereby achieving or maintaining a healthy environment and a healthy economy;
* To ensure that projects to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out;
* To ensure that there be an opportunity for public participation in the Environmental Assessment (EA) process.

The RA carries out a self-assessment in 99% of the projects submitted for approval under the CEAA. Only in cases of mediation and panel review is the assessment independent, since the Minister of the Environment selects the mediator or panel. In these cases, there is some flexibility of process, providing for "negotiation of harmonized procedures" and

"substitution of a comparable process for a panel review". The Minister of the Environment has the power to substitute processes under subsection 43(1) of the CEAA, which reads:

> Where the referral of a project to a review panel is required or permitted by this Act and the Minister is of the opinion that a process for assessing the environmental effects of projects that is followed by a federal authority under an Act of Parliament other than this Act or by a body referred to in paragraph 40(1)(d) would be an appropriate substitute, the Minister may approve the substitution of that process for an environmental assessment by a review panel under this Act.

The Minister can either initiate substitution or respond to a written request. Approval of a substitution, whether for a single project or a class of projects, must be given in writing.

A substitution may be carried out by a federal authority or any body established pursuant to a land claims agreement that has powers, duties or functions relevant to an environmental assessment.[1] Federal authorities include a Minister of the Crown, any body established by federal statute and accountable through a Minister such as a federal government agency or crown corporation, and federal government departments.[2]

In the Emera Brunswick Pipeline Panel Review, the National Energy Board (NEB) was the federal authority that was substituted for a CEAA Review Panel. Other bodies that are federal authorities and may be considered for substitution purposes include: the Canadian Nuclear Safety Commission (CNSC) in areas such as a new nuclear reactor or storage of high-level radioactive waste; the Canadian Transportation Agency; the Canada-Newfoundland Offshore Petroleum Board or the Canada-Nova Scotia Offshore Petroleum Board, both of which are involved in managing off-shore oil developments.

On a somewhat separate but related issue, there is pressure from some provincial and territorial governments to move from joint or "harmonized" assessments into substitution of their own processes.

In November of 1997, the federal government issued a guideline entitled *Procedures for an Assessment by a Review Panel*, pursuant to paragraph 58(1)(a) of the Act. The guideline contained sections on Harmonization with Other Jurisdictions and Substitution, however other than broadly defining jurisdictions the guideline provided little direction on substitution.

THE MOMENTUM DRIVING SUBSTITUTION

There are genuine concerns across the country with the amount of time and money spent on environmental assessment, though these can mean different things depending on your

[1] See paragraph 40(1)(d), CEAA.
[2] See section 2, CEAA.

perspective. Throughout the Five-Year Review of the Act, which concluded in October of 2003, there was a clamour from much of the industrial sector around "duplication and overlap." There were claims that the federal government was wasting time and money, the processes were overly burdensome and often there were several assessments carried out for the same project.

This pressure came from a variety of sources, such as the Canadian Energy Pipeline Association. In their brief to the Canadian Environmental Assessment Agency (the Agency) in respect to the Five-Year Review, they made the following recommendation:

> The Canadian Energy Pipeline Association notes that efforts at an administrative level to recognize the efficiencies of the substituted process provision through recognition of the NEB EA process have not been successful. This has unnecessarily impeded process efficiency and certainty objectives. To ensure such objectives are achieved, we recommend legislative amendments be introduced to *require* the substitution of other federal EA processes, including the NEB process, for review panels under (the Act).
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> This could be accomplished by authorizing the federal Minister of the Environment or the Governor-in-Council the authority to enact regulations listing federal processes recognized as meeting the substitution criteria and by amending section 41 *to require* the substitution of any such process for panel review.

The Association also mentioned substitution in their section on timeliness:

> We also believe improvements in process efficiency and timeliness would occur if the NEB process is automatically substituted for pipeline projects requiring panel review. This would eliminate the time needed to establish the panel and recognizes the synergies between the NEB legislated obligations and the obligations under (the Act).

The Canadian Energy Pipeline Association did not stand-alone. In the *2006-2007 Report on Plans and Priorities* for the NEB, Chairman Kenneth W. Vollman noted that:

> To achieve regulatory streamlining, the NEB is working with other regulatory agencies and government departments to develop environmental assessment harmonization agreements in order to minimize duplication of efforts and to ensure that the regulatory process meets expectations. The NEB continues to pursue substitution as a means of demonstrating integrated decision making that allows for single-window environmental assessments and execution of the regulatory aspects of is mandate. .

The provincial and territorial governments have also been involved in the push towards some form of substitution. During the Five-Year Review, they provided input to the Agency on Interjurisdictional Cooperation in Environmental Assessment in April 2000.

In that report, they pointed out many instances where the provincial and federal assessments, including harmonization, were causing problems.

> A fundamental flaw in (the Act) is that it can trigger multiple assessments throughout the regulatory phase of a project after both the federal and provincial governments have completed comprehensive environmental assessment reviews. Under provincial EA processes, an approved project implies that the potential environmental impacts have been identified and that the impacts of the project can be managed by regulatory activity. The application of CEAA to projects that have already received provincial review and approval adds another series of bureaucratic procedures that do not enhance the technical merit of an EA of a project. In these cases, CEAA does not contribute to the technical assessment and its bureaucratic procedures often interfere with the technical EA process.
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> Generally, many federal and provincial officials view CEAA as an unnecessary activity that serves as an audit function rather than promoting EA.
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> At the heart of federal-provincial/territorial cooperation has been the belief that CEAA needs to recognize that existing provincial/territorial EA regimes are vital to the integrity of environmental harmonization. The role of the CEAA process is to complement and bridge gaps between the federal and provincial/territorial EA legislation rather than to supersede or replace the provincial/territorial EA legislation. These principles need to be reaffirmed and incorporated in a meaningful way into the review of CEAA.

Not surprisingly, the federally-appointed External Advisory Committee on Smart Regulation also supports substitution. In Recommendation 59 of the 2004 final report, the Committee says that "The Canadian Environmental Assessment Agency and potential substitute authorities, such as the National Energy Board, should negotiate an agreement to enable substitution when an environmental assessment by a review panel and other project approval processes are both required."

Some industrial sectors and governments are looking at substitution to provide surety of process, though this is not necessarily a supportable conclusion. The phrase "timeliness, certainty and predictability" seems to have developed a life of its own. In her remarks to the *Departmental Performance Report* of the Canadian Environmental Assessment Agency for the period ending March 31, 2006, former Environment Minister Rona Ambrose noted "In November 2005, the Agency announced an action plan to strengthen the accountability and integrity of the federal EA process. As such, the new *Cabinet Directive on Implementing the Canadian Environmental Assessment Act* creates a framework within which federal authorities can exercise their respective powers, duties and functions established under the *Canadian Environmental Assessment Act* and its regulations, in a manner that encourages timeliness, certainty and predictability."

While there is nothing inherently wrong with any of these terms, to put them forward without clear definitions suggests that we may be heading down a path full of

obstructions. Especially in the area of timeliness, a bridge builder seeking a permit and a fishing community trying to protect their resources may have very different definitions for the word.

All aspects of the business community seem to be getting involved. Blake, Cassels and Graydon, LLP, one of Canada's leading business law firms, posted an article on their web site in May of 2006 entitled *Does the NEB Constitute a Substitute Process under CEAA?* The article stated that,

> For years now, the National Energy Board (NEB) has not been authorized as a "substitute process" that would satisfy the requirements of the Canadian Environmental Assessment Act, despite the NEB's requests. Recently, however, the Canadian Environmental Assessment Agency has indicated it will recommend to Minister Ambrose that she approve the substitution of the NEB process for a review panel environmental assessment, for the proposed "Brunswick Pipeline Project", a facility expansion planned by Maritimes & Northeast Pipeline. The NEB has confirmed its commitment to the Agency that it will satisfy all the Agency's conditions of the substitution. Given the new leadership at the Agency, this trial run could lead to a more permanent "class" delegation to the NEB and a more streamlined federal facilities approval process.

There is no doubt that a certain amount of duplication and overlap have occurred and will continue to occur, though it is still not clear at what levels. In fact, it seems that the whole issue might be overblown. In August 1999, the Canadian Environmental Assessment Agency (the Agency) commissioned a report on *Multi-Jurisdictional Environmental Assessments* in preparation for the Five-Year Review. David Lawrence summarized projects subject to CEAA review from April 1995 to March 1996 and found that "A large majority of projects (98 percent) subject to the Act [CEAA] were not subject to provincial EA legislation. Both levels of government assessed only about two percent of projects. Overall 7.5 percent of projects subject to EA under provincial legislation also were subject to review under the Act." He concluded that,

> EA duplication is rare, sometimes positive and avoidable where there is a will on the part of the parties involved.
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> In those limited instances where two jurisdictions have legislated EA responsibility for the same project, overlap problems often do occur. Sometimes overlap problems inhibit the quality, efficiency and effectiveness of Federal and provincial EA practice. Only a small proportion of Federal and provincial environmental assessments are subject to Federal and provincial EA requirements. Most provincial environmental assessments, for major projects, involve participation by both governmental levels. EA overlap concerns vary by jurisdiction, Federal agency and department type, environmental component, project type, EA document type and EA component. Measures to prevent and reduce EA overlap concerns should be applied strategically.

Long EA processes are frustrating for everyone involved, not just the government and industrial sectors. This is true whether we're talking about projects that have distinct federal and provincial assessments (generally those without harmonization agreements) or for federally-regulated sectors that already have to go through an additional assessment as part of their approval (such as an oil development going through the NEB process). The key question is, "How do we actually fix the problem of duplication and overlap when it does exist?" Not, "How do we have less federal government involvement in environmental assessment" or "How do we have shorter processes?" Most importantly, we need to address the duplication issue without further degrading an already shaky environmental assessment process.

If in fact overlap and duplication is a real concern in environmental assessment, there have been several other potential solutions identified along with substitution that have been supported and deserve serious consideration. These include a stronger role for the Agency, including a one-window approach to federal environmental assessment, increased federal coordination and improved harmonization agreements. Based on the analysis provided above, it appears that the pressure to simply move the process along without giving equal consideration to the need for high-quality environmental assessments has resulted in the notion of substitution overtaking these other good ideas in terms of priority.

DIFFERING MANDATES

The problem many people have with substitution is that the mandates of the bodies that could be carrying out or administering the environmental assessments are very different from that of the Canadian Environmental Assessment Agency. This should not be taken as a criticism of any of the regulatory authorities or provincial/territorial governments. These regulatory processes have a critical role to play in the development and oversight of a project, but they were not designed to be planning processes in the way that the CEAA contemplates.

The Agency's website proclaims a mandate "to provide Canadians with high-quality environmental assessments that contribute to informed decision making, in support of sustainable development." That mandate, and the leadership the Agency has shown in many high-profile environmental assessments across the country, is why most Canadians feel that their best chance of having an opportunity for meaningful public participation is a panel review.

The NEB's mandate is "to promote safety and security, environmental protection and economic efficiency in the Canadian public interest within the mandate set by Parliament in the regulation of pipelines, energy development and trade. Under this mandate, the Board's role is to both protect and enable in the public interest. In its enabling role, the Board meets its mandate through providing a clear regulatory framework and efficient regulatory processes and practices so that projects found to be in the public interest can proceed on a timely basis. At the same time, the Board must protect the things that are

important to Canadians: the integrity of our environment, respect for individual property; public safety and security, and effective market function."

According to the NEB website,

> The main functions of the NEB include regulating the construction and operation of pipelines that cross international or provincial borders, as well as tolls and tariffs. Another key role is to regulate international power lines and designated interprovincial power lines. The NEB also regulates natural gas imports and exports, oil, natural gas liquids and electricity exports, and some oil and gas exploration on frontier lands, particularly in Canada's North and certain offshore areas. The NEB also provides energy information and advice by collecting and analyzing information about Canadian energy markets through regulatory processes and monitoring. By constantly striving for excellence throughout this broad spectrum of activities, the NEB works hard to achieve its purpose of promoting safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest.

Similarly, the Canadian Nuclear Safety Commission is another creation of Parliament, and is mandated to do the following:

- regulate the development, production and use of nuclear energy in Canada;
- regulate the production, possession, use and transport of nuclear substances, and the production, possession and use of prescribed equipment and prescribed information;
- implement measures respecting international control of the development, production, transport and use of nuclear energy and nuclear substances, including measures respecting the non-proliferation of nuclear weapons and nuclear explosive devices; and
- disseminate scientific, technical and regulatory information concerning the activities of the CNSC, and the effects on the environment, on the health and safety of persons, of the development, production, possession, transport and use of nuclear substances.

Another area that illustrates the differences is in the selection of review panel members. Under CEAA, panel members are not employees of the federal government in their capacity as panel members and receive only a stipend while participating in an assessment. Generally, individuals are asked to participate on a particular review panel because they have some relevant expertise and they are recognized as upstanding citizens in their community. Review panel members are selected from a long list of individuals who have asked to be considered for this task. Many review panel members will serve on only one or two panels.

In the case of the NEB, the panel members for a particular hearing are members of the full NEB. The NEB has 9 permanent members, including a chair and vice chair and two temporary members. These individuals are employed by the NEB, an independent

federal agency considered to be part of the "federal family." Members of the NEB receive a salary and will participate in numerous hearings during the course of their career with the NEB.

The backgrounds of panel members can be vastly different as well. A look at the NEB shows a membership with strong ties to the oil and gas industry. From the NEB's perspective, this is probably quite logical. Panel members for CEAA reviews often have a broader scope of interests and backgrounds. Though the fixed link panel review was pre-CEAA, it operated in much the same way. The five-member panel, chaired by a fisheries consultant, included a structural engineer, an oceanographer, a community development/tourism operator and a writer/researcher with a focus on land use issues. For most, if not all of these members, it was their only panel experience. Their strong ties to the community and varied backgrounds helped produce a report that was well-accepted even by those opposed to the fixed link.

There is no question that given these differences, and the difficulties many people already experience in ensuring that public participation is indeed meaningful, there is cause for concern. As well, there is at least an appearance of bias in allowing regulatory bodies to carry out these assessments. The same holds true with provincial and territorial governments. Some assessments could be quicker and smoother if run by provincial staff with both capacity and a track record of building public trust. Unfortunately, that is not always the case. In some areas, the capacity is just not there, while in others, large developments tend to be very political matters and would have at least the appearance of conflicting interests.

EMERA BRUNSWICK PIPELINE - RESULTS OF A PILOT SUBSTITUTION

The Emera Brunswick Pipeline Project proposes to construct a 145 km natural gas transmission pipeline from a liquefied natural gas terminal in Saint John, N.B. to the U.S. border in St. Stephen, N.B. The proposal triggered a comprehensive study under the *Canadian Environmental Assessment Act* (CEAA) and required a Certificate of Public Convenience and Necessity under the *National Energy Board Act*. A portion of the proposed pipeline route runs through Rockwood Park a 890 hectare park located five minutes from downtown Saint John. Public concern over the proposed pipeline's 31 km route through Saint John was significant and was demonstrated in a petition signed by over 15,000 people. Citing this public concern and the support of other Responsible Authorities the Chairman of the National Energy Board (NEB) made a request to the Minister of Environment on March 16, 2006 to have the assessment referred to a Review Panel.[3] This request was accepted by the Minister of Environment on May 4, 2006.

The NEB Chairman made a second request in the same March letter, to substitute the CEAA Panel Review with the NEB Regulatory Hearing Process. The NEB Chairman recognized that this would be the first exercise of the CEAA substitution provisions and

[3] The request was made in writing in accordance with section 25 of the *Canadian Environmental Assessment Act.*

indicated that this might serve as a 'test' of the substitution process. The Minister of Environment accepted the request following consultation with certain federal departments and agencies.

The substitution decision came to the attention of the public through a generic public announcement issued by the Minister of Environment in May 2006. CEAA does not require consultation on this decision and the Agency chose not to provide any public opportunity to comment on the decision. As well, the public was not given any explanation of substitution or direction on how it would differ from a regular CEAA Review Panel process.[4]

Most members of the public who engaged in the Emera Brunswick Pipeline hearings entered into the process with little or no understanding of either the CEAA Review Panel process or the NEB Regulatory Process. The NEB held four public information sessions prior to the hearings but substitution was never emphasized or explained during the public information sessions and the Agency staff did not make themselves available at those sessions to answer questions.

Substitution

In the case of a substitution by a federal authority the Minister is required to determine that the process for assessing environmental effects is an appropriate substitute for an assessment by a Review Panel. CEAA further requires that the substitution meet the following four criteria:

- include consideration of section 16(1) and (2) factors;
- give the public an opportunity to participate;
- include a report to the Minister of Environment; and
- publish the report.[5]

Paragraph 58(1) (g) of CEAA provides regulation-making authority to develop criteria for substitution.[6] There were no criteria developed for the Emera Brunswick Pipeline hearing. If such criteria had been developed for the Emera Brunswick substitution and the public were invited to review and comment on those criteria, much of the confusion that surrounded the hearing process may have been alleviated and intervenors would be in a much better position to evaluate their experience.

CEAA does not define the term substitution and is silent on the role of the Agency in a substituted process. Although the Act does not require it, the Minister of Environment and the Agency took a completely hands-off approach to this pilot substitution project.

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[4] This paper refers to the "regular' CEAA Review Panel in recognition of the fact that there are many iterations of a Panel Review encompassed within the CEAA.

[5] See *Canadian Environmental Assessment Act*, ss.43-45. These can be found in Appendix A.

[6] 58(1) For the purposes of this Act, the Minister may (*g*) establish criteria for the approval of a substitution pursuant to section 43;

During the course of the NEB hearings there was considerable misunderstanding around the final decision-making process. The fact that the substitution provisions apply only to the Review Panel and not any other aspect of CEAA was never explained to the public. Adding to the confusion, the NEB staff members who attended public information sessions did not appear to understand the role of CEAA in the decision-making process and therefore could not answer questions about how decisions would ultimately be made. Questions were referred to the Agency, which was not represented at the public information sessions.

The fact that Agency staff did not participate in public information sessions and there was no information readily available on the substitution process made it particularly puzzling for intervenors in the NEB hearing to learn that the Agency was responsible for the provision of participant funds. Although the funds were greatly appreciated by those engaged in the process, the requirement to work with what appeared to be a completely unrelated agency for financial support created confusion.

The Agency did not participate in any of the public information sessions to explain the role of participant funding, how to apply for participant funding or answer questions from members of the public on participant funding. Furthermore, the timelines established for the delivery of funds by the Agency were not coordinated with those established by the NEB for submission of information requests and evidence.

For example, one of the intervening groups received a first instalment of funds from the Agency on August 25, 2006, while the deadline for submission of information requests on the Emera Application was 10 days earlier (August 15, 2006). The intervening group had no funding available to hire experts to assist them in review of the Application. Furthermore, the final deadline for submission of evidence for the hearing was September 13, 2006, a mere 12 business days after funds were received.

Several intervenors sought an adjournment of the proceedings to allow them time to prepare evidence after their funding was received. The NEB denied this request and provided only a 7 day extension, to certain intervenors, for the submission of evidence This meant that rather than having only 12 business days to hire experts, brief the experts, obtain a report, review the report and submit it to the NEB, intervenors had 18 business days to complete these tasks.

Arguably if the participant funding and the hearing process were governed by the same agency there would have been greater recognition of the difficulties imposed on the public participants when funding and timelines were not well coordinated. The fact that the Agency provided participant funding suggests that funding for pipeline hearings under the NEB Act was not considered to be sufficient to meet the public participation requirements outlined in CEAA.[7]

[7] The National Energy Board Act does include provisions that enable the Board to provide funds to cover the "actual costs reasonably incurred by any person who made representations to the Board at a public hearing." See section 39 as one example.

Relative to other Review Panels and Joint CEAA/NEB hearings the 18 business day timeline appears to be unprecedented. Intervenors in the Sable Gas hearings raised concern over the four month timeline between receipt of funding and submission of evidence.[8] Participants in the Whites Point Quarry Review Panel received funding almost one year before comments on the EIS had to be submitted.[9]

Participants must also be aware that the NEB may refuse to recognize a party as an intervenor if the party is unable to show it would be affected by the Board's decision. The NEB accords intervenor status to public groups, such as environmental associations, at their discretion. The fact that the NEB could refuse to recognize an environmental group or other public interest group because they are not considered by the Board to be sufficiently affected by the decision is at odds with the role of EIA in assuring broad public interests, such as environmental protection and public health protection, are represented in the planning process. This limitation does not exist in a regular CEAA Review Panel process and is in fact one of the key reasons why environmental impact assessment legislation was created.

Challenges to Effective Public Participation in the NEB Regulatory Hearing Process

There were a number of impediments to effective public participation in the Emera Brunswick Pipeline hearing process. This case study will focus on four of those impediments: (1) Lack of pre-hearing consultation; (2) The need for legal representation; (3) Narrow timelines and heavy-handed schedules; (4) The quasi-judicial process, particularly the rigours of cross-examination.

(1) Lack of Pre-hearing Consultation

Consultation during a Review Panel process can vary however; it is generally standard practice to consult members of the public on the scope of the assessment and the guidelines for the Environmental Impact Statement (EIS Guidelines). In the case of the Emera Brunswick Pipeline process the public were given an opportunity to comment in writing on the scope of the assessment, although the NEB made no amendments to the scope following the consultation.

The NEB did not provide members of the public with any opportunity to review or submit comments on the EIS Guidelines. The NEB regulatory process does not require the Applicant to develop a specific set of Guidelines for the project but rather relies upon the generic NEB Filing Manual to direct the Applicant on all aspects of their application. This is a clear departure from the regular CEAA Review Panel process and fundamentally limits early opportunity for members of the public to be engaged in the planning for the development of the EIS. In the regular CEAA Review Panel process the Panel members and the public become very involved in the review and refinement of the EIS Guidelines. This process enables the Panel members to become thoroughly

[8] See Fitzpatrick, P. and A.J. Sinclair, 2006. Multi-jurisdictional Environmental Assessment at pg. 170
[9] For information on the Whites Point Quarry Review Panel process refer to http://www.wpq-examenconjoint.ca/site/article.php3?id_article=2&lang=en

knowledgeable of the EIS requirements and to become familiar with the key environmental aspects of the project. It is ultimately the responsibility of the Panel to ensure that the EIS requirements are appropriate for the proposed project and that the proponent meets those requirements.

During the development of the EIS Guidelines for the White's Point Quarry EIA members of the public had 60 days to review and comment on the draft EIS Guidelines, including a series of scoping sessions where the Review Panel received oral and written comments directly from the public. The draft EIS Guidelines were substantially revised following public comment. The panel chair, Dr. Bob Fournier commented, "The quality of submissions brought forward by the public for this project was impressive. The Panel found the public scoping meetings along with the information gathered to be extremely valuable in helping to identify the issues".[10]

The NEB held four public information sessions in Saint John in preparation for the hearings. The first session held in March was to explain the regulatory process. It was very well attended (over 300 public participants). Many participants indicated following the session that they found the explanations provided to be "confusing, wordy, bookish and too formal." Many also indicated that they did not come away from the session with a solid understanding of what the process entailed.

Following this session one of the intervenors contacted an NEB staff member to explain some of the problems with the information session. The NEB staff member was very open, listened to the concerns and agreed that there were issues to be resolved.

The next NEB information sessions were scheduled for June 19 and 20, 2006. Attendance for these sessions was very low, particularly the first session which had only 6 persons in attendance. Part of the reason for the low attendance on the 19th of June was a conflict with a large related public event that drew many interested participants away from the NEB session. The NEB was informed of this conflict prior to the session but refused to amend the schedule. A second reason for low attendance probably stems from the fact that it was not advertised in the local newspaper, the Telegraph-Journal. Apparently a block advertisement was to have been placed in the Telegraph-Journal prior to the sessions but it had inadvertently been sent to the wrong address.

The final information session was held on October 12, 2006. It was a pre-hearing planning session and an opportunity for members of the public to meet the Board members that would be conducting the hearing. Approximately 50 individuals attended the evening session. There were at least three plain-clothed police officers present at the session, at the request of the NEB. Members of the public found this to be intimidating and inappropriate. No explanation was provided for the presence of the officers. When a

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[10] **Whites Point Quarry and Marine Terminal Project: Joint Review Panel issues final Environmental Impact Statement Guidelines News Release, March 31, 2005.**

member of the public requested that they be asked to leave, the NEB complied with the request.

(2) The Need for Legal Representation

The quasi-judicial NEB Regulatory process is formal and complex. Members of the public who wish to fully participate in the process must register as intervenors. An intervenor is required to file motions, prepare and submit affidavits and evidence, cross-examine witnesses, be prepared for cross examination by lawyers, produce rebuttals and offer final arguments. During the information sessions on the NEB hearing process, intervenors were not encouraged to engage lawyers to represent them at the hearing. However, the NEB public information bulletin recognizes that the hearing process favours legal representation. Information Bulletin #4 states, "Because of the complexity of legislation involved and the quasi-judicial nature of NEB hearing, intervenors may wish to be represented by legal counsel." It goes on to say that, "…it is by no means necessary."[11]

As they became more familiar with the NEB process, certain intervenors recognized that they would have a difficult time effectively participating in the hearing without legal representation. However, the NEB provides no funding for legal representation at the hearings. The only funding available to the public was the participant funding through the Agency. Legal advice is categorized as a low priority in participant funding applications, and legal representation is not mentioned in the funding application. When a law firm agreed to represent the intervenors they requested permission to use some of their participant funds for that purpose. In an email from Agency staff they discouraged the hiring of a lawyer particularly as a representative at the hearings.[12]

One of the intervenors ultimately convinced the Agency to fund the participation of professional geologist who had some experience with NEB processes to serve as their agent during the hearings. The message from the Agency appeared to be that an intervenor will not be funded to hire a lawyer but they can receive funds to hire someone who is not a lawyer to represent them as an "agent" performing all of the functions of a lawyer.

This quasi-judicial approach to EIA is not contemplated by the CEAA. The regular Review Panel process prides itself on creating open and informal opportunities for interested parties to present their comments and concerns. The process is structured and guided by the Panel chair but it does not lend itself to legal representation. In this context it entirely makes sense for Agency staff to discourage the use of participant funds to hire legal representation, however, the NEB process and the CEAA process are fundamentally different in this way.

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[11] National Energy Board, Information Bulletin # 4, page 1

[12] An email received by the intervenor included the following statement: "The costs for legal advice are eligible under the program, but legal representation at public hearings and other public participation events is not encouraged." Email from Suzanne Osborne, Participant Funding Program, CEA Agency.

(3) Narrow Timelines and Heavy-handed Scheduling

The NEB Regulatory process establishes narrow windows of time for review of and response to documentation. Such an approach may be very efficient but only intervenors with full-time staff members available to prepare and submit information can work effectively in this environment. In an effort to make the timelines more generous for public participants in the Emera Brunswick Pipeline hearing one of the intervenors submitted a motion to have all information requests and responses to information requests carry a preparation period of not less than 15 business days. The NEB promptly denied this notice of motion.

Although the NEB's quasi-judicial process appears to be highly structured, intervenors learned during the pre-hearing process that evidence could in fact be submitted after the deadline. The evidence would be accepted by the Board unless it was challenged by the Applicant or another intervenor. This insight into the NEB process was not provided by NEB staff but rather via an independent expert who had experience with NEB hearings. This loophole in the NEB process encourages participants to risk valuable participant funding when narrow timelines cannot be met.

The NEB Regulatory process uses a standard hearing schedule that generally does not accommodate the fact that most public participants are volunteers with other careers and occupations. In the case of the Emera Brunswick Pipeline, hearings were scheduled to run from November 6 – 20, 2006. Public intervenors asked that sessions run during the afternoon only to allow them an opportunity to prepare in the morning, given they had no staff support. This request was not met and the hearings were scheduled from 9:00 am to 6:00 pm each day, with the exception of a ½ day on Saturday and no hearings on Sunday. A few days into the hearings the NEB determined that they were not progressing quickly enough. To deal with this they chose to extend the daily schedule rather than extending the period for the hearings. They also decided that it would be appropriate to hold hearings on the afternoon of Remembrance Day (a statutory holiday) in order to make-up time. Many of the hearings days were then scheduled to run from 9:00 am to 9:00 pm with brief breaks for lunch and dinner. Intervenors complained on the record and several asked why the hearing dates could not be extended. The Board's only response was that the hearings were to end on November 20, 2006 and that is when they would end.

By the middle of week two of the hearings the Board determined that they would be able to complete the sessions within the expected time frames so they amended the schedule once again taking the hearings back to 9:00 am to 6:00 pm days. Intervenors were often left scrambling to accommodate the mid-hearing changes made by the Board.[13]

(4) The Quasi-judicial Process and the Rigors of Cross-Examination

As discussed above, full participation as an intervenor in an NEB hearing is all-consuming, complicated and cumbersome. Members of the public who were not comfortable in this quasi-judicial forum were given the option to submit a letter of

[13] A summary of the hearing schedule can be found in Appendix B.

comment or provide an oral statement to the Board in a separate less formal process. Although this allowed informal participation it created the perception that the playing field was not level. Those members of the public who did not feel comfortable participating as intervenors were seen to have less legitimate concerns than those who became intervenors. This even carried over to the hearing order, which stated ,"In determining the weight to be given to these comments, the Board may take into consideration the fact that they have not been made under oath or tested by cross-examination." The NEB has decided to solve the concerns raised over the exclusivity created by the quasi-judicial process by creating an add-on hearing so that citizens can have a place to put forward their comments in an informal manner. However, whether or not the comments made in this forum actually form part of the decision-making process is very much open for debate and very difficult to measure.

Another aspect of the quasi-judicial process that impedes the public from full participation is the threat of cross-examination. Proponents of the quasi-judicial process may legitimately argue that the Panel benefits from formal cross-examination as a means of testing the evidence presented. In the context of regulatory and technical matters this is likely the case. However, environmental and socio-economic concerns are the purview of the public and a quasi-judicial process is not only unnecessary, it limits the submission of information to the panel. In the Emera Brunswick Pipeline hearing, the Applicant's lawyer never cross-examined an intervenor or their witness.

Many intervenors did attempt to cross-examine the Applicant's witnesses, though only the government participants were represented by a lawyer. Without litigation experience, few lawyers - let alone members of the public - can effectively cross-examine a witness. The result was a long, drawn-out process requiring numerous interventions by the Board and objections from the Applicant's lawyer.

Providing an opportunity to ask questions of or comment on information provided during a public hearing can add value to the EIA process. Members of the public, technical experts and project proponents can ask relevant and useful questions. However, applying the rigors of cross-examination to the completely uninitiated is intimidating and, as demonstrated by the Emera Brunswick Pipeline hearing not very effective. In a regular CEAA Review Panel process the opportunity to present arguments and raise questions is well-accommodated within a less formal and less intimidating forum.

Summary for the Case

The NEB Regulatory hearing process favours well-financed corporate applicants and intervenors with a considerable staff to maintain, review and process the large amount of written material within very narrow timelines. As well, the quasi-judicial process is tailored to expertise honed by legal professionals. Arguably, the NEB process, as characterized in the Emera Brunswick Pipeline hearings, may meet the CEAA section 43 requirement to provide an opportunity for public participation, it is questionable whether that opportunity fair and meaningful in a way that meets the spirit of CEAA. The

methods of involving the public in a regular CEAA Review Panel process are fundamentally different than the approach used in an NEB hearing.

There is much concern in the amongst non-governmental organizations that if the pilot project on substitution is considered to be a 'success' by the Agency it will set a precedent for the Minister of Environment to virtually dismiss responsibility for a Review Panel on any project that may be 'adequately' assessed via an NEB Regulatory process. These are entirely different processes, both in form and function. The opportunity for members of the public to have a voice in the environmental planning around major oil and gas projects in Canada will be compromised.

FINDING SOLUTIONS

In order to actually fix some of the problems in Canada's system of environmental assessment, it is imperative that political interference be kept to a minimum. Since too many developments in Canada are seen as job creation projects with little emphasis on sustainable development, it is critical that they be judged on their merits, keeping political pressures at bay. As an example, Minister of Indian Affairs Jim Prentice addressed the Canadian Association of Petroleum Producers in May of 2005 when he was a backbencher. His talk was entitled *Mackenzie Delta Natural Gas Development: Opportunities, Obstacles, and Ottawa.* He said that,

> The truth of matters is that there is only one real impediment to the Mackenzie Valley Pipeline and that is the ineptitude of the Federal Government. I call today for the Prime Minister to adopt an approach which I call "project based management" to this Project. I call upon him to appoint a Minister who will be responsible for this project, a Minister who will have the interdepartmental authority to move this project forward, empowered to cross departmental boundaries, negotiate agreements with territorial and First Nation governments, and clear away the financial and regulatory confusion which stands in the way of the project. This approach should be a prototype for other northern projects which are in the national interest.

Many Canadians would find that type of involvement a disturbing development, feeling as though the politics were driving the assessment. Especially for larger projects, Canadians are reliant on at least some form of independent assessment that will safeguard the public interest, including their interest in sustainability.

Solutions will have to come from a variety of actions. Members of the EPA Caucus were active participants in the Five-Year Review of the Act. Though the review did help improve the Act, some of the actions put forward in the *Discussion Paper for Public Consultation* were not fully acted upon and could still go a long way to solving the actual problems in federal environmental assessments.

Harmonization

First and foremost would be improving and completing the harmonization agreements, while assuring meaningful public participation. The present harmonization agreements have not created smooth pathways for assessment, as evidenced by the comments from provincial/territorial governments during the review. A background report on jurisdiction produced in April 2000 by provincial and territorial staff noted:

> Jurisdictional concerns arise in situations where the application of CEAA curtails, circumscribes, prevents or ignores the exercise of provincial jurisdiction. In particular, the federal application of EA interferes at times with the objectives of the resource owners and managers regarding those resources. Such situations often arise with respect to the development of natural resources. They may also emerge in other contexts such as highway construction or the proximity of the project to a national park.

The Ontario Red Hill Creek Expressway environmental assessment serves as an example where there was overlapping federal and provincial jurisdiction that required different levels of government to cooperate which caused problems for all participants.

> **ONTARIO RED HILL CREEK EXPRESSWAY**. "The Region [of Hamilton-Wentworth] filed a second Judicial Review Application on November 15, 1999 challenging the Environmental Impact Statement Guidelines issued by the Panel on October 15, 1999, claiming that they encroach on provincial and municipal responsibilities and that the Panel's Terms of Reference are outside Federal jurisdiction" (Ontario Case Studies: p. 25). "Ontario believes that if a federal assessment is necessary for the Red Hill Creek Expressway, it should be limited to those areas of federal interest which trigger CEAA. Since this is already a provincially approved project, this duplication sets a dangerous precedent for future projects that trigger both the provincial and federal Environmental Assessment Acts. It can be argued that this type of involvement is an intrusion into matters of provincial jurisdiction"

This does not necessarily mean the concerns are all valid - it is simply a recognition that problems exist within these relationships. In *Multi-jurisdictional Environmental Assessment,* a paper by Patricia Fitzpatrick and John Sinclair, the authors noted:

> Many questions about the need for, and practice of, EA harmonization remain unanswered and there is little on-the-ground practice to guide decisions. In fact, the practice may only add to the confusion. In an ongoing multi-jurisdictional dam project case in Manitoba, the province developed guidelines, the proponent submitted its environmental impact statement (EIS), and the provincial Clean Environment Commission hearings commenced. The Department of Fisheries and Oceans, on behalf of the federal government, is waiting for the completion of the provincial assessment *before* they write their comprehensive study. This not only causes confusion for participants, but creates a situation where if the federal

> comprehensive study establishes that there may be significant impacts from the project, a federal CEAA hearing could be required in addition to the provincial hearing. Such confusion, even where a bilateral agreement exists, only makes the EA process more bewildering to the public and brings the utility of harmonization into question.

Here is another look at harmonization from the public side of the aforementioned Red Hill Expressway assessment. Don McLean made a submission to the Agency during the Five-Year Review for the Friends of Red Hill. He expressed his concerns about the overlapping jurisdiction.

> There is much talk about harmonizing federal and provincial EA processes. We find that very troubling. We believe it is self-evident that the QUALITY of environmental assessments increases in proportion to the separation of the assessor from the assessed. Only the federal government could provide an INDEPENDENT assessment of the Red Hill Expressway proposal, because they are the only level of government which is not either a proponent or a major financier of the project. Canada desperately needs INDEPENDENT ASSESSMENTS

While there currently are harmonization agreements with seven provinces/territories, that leaves almost as many with no agreements at all. This is one area the Agency needs to continue to work on, ensuring that there are sound agreements with all other jurisdictions. Yet this will not be an easy task. As Fitzpatrick and Sinclair pointed out,

> There is no doubt that drafting such agreements presents difficult legal challenges. Provincial and territorial jurisdictions are reticent about creating what amounts to a new EA law through such agreements, and all jurisdictions want to maintain their current decision-making authority; hence, discussions centring on EA process equivalency are challenging. Governments do not give up the power to make decisions easily, and in many EA situations the public does not want to see decision-making powers eroded, particularly those of the federal government. Thus, the extent that EA laws are harmonized through these agreements is questionable; rather they tend to be cooperative agreements on how to proceed.

Despite the admitted degree of difficulty, this would seem to be a logical first step before any substitution for provincial/territorial processes take place. If you do not have an effective way of dealing with these jurisdictional issues, it is hard to think of how devolving to a provincial regime could be anything but fraught with danger.

Single window

Secondly, many of the ideas suggested in the Agency's Five-Year Review discussion paper - enhancing the co-ordinating role of the Agency, designating the Agency as the "single window" for joint federal-provincial reviews, etc. - have not been fully followed up on. There is a larger role for the Agency to play in environmental assessment,

especially as they tend to be holders of the public trust. Perhaps these steps are ones best left to the upcoming Seven-Year Review of CEAA, but the Agency would be doing itself and the Canadian public a service if it took on the challenge rather than just responding to more pressure for substitution.

Strategic Environmental Assessment

As EPA Caucus members repeatedly pointed out in the Five-Year Review, and since then at every other opportunity, Strategic Environmental Assessment (SEA) will go a long ways to both reducing conflicts and speeding up processes. Almost everyone who participated in the Review noted that people with no suitable opportunity to enter the debate about important issues use any venue that is available. Citizens who repeatedly attempt to bring up climate change issues in regulatory hearings of oil and gas pipelines feel frustrated when they are challenged about these issues being outside of the scope of the assessment, especially in light of an almost world-wide turnaround on the issue.

The Agency has taken a good first step in setting up a subcommittee of the Regulatory Advisory Committee to specifically look at strategic environmental assessment. As well, the EPA Caucus and many other people are also spending time on this issue. Hopefully, by working together, there will be some concrete results that not only will improve environmental protection but also create a smoother federal EA process.

Once the above steps are fully explored, if there are consistently documented areas of duplication and overlap, then substitution could be an option if the processes are truly equivalent. This will not be an easy task, given the long-standing suspicion around substitution. The University of Regina's Green Campus Society submission to the Five-Year Review in March 2000 reflected an intense public feeling.

> There is a need for a strong federal role in EA. This has been supported by the Supreme Court of Canada and borne out in the history of EA. For example, the Oldman Dam might/should never have been built if the federal process had been followed earlier and the panel recommendations followed. Delegation to the provinces or substitution of their processes is just not on. There is no evidence to show duplication and overlap in federal provincial EAs (only 2% of federal EAs are the subject of provincial EAs). The feds must continue to be involved...it is that simple.

CONCLUSIONS

Many environmental and public interest groups continue to express concerns over substitution, including the (EPA) Caucus of the Canadian Environmental Network. In a letter to the Environment Minister's Regulatory Advisory Committee in 2005, the Caucus made the following points:

> Furthermore, while not opposed to the concept of substitution in appropriate circumstances, we have serious concerns with the substitution process.... We cannot overemphasize that the broad goals of an environmental assessment are distinct from the more narrow regulatory approval considerations associated with the various administrative tribunals mentioned. Given these very distinct goals, we ask that there be specific, legislative and administrative protections and assurances to guide substitution to ensure that any substitution of another administrative tribunal's process for the CEAA process would guarantee that CEAA purposes, processes (e.g. public participation guarantees) and substance (e.g. s.16(1) and (2) requirements) nonetheless receive full recognition and are fully implemented.
>
> Agreements for substitution would have to be just as rigorous as the harmonization agreements to ensure the fulfillment of CEAA process and substance. Most importantly perhaps, it will be crucial to limit substitution to processes where the timing of the process as well as its scope are consistent with the EA process as a planning tool that encourages open interaction among proponents, members of the public and government decision makers.

If there is to be substitution, how this decision is made would have to be extremely transparent to ensure public support. The substitute authority or jurisdiction would have to meet the both the letter and the spirit of the Act. That is not going to be an easy task, as noted New Brunswick environmentalist Janice Harvey pointed out in a Telegraph-Journal column in November 2006.

> The National Energy Board is not a body with which citizens will find common cause. Regardless of its mandate to determine what is in the public interest, NEB hearings into Emera's proposal to blast a high pressure natural gas export line through the heart of Saint John have revealed the process to be biased towards corporate participants and hostile to ordinary citizens. Anyone with a day job can forget being involved.
>
> First, the quasi-judicial nature of the hearings is a lawyer's game. Those who can afford lawyers - energy companies hire the best - sail through with nary a hitch. Those who cannot are forced to deal with unfamiliar, arcane rules where one inadvertent slip-up could disqualify an intervenor, their evidence, or both...
>
> Finally, the hearings - the whole set-up designed to intimidate the uninitiated. The NEB presiders sit in judgement on a raised dais. A bank of NEB staff sit poker-faced in front of computers. Citizen intervenors sit for hours listening to technical presentations by panels of company experts. Then they must cross-examine, trying to make their points without or before being ruled out of order by the chair. Understandably, they become rattled and frustrated with a process not designed to hear their concerns. Meanwhile, the company's lawyers and experts deftly stick-handle their way through the procedural maze, garnering undeserved leeway from the chair.

Formal hearings, like those carried out by the NEB, have long been considered problematic to the public, who even with intervenor funding cannot afford the required legal representation. Participants of the Sable Gas Project Panel Review (Joint NEB/CEAA following NEB rules of procedure) in 1997 later suggested that the formal hearing rules countered the spirit of the Nova Scotian and Canadian Environment Acts. One participant's response to the Agency noted "The current panel review format is not the type of forum it was intended to be. It is viewed by the public as very 'formal, judicial, adversarial.' Hearings are very unfriendly to community groups, especially if they feel that they are being 'cross-examined.'"

Fitzpatrick and Sinclair pointed out that

> According to participants, the very formal quasi-judicial format weakened public accessibility to the hearings. This sentiment is supported not only by the comments of participants but also by the numbers of participants. The public made up 29 per cent of participants at the informal hearings but only 10 per cent at the formal hearings. By meeting the formalistic need of one legislative framework, the harmonization of the assessment process detracted from opportunities for public participation.

There are other problems that would undoubtedly arise with any substitution. Issues would arise with participant funding, especially around the final amounts, who would control distribution and what would intervenors be allowed to do with the funds. Another key area of concern would be the decision-making role that authorities such as the NEB have and how that would mesh with the traditional panel review role of reporting to the Minister of the Environment.

Clearly, there are fundamental differences between potential substitute authorities and CEAA Review Panels. They have different masters and often contradictory mandates.

If we go back and re-examine the issues raised by the Emera Brunswick Pipeline hearing and ask whether or not that process could be amended to accommodate public participation in the way it is contemplated by the CEAA what do we find? Upon evaluation we would likely determine that some things could be easily addressed:

(1) The NEB and the Agency could do a better job of explaining to the public the role and nature of a substituted hearing.
(2) The Agency could be available at public information sessions to explain to the public the expectations under CEAA and the role of CEAA in the decision-making process.
(3) The NEB and the Agency could coordinate their approach to the provision of participant funds so as to ensure funds are provided in time to support full participation in the hearing process.
(4) The NEB could agree to allow the development of EIS guidelines for substituted hearings and provide an opportunity for public comment on those guidelines.

(5) The NEB could agree to provide more citizen-friendly timelines so that members of the public that are not supported by staff and lawyers have adequate time to review and comment on documents.

These changes would certainly address some of the impediments to effective public participation. However, at the end of the day the NEB hearing is about regulating an activity and the CEAA hearing is a planning process. Elements of the NEB process need to remain quasi-judicial in order to ensure that the regulatory requirements are met. However, this quasi-judicial process is not an appropriate means of addressing planning and assessment of the environmental effects of proposed projects. The provision of funds to enable intervenors in a substituted process to hire lawyers is not a solution as it will ultimately lead away from open and transparent processes, which is the foundation for EIA. Another option that appears to be on the table is to continue with a two-tiered process where the NEB provides an opportunity for informal input. Such a process will always be considered to be a secondary measure, not providing the public with access to the venue where decisions will ultimately be formed.

This is a fundamental problem that may only be addressed with proper evaluation of the pilot project and a through public examination of a variety of options that can maintain the important regulatory elements of the NEB process without compromising the valuable role of a real public process in environmental assessment and planning.

NEXT STEPS

In order to make progress on this issue, the Agency needs to play a leadership role and carry out the following steps:

1. Continue the work already underway in the areas of harmonization, joint assessments, an enhanced agency role (Galore Creek Mine pilot), etc.

2. Carry out an independent and transparent evaluation of the pilot substitution. Provide a report on the evaluation including an explanation of the successes and failures of the pilot.

3. Thoroughly explore whether substitution will actually solve any of the problems it purports to resolve.

4. If it will, then carry out an open, transparent public process to develop the ground rules of any substitution. Include in this process participation by potential substitutes to demonstrate how their processes can be changed to meet the expectations for effective public participation that have developed under the CEAA Review Panel process.

5. Do not allow further substitutions under the CEAA until the above tasks have been satisfactorily completed.

Taking these steps will ensure that we are actually working towards continuous improvement of environmental assessment in Canada, instead of just reacting to complaints that may have little merit.

Appendix A

Sections 43 to 45 of the CEAA state:

43. (1) Where the referral of a project to a review panel is required or permitted by this Act and the Minister is of the opinion that a process for assessing the environmental effects of projects that is followed by a federal authority under an Act of Parliament other than this Act or by a body referred to in paragraph 40(1) (*d*) would be an appropriate substitute, the Minister may approve the substitution of that process for an environmental assessment by a review panel under this Act.

(2) An approval of the Minister pursuant to subsection (1) shall be in writing and may be given in respect of a project or a class of projects.

44. The Minister shall not approve a substitution pursuant to subsection 43(1) unless the Minister is satisfied that

(*a*) the process to be substituted will include a consideration of the factors required to be considered under subsections 16(1) and (2);

(*b*) the public will be given an opportunity to participate in the assessment;

(*c*) at the end of the assessment, a report will be submitted to the Minister;

(*d*) the report will be published; and

(*e*) any criteria established pursuant to paragraph 58(1) (*g*) are met.

45. Where the Minister approves a substitution of a process pursuant to subsection 43(1), an assessment that is conducted in accordance with that process shall be deemed to satisfy any requirements of this Act and the regulations in respect of assessments by a review panel.

Appendix B

Hearing schedule:

DATE	TOTAL HOURS	BEGIN	END
Monday	8	1 pm	9 pm
Tuesday	5	1 pm	6:20 pm
Wednesday	8	1 pm	9 pm
Thursday	8	10 am	6 pm
Friday	9+	9 am	6:20 pm
Saturday (Remembrance Day)	5+	2 pm	7:10 pm
Sunday			
Monday	12	9 am	9 pm
Tuesday	9+	9 am	6:10 pm
Wednesday	10	9 am	7 pm
Thursday	10	9 am	7 pm
Friday	10+	9 am	7:40 pm
Saturday	8+	10 am	6:40 pm
Sunday			
Monday	5+	1 am	6:40pm