

FORWARD, TOGETHER  
**Enabling Canada's Clean, Safe,  
and Secure Energy Future**

**Volume II – ANNEXES**

REPORT OF THE EXPERT PANEL  
ON THE MODERNIZATION OF THE  
NATIONAL ENERGY BOARD



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# Annex I: Recommendations

## 1. Mandate

1.1.1 The Department of Natural Resources, in partnership with Environment and Climate Change Canada (and any other relevant players within the federal house), provinces and territories, in Consultation with Indigenous peoples, and with broad stakeholder engagement, publish and update on a reasonable schedule a formal Canadian energy strategy which plots a course for the future of energy in Canada, balancing environmental, social, and economic objectives.

1.2.1 That the federal government should perform a high level of inter-governmental coordination on all energy-related matters in order to realize its vision of the future of energy in Canada, fully respecting the roles of provincial, territorial, and Indigenous governments. Furthermore, we recommend that this approach include, to the greatest extent possible, the engagement of other stakeholders, to create a united front for making Canada's energy vision, and related emission reductions, a reality.

1.3.1 The government establish an independent Canadian Energy Information Agency, reporting to the Minister of Natural Resources, whose mandate would include collection and dissemination of energy data, as well as the production of an annual public report on Canada's energy system, and quantitative analysis of the alignment with Canadian energy strategy goals.

1.4.1 The enabling legislation of the CETC be amended to provide for the Minister of Natural Resources – based on advice from a whole-of-government perspective – to make a public recommendation to the Governor in Council of whether a preliminary major project proposal is in the national interest, on the basis of Consultation with Indigenous peoples (supported by a new Indigenous Major Projects Office described in Theme 2, below), strategic-level assessment, and engagement with stakeholders. The Governor in Council would have authority for the final national interest determination.

1.4.2 In addition, we recommend that a more complete definition of the national interest, inclusive of Indigenous Consultation, environmental, economic, and social factors, be enshrined in regulation and updated on a reasonable schedule to keep pace with societal change, and that enabling legislation of the regulator be amended to make mandatory the consideration of the national interest so defined.

1.5.1 Enshrined in the CETC Act, a modernized National Energy Board, hereafter known as the Canadian Energy Transmission Commission (CETC) will have the mandate and authority for the licensing of transboundary pipeline and transmission line projects, including the imposition of specific conditions on project proponents. Major projects must first be determined to align with the national interest by the Governor in Council, before any licensing hearing.

1.5.2 We further recommend for major and significant projects that the CETC exercise this authority through Joint Hearing Panels which integrate CEA Agency-led project-level Environmental Assessments and the CETC decision making process to achieve the dual goals of delivering a single regulatory review process (not parallel technical and environmental review processes), and assuring that all federally-mandated Environmental Assessments are conducted in a consistent, high quality manner (under the authority of the CEA Agency). Five person Joint Hearing Panels – with at least one Indigenous member – would be comprised of two Commissioners from the CETC, two from the CEA Agency, and a final independent Commissioner.

1.6.1 The Canadian Energy Transmission Commission's enabling legislation should have provisions to review and strengthen its capacity with respect to transmission lines, with a particular focus on building capacity for engagement with Provinces (under whose authority new generation projects will take place), and the integration of new forms of (renewable) energy into the national grid.

## **2. Relationships with Indigenous Peoples**

2.1.1 Indigenous peoples should have a nation-to-nation role in determining Canada's national energy strategy, and we look to the Minister of Natural Resources to define how this commitment can be met within the context of the decisions and recommendations of the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples.

2.2.1 The government fund an Indigenous Major Projects Office, under the governance of Indigenous peoples (determined as they see fit). Responsibilities of this Office would include but not limited to defining clear processes, guidelines, and accountabilities for formal Consultation by the government on energy transmission infrastructure, regulatory processes and assessing compliance with those guidelines. In addition, the Office would define and disseminate best practices, including coordinating and/or supporting Environmental Assessments and regulatory reviews, to help interested Indigenous communities enhance the quality of their participation in formal Consultation and engagement processes.

2.2.2 The CETC Act should empower the CETC to engage in discussions with Indigenous communities to enhance and facilitate the meaningful participation of Indigenous communities in the strategic and licensing phases of projects.

2.3.1 That the Minister of Natural Resources, working under the framework defined by the Ministerial Working Group, and in partnership with Indigenous peoples, define authorities for Crown consultation in the strategic phase of a project review, in the detailed assessment and regulatory decision making phase of a project review, and for the oversight of CETC operations on an ongoing basis. This must include clear guidance regarding who may or must be physically present on behalf of the Crown during Consultations, not just overall authorities.

2.4.1 The CETC and the Minister of Natural Resources should move to produce guidelines for early engagement, that allow industry and Indigenous peoples to communicate more freely and without prejudice to outstanding claims of right, or subsequent project reviews. This would include pre-filing information sessions, town halls with proponents under the oversight of the regulator, and more.

2.5.1 That the Crown retains flexibility in its processes, reflecting the principle that each Indigenous nation has an independent relationship with Canada. In addition, we encourage the government to do more to meet with Indigenous peoples on their own terms, and in their own places, to the greatest extent possible.

### 3. Governance and Decision-Making

3.1.1 Enshrined in legislation, authority for the Governor in Council to make the determination of whether or not a major project is in the national interest, based on a public report and recommendation from the Minister of Natural Resources. Furthermore this phase, from preliminary project filing to Governor in Council Decision, should typically happen within 12 months, with three months for GIC decision. The purpose of this phase of the process would be to determine whether a major project may proceed to a detailed project review.

3.2.1 The enabling legislation of the Canadian Energy Transmission Commission should establish it as an independent, quasi-judicial body, with full authority to approve or deny major projects - based on technical criteria, detailed environmental assessment and project-specific conditions including social, economic, lands, and municipal interests - that have passed a Governor in Council review. We further recommend that detailed project reviews of major projects typically be concluded within 2 years from time of filing, to allow adequate time for meaningful Consultation and engagement.

3.2.2 We also recommend that Section 58(1) of the NEB Act be repealed, and that the Act be amended to provide authority, mechanisms, and specific criteria for three classes of review: 1. Projects of national consequence, which require review by the Governor in Council; 2. Projects of significance which require a full Joint Panel review (but not review by Cabinet); and 3. Smaller activities which require review and approval, but not a full Joint Panel review. Such criteria should relate to a project's risk and impact, not an arbitrary distance criterion.

3.2.3 Enshrined in the CETC Act, moreover we recommend that processes and authorities for export/import permits and electric transmission line reviews be harmonized, to the greatest extent possible, with those pertaining to pipelines, to afford all review processes the same level of transparency and integrity.

3.2.4 Enshrined in the CETC Act, in order to ensure clear accountability for permitting authority, the CETC should not exercise any permitting authority delegated to it by the federal entities of Fisheries and Transport Canada (e.g. permitting under the Fisheries or Navigation Protection acts) and any existing agreement to exercise such authorities on their behalf should be abrogated.

3.2.5 Lastly, we recommend that the government enshrine in legislation two core principles: that no regulated activity shall proceed without proper approval, and that all regulated activities undergo environmental assessment commensurate with the scale and risk of the proposed activity.

3.3.1 The enabling legislation of the Canadian Energy Transmission Commission should require that the CETC be governed by a board of directors whose sole responsibility is strategy and oversight of the Commission's activities, while hearing panels and other regulatory decisions would be the purview of Hearing Commissioners responsible for executing Commission decision-making responsibilities.

3.3.2 We further recommend that the Commission be managed by a Chief Executive Officer who is neither a board member nor a Hearing Commissioner, nor the Chair of the Board (with relevant amendments to the current NEB Act as required). Also, the CETC Act should ensure that the Chair does not have the discretion to undertake measures to ensure that the time limit of a project review is met, such as removal of commissioners dealing with an application.

3.3.3 Finally, we recommend that the government include a plain language report on and explanation of the CETC cost recovery funding model in CETC annual reports, and that the funding model be included in the list of issues for possible consideration by Regional Multi-Stakeholder Committees.

3.4.1 The CEO of the CETC (or NEB in the immediate term) should be responsible for establishing a competency matrix for hearing panel members, which represents a broad array of skills, experience, and backgrounds, and for ensuring that each hearing panel contains a cross-section of those competencies. Because Indigenous knowledge is essential to inform sound decision-making, and to enable real nation-to-nation relationships we further recommend that every joint hearing panel consist of at least one Indigenous member with extensive experience with Indigenous issues and worldview. Further, the competency matrix should be subject to Consultation and engagement, made public, and updated on a regular basis.

3.4.2 We further recommend that the NEB Act be amended to remove the requirement that Board members (Hearing Commissioners in our modernized vision) live in the area of the organization's headquarters, and that the future office of the Board of Directors be based in Ottawa.

3.4.3 Enshrined in the CETC Act, we recommend that the CETC affirm the current NEB conflict of interest rules, including industry cooling and post-employment provisions, to reduce the risk of real or apparent conflict of interest. In addition, the CETC conflict of interest policy should provide for the revocation of a Director or Hearing Commissioner appointment in the event of serious real or perceived conflict of interest that is further bolstered by guidelines or regulations that can be updated periodically.

3.4.4 Finally, we recommend the establishment of an Elders External Advisory Council, in Consultation with Indigenous peoples, charged with advising the Board, CEO, and Hearing Commissioners on Indigenous issues, as well as reviewing CETC practices, and helping to ensure high quality inclusion and interpretation of traditional knowledge.

## 4. Public Participation

4.1.1 Standing tests be repealed as a criterion for input into project hearings and operational oversight, and the CETC Act should be adapted to allow for a wider array of input (from simple letters to the provision and testing of evidence).

4.1.2 Furthermore, it is recommended that the CETC Act provide a provision for all Canadians be permitted to submit a Letter of Comment to the CETC for consideration during its deliberations.

4.2.1 The government should amend enabling legislation of the CETC to empower the regulator and demand that it performs its quasi-judicial role to a high standard, but also that its processes are designed and implemented in such a way as to maximize the inclusion of all parties. The regulator should examine and reform its processes to achieve a higher degree of engagement and flexibility, toward the outcome that the public feel welcome and to enable the participation of interested parties who may not be experts in legal process.

4.2.2 In addition, tests of standing should be abolished, and every interested party should have a reasonable opportunity to participate commensurate with their contribution to the process. Finally, Letters of Comment from any party should be permitted without qualification.

4.3.1 Enshrine the enabling legislation of the CETC a Public Intervenor Office, based on successful models from other jurisdictions, to represent the interests and views of parties who wish to use the service, and to coordinate scientific and technical studies to the extent possible.

4.4.1 CETC legislation establish Regional Multi-Stakeholder Committees, open to all interested parties, with a mandate to review all aspects of the regulatory cycle and operational system (for example, issues like: emergent environmental risks, monitoring performance, socio-economic impacts of regulated activities, and more).

4.5.1 The government continue to reform its online presence, driven by the priorities of its users, not the regulator. We further recommend the creation of a visible and accessible online public outreach office charged with engaging citizens and helping them to navigate the many processes and documents that can represent a barrier for participation in the regulatory system.

## **5. Î-kanatak Askiy Operations (Keeping the land pure)**

5.1.1 That the CETC regulate and clearly communicate its standards and approach to ensuring compliance with standards and expectations for management systems, and water protection specifically, in a way that can be understood by non-specialists, and that it should engage its (proposed by us) Regional Multi-Stakeholder Committees to identify specific elements for review and revision, as appropriate.

5.1.2 We further recommend that the CETC explain in plain language how rules for liability work, how the relative monetary amounts are calculated, and consider a public review of the surety bond amount to ensure that it adequately addresses risk as intended.

5.2.1 The government immediately improve transparency of monitoring information, incident reports, and follow-up, including the provision of better online tools to help all citizens interact with this information.

5.2.2 That the government enter into formal agreements with Indigenous nations who wish to participate, in order to deliver local Indigenous energy infrastructure monitoring programs which are considered as a vital input to existing monitoring tools and systems.

5.2.3 We further recommend that Regional Multi-Stakeholder Committees review emergency preparedness plans with citizens, first responders, and other groups, to ensure their completeness, and to recommend any gaps for further action to be addressed by the CETC.

5.3.1 That the CETC publish regular reports – written in plain language, not jargon, without sacrificing accuracy – on incidents and compliance actions, that will allow any interested party to know what happened, why, and what was done in response.

5.4.1 That the CETC Act would enable the creation of Regional Multi-Stakeholder Committees. The intention in operation is that these Committees be formally integrated into the CETC’s management and continuous improvement systems, allowing all participating parties to assess aspects of the CETC’s practices and outcomes, and make recommendations for improvements.

## 6. Respect for Landowners

6.1.1 The CETC Act should establish a Landowners Ombudsman to review and make recommendations on improving relationships with landowners, provide advice and best practices on how to navigate processes, enable better mediation, and potentially administer a fund so that landowners can access relevant legal advice.

6.1.2 We further recommend that CETC Hearing Commissioners take on the alternative dispute resolution, with support from alternative dispute resolution staff as appropriate, and adjudication functions, and reform the current process to streamline it significantly, and make public the results of adjudication decisions.

6.2.1 That the CETC work with the provinces and territories to enact more rigorous standards for land agents, up to and possibly including a formal certification program, and that it conduct more regular oversight of this function. Such standards should include strict protocols for first contacts with landowners, should require that industry fully explain expected impacts on the land and how the proposed agreement works, and should enact a mandatory cooling off period between first contact and signing, to ensure full consideration of the agreement.

6.2.2 We recommend that the CETC establish clear protocols for communication to ensure that landowners are adequately informed of operators exercising rights of entry, in non-emergency circumstances. This would include resolving issues around right of entry in cases of disputes that have not yet been settled.

6.2.3 We further recommend a review of compensation practices and outcomes, resulting in a public report on the matter, so as to better understand and deal with compensation issues both large and small.

# Annex II: Legislative and Regulatory Review

## Preliminary Findings Regarding Potential Legislative and Regulatory Changes

This annex provides the Expert Panel’s preliminary findings of potential ways in which the National Energy Board Act, the Pipeline Safety Act, the National Energy Board Damage Prevention Regulations – Obligations of Pipeline Companies, the National Energy Board Onshore Pipeline Regulations, and the Pipeline Financial Requirements Regulations, would need to be amended to align with their recommendations. This annex is, therefore, intended to serve as a starting point, as an alert of the Panel’s intent, to help guide drafters working on future legislative and regulatory reforms. It should not be interpreted as a comprehensive legislative or regulatory review. In general, the Expert Panel recommends that the National Energy Board Act’s reliance on general exemptions should be repealed and replaced with a legal framing that is more permission oriented. The Panel recognizes that Indigenous peoples should be Consulted during the legislative drafting process.

<b>National Energy Board Act</b>	
<b>General Comments</b>	<p>The name of the Act should be amended.</p> <p>The Act should:</p> <ul style="list-style-type: none"> <li>i) Be written in readable format, that is easily understood by the public;</li> <li>ii) Reflect gender neutrality; and</li> <li>iii) Support efforts to advance the nation-to-nation relationship.</li> </ul> <p>The Act should reflect the Panel’s recommendation that while decision-making for major projects will include a phase to determine alignment national interest, the revisions described throughout this annex pertain to the licensing phase.</p> <p>All references to “navigable waters,” the “Department of Transportation” and the “Department of Fisheries and Oceans” should be repealed.</p> <p>The Act should reflect the Panel’s recommendation that CETC inspectors should examine pipelines before they begin operation.</p> <p>The Act should require the CETC to make public the rationale for any specific exemptions granted.</p> <p>The Act should be amended to give CETC the authority to provide advice on issues related to access capacity to support diversity of electricity generation.</p>
<b>Definitions</b>	<p>s. 2: the following definitions should be reviewed and potentially amended:</p> <ul style="list-style-type: none"> <li>- “Aboriginal governing body” should be updated;</li> <li>- “Arbitration Committee,” should be amended to state that Arbitration committee will now be under the CETC’s purview.</li> <li>- “Board,” which should be amended to reflect the establishment of the new “commission;”</li> </ul>

	<ul style="list-style-type: none"> <li>- “Certificate,” which should be amended to specify that this term applies to major projects. “Major projects” will need to be defined. For smaller projects, the term “license” applies, which will also need to be defined.</li> <li>- “Secretary of the Board,” which should be revised to be a “Secretary of Commission;”</li> </ul> <p>A definition for the term “commissioners” will need to be added.</p>
<b>Board Established</b>	<p>ss. 3(1) should be amended to reflect the Expert Panel’s recommendations regarding:</p> <ul style="list-style-type: none"> <li>- The Board of Directors, which will determine strategy and oversight of the Commission’s activities;</li> <li>- The new role of Hearing Commissioners, which will serve on hearing panels, special adjudication, alternative dispute resolution, engagement, and to make other regulatory decisions.</li> </ul>
<b>Tenure of Members</b>	<p>ss. 3(2) should be amended to stipulate that the term for Commissioners will be 6 years.</p>
<b>Eligibility</b>	<p>ss. 3(4) should be amended to describe the Hearing Commissioners’ appointment process and to specify that this process should be conducted in a transparent manner.</p>
<b>Residence and Other Employment</b>	<p>ss. 3(5) should be amended to stipulate that there should be a waiting period (specific time to be determined) that must pass before an individual from the energy industry can become a CETC commissioner. Similarly, this waiting period applies for CETC commissioners who wish to accept positions within the energy industry.</p> <p>Paragraph 3(5)(a): which describes the residency requirements for Board members should be repealed.</p> <p>Paragraph 3(5)(b) and s.4: should be amended to reflect that all Hearing Commissioners are permanent, and some are part-time. The text that specifies that each [commissioner] “shall not accept or hold an office or employment inconsistent with his duties and functions under this Act” should remain.</p>
<b>Executive Officers</b>	<p>s. 6: should be amended to reflect the Panel’s recommendations regarding the roles and responsibilities of executive officers described in the Governance chapter. Specifically, the Commission should be managed by a Chief Executive Officer who is neither a board member nor a commissioner. Board members will determine the strategy and oversight of the Commission’s activities.</p> <p>ss. 6(2) Chairperson’s duties: should be repealed.</p> <p>ss. 6(2.2) and 6(2.3) Measures to meet time limit: should be repealed. The CETC Act should ensure that neither the Chair nor the CEO has the discretion to interfere with the independent work of hearing panels, such as removal of commissioners dealing with an application.</p>

	ss. 6(2.5) should be amended to remove the reference to ss. 6(2.2) “measures to meet time limit.”
<b>Head Office</b>	ss. 7(1): should be amended to reflect that the Commission’s Board of Directors and staff working on electricity regulation should be located in Ottawa, ON. The Commission’s head office should be located in Calgary, AB, and several regional offices should be established across Canada where appropriate.
<b>Quorum</b>	s. 7(2): should be amended to reflect the Panel’s recommendations regarding the hearing process.
<b>Powers of the Board – Board a Court</b>	ss. 11(1): should be amended to describe the powers of the Board and the Commissioners (see the Alberta Energy Regulator’s enabling legislation for guidance).
<b>Powers with Respect to Witnesses, etc.</b>	ss. 11(3): should be amended to specify that the CETC should have the power of a quasi-judicial body, it should also have the powers to engage parties in a non-quasi-judicial manner.
<b>Expeditious Proceedings</b>	ss. 11(4): the reference to ss. 6(2.2) (i.e., “measures to meet time limit”) should be repealed.
<b>Inquiry</b>	ss. 12(1.1): see Panel’s recommendations regarding in the “Operations” chapter of the report.
<b>Participant Funding Program</b>	ss. 16(3): should potentially be amended, if following a future review, the existing program is found to be inadequate.
<b>Chairperson’s Powers</b>	ss. 16(5) should be amended to repeal the reference to 6(2.2) (i.e., measures to meet time limit.”
<b>Members Ceasing to Hold Office</b>	ss. 16(6) should be amended to stipulate that Commissioners who are found to be in violation of CETC conflict of interest guidelines lose their position as commissioners.
<b>Advisory Functions – Study and Review</b>	Paragraph 26(1)(a): should be amended to reflect the Panel’s recommendation that these functions should be transferred to the new Canadian Energy Information Agency. Note that paragraph 26(1)(b), which states that the Board shall study and keep under review “the safety and security of pipelines and international powerlines” should remain in the Act.
<b>Location of Pipelines – Approval of Board</b>	s. 31 should be amended specify that the CETC should consult with interested parties prior to delivering a certificate and should make information regarding the final route publicly available.
<b>Notice to Provincial Attorney General</b>	ss. 32(2) should be amended to ensure that the map and application are adequately communicated to the public, which should include modern means of communication.
<b>Costs of Making Representations</b>	s. 39 should be amended to ensure that CETC can provide funding to support participation in public hearings as well as other activities (e.g., detailed route hearings).

<b>Deviations – Approval of Deviations</b>	ss. 45(1): may need to be amended to specify that if the deviation extends beyond the approved corridor, the Commission must consult the landowner.
<b>Regulation of Construction, Operation and Abandonment – Safety and Security</b>	ss. 48(1): should be amended to stipulate that orders issued by the regulator to repair, reconstruct, or alter part of a pipeline should be made available to the public.
<b>Exempting Orders Respecting Companies</b>	ss. 48(2.1): Any general exemption power should be repealed from the Act.
<b>Limits of Liability</b>	ss. 48.12(5): should be amended so that the information is provided in plain language.
<b>Costs and Expenses Related Abandonment</b>	ss. 48.49(1): should be amended to stipulate that the Commission shall evaluate the effectiveness of measures employed by the regulator to ensure that companies have the ability to pay for the abandonment of its pipelines and any costs and expenses related to its abandoned pipelines. Also, this subsection should be further amended to stipulate that these measures must be made publicly available, and the effectiveness of these measures should be assessed periodically.
<b>Inspection Officers – Designation of Inspection Officers</b>	ss. 49(1): should be amended to emphasize that these inspections should be carried out in a transparent manner and be made public, with the exception of proprietary information.
<b>Certificates - Report</b>	ss. 52(1): should be amended to reflect the Panel’s recommendations regarding the two-phased approach to decision-making for major projects (i.e., phase I will involve a determination of alignment with national interest; phase II will involve a CETC-led regulatory review.  Also, this section should require the regulator to demonstrate that the proponent can construct the project safely by ensuring that all necessary information (e.g., engineering details) are provided.
<b>Factors to Consider</b>	ss. 52(2): should be amended to reflect the Panel’s recommendation regarding national interest.
<b>Environmental Assessment</b>	ss. 52(3): should be amended to reflect the Panel’s recommendation regarding environmental assessments.
<b>Time Limit</b>	ss. 52(4): should be amended to reflect the Panel’s recommendations for timelines: phase I (one year) and phase II (two years).
<b>Extension</b>	ss. 52(7) should be amended to indicate that only one extension (for 3 months during CETC-led regulatory review) should be granted.

<b>Minister's Directives</b>	Paragraph 52(8) b should be amended to remove the reference to 6(2.2) (i.e., "measures to meet time limit."
<b>Orders to Reconsider</b>	s. 53: should be repealed.
<b>Order Regarding Issuance or Non-Issue</b>	s. 54 should be repealed.
<b>Representations</b>	s. 55.2: should be amended to reflect the Panel's recommendations regarding enhanced public participation in hearings.
<b>Conditions to Certificate</b>	s. 57: should be amended to reflect the Panel's recommendations regarding project conditions.
<b>Exempting Orders Respecting Pipelines, etc.</b>	s. 58: should be amended so that the process for reviewing smaller projects becomes permission oriented as opposed to enabling the regulator to make orders related to exemptions.
<b>Environmental Assessment</b>	ss. 58(6): should be amended to align with the Panel's recommendations regarding environmental assessments.
<b>Permits - Issuance</b>	ss. 58.11: should be amended to enable CETC to conduct hearings related to powerlines.
<b>Exemptions</b>	Any general exemptions in the Act should be repealed.
<b>Arbitration Proceedings and Land Owner Issues</b>	s. 85-106 should be amended to reflect the Panel's recommendations on land issues.

**National Energy Board's Damage Prevention Regulations – Obligations of Pipeline Companies:** should be amended so that company's damage prevention programs are made public. Also, s. 2 should be amended so that the one-call center can be utilized by individuals interested in expressing any concerns they have related to a pipeline and that a hotline, as well as other mechanisms for contacting the CETC, is also established.

**National Energy Board Onshore Pipeline Regulations:** should be amended to ensure that CETC is required to conduct a results oriented inspections and verifications. Also, s. 34 of the regulation should be amended to specify that the regulator must ensure the company is taking reasonable steps to inform emergency response providers with issues related to the pipeline.

**Pipeline Financial Requirements Regulations (once they come into force):** The classes of liability described in these regulations should be reviewed and amended on a regular basis as required.

# Annex III: Expert Panel Terms of Reference

## Context

The National Energy Board (the Board or NEB) is an independent federal, quasi-judicial regulator of pipelines, energy development and trade, with three key roles: adjudicating energy projects, supporting the safety of Canadians and the environment through oversight, and engaging Canadians on energy information. The Board regulates pipelines and electricity transmission lines that cross inter-provincial or international borders, which often involves multiple jurisdictions.

The Board has a legislated mandate to regulate in the Canadian public interest. This means that it must factor economic, environmental and social considerations into its decision-making process, as well as matters with respect to Indigenous interests. The NEB also regulates over the complete lifecycle of a pipeline project (from design through to abandonment) using a wide variety of enforcement tools and activities. This provides one-window for industry and stakeholders, and allows for effective and consistent regulatory approaches at all stages of a project.

The Government has signaled a commitment to modernize the NEB, which was reflected in the Minister of Natural Resources (NRCan Minister) mandate letter where he was directed to: “Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge” and to work with Ministerial colleagues on a review of federal environmental assessment processes.

## Panel Mandate

The NRCan Minister will establish an Expert Panel (the Panel) to conduct a targeted review of the NEB’s structure, role, and mandate pursuant to the *National Energy Board Act* (NEB Act). Specifically, the Panel shall:

- Enable public participation and input on key themes related to the review by ensuring this information is available on the Panel’s website;
- Provide opportunities for engagement, including meetings with key stakeholders (e.g., industry associations, environmental organizations and landowner groups) and the general public to enable the participation of interested Canadians;
- Engage national and regional Indigenous organizations, groups, and communities (including First Nations, Métis and Inuit) to enable their participation at regional and local levels;
- Engage provincial and territorial governments to solicit input on opportunities to modernize the NEB, including jurisdictional considerations.
- Work with regional Indigenous organizations in the planning and hosting of Indigenous in-person engagement events; and
- Prepare a report with respect to the review of the NEB’s structure, role, and mandate that includes the Panel’s findings and recommendations to modernize the NEB which would include potential legislative amendments and a summary of the input received from the public, Indigenous peoples and any other interested group or organization.

## Scope of Review

Efforts to modernize the NEB will deal with a focused set of issues related to the Board's structure, role, and mandate pursuant to the NEB Act. Specifically, these efforts will aim to position the NEB as a modern, efficient, and effective energy regulator and regain public trust.

NEB Modernization will involve engaging Canadians on reforms to the NEB Act to position the Board to serve the interests of Canadians into the future. Targeted engagement activities will focus on key areas where there may be opportunities to strengthen the NEB. For example, the Panel shall review the structure, role, and mandate of other regulators (e.g., Alberta Energy Regulator) to identify potential best practices and guide its review. The review may also validate areas of strength within the NEB and confirm that actions underway (e.g., the *Pipeline Safety Act* coming into force) are sufficiently robust. The focus of NEB Modernization shall include:

**1) Governance:** the mandate letter to the Minister of Natural Resources asks to ensure the Board's composition is diverse and has sufficient expertise in relevant fields such as environmental science, community development, and Indigenous traditional knowledge. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Composition and expertise of Board members;
- Governance and division of the NEB's operational and adjudicative functions, including the roles of the Board's Chief Executive Officer and Chair;
- Role of the NEB in implementing Government policies and priorities, including mechanisms for policy direction; and
- Delegation of authorities to Board members and senior NEB staff.

**2) Mandate:** Canada's energy sector has undergone significant changes in recent years due to technological innovations and shifting global dynamics. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Defining and measuring public interest (e.g., consideration of national, regional, Indigenous, and local interests as well as environmental, economic and social factors);
- Potential to clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis; and
- Potential to expand the NEB's mandate (i.e., in emerging areas such as offshore renewables and to support the transition to a low carbon economy in light of Canada's climate change commitments).

**3) Decision-making Roles:** Some stakeholders have expressed differing views regarding the appropriate decision-making roles for the NEB, Minister, and the Governor in Council regarding projects, licences, and compensation disputes. Therefore, potential outcomes could include findings and recommendations on whether to maintain or revise the current approach with respect to who is making what decision.

**4) Legislative Tools for Lifecycle Regulation:** To ensure that the NEB is a modern, efficient, and effective energy regulator, its legislative tools for lifecycle regulation must be comprehensive and robust. To date, there have been significant efforts to optimize these legislative tools (e.g., coming into force of the *Pipeline Safety Act*). Potential outcomes could include findings and recommendations with respect to the following areas:

- Lifecycle oversight and public engagement tools (e.g., effective legislative tools throughout project planning, regulatory hearings, construction and operation and abandonment);
- Information requirements of regulated companies over the lifecycle of a project, and public access to this information;
- Safety and emergency preparedness tools (e.g., effective compliance monitoring and enforcement legislative tools; safety standards and emergency response requirements); and
- Land acquisition matters and related negotiation proceedings.

**5) Indigenous Engagement:** Some Indigenous peoples have raised concerns regarding the nature and process of their participation in different aspects of a federally regulated pipeline’s lifecycle. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by a specific project under the NEB’s mandate;
- Facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making;
- Further integrating Indigenous traditional knowledge and information into NEB application and hearing processes; and
- Developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and
- Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.

**6) Public Participation:** Stakeholders have expressed increased interest in the NEB’s activities, including hearing processes and in developing emergency response plans. Potential outcomes could include findings and recommendations in the following areas:

- Identifying legislative changes to support greater stakeholder and public participation in NEB activities (e.g., hearings, developing emergency response plans, etc.) that would enhance the outcomes of these activities.

### Complementary Mandates

In addition to Natural Resources Canada's efforts to modernize the NEB, Environment and Climate Change Canada is working to review environmental assessment processes under the *Canadian Environmental Assessment Act, 2012*. Also, the Departments of Fisheries, Oceans and the Canadian Coast Guard and Transport are working together to review changes to the *Fisheries Act* and *Navigable Waters Protection Act*, restore lost protections, and incorporate modern safeguards. In preparing for and undertaking the review, the Panel shall take into account the activities associated with the other mandated reviews, with the objective of sharing information received during the respective reviews, where relevant, and coordinating review activities, to the extent possible. If issues arise that fall beyond the scope of NEB Modernization but are related to the other mandate reviews, the Panel shall forward the matter to the appropriate secretariat or department. Participants who would like to participate in the mandated reviews are not expected to duplicate efforts; a single submission can be made to one or more reviews. The relevant information will be shared with the appropriate review bodies with the consent of the participant.

Given that the North has distinct regulatory regimes governed by different legislation and land claim agreements, matters related to these regimes will not be explicitly reviewed by the Panel. However, the Panel may take Northern approaches and frameworks into consideration in developing its report and recommendations on the structure, role, and mandate of the NEB pursuant to the NEB Act.

The Panel shall, in reviewing the NEB structure, role, and mandate, consider the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

## **The Review Process**

### The Panel

The Minister's selection of Panel members will be guided by the mandate letter commitment related to the Board's composition. Therefore, in addition to having background in energy regulation, the Panel should have sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.

The Panel will consist of five members, including two co-chairs. In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister determines otherwise. In such circumstances, the Minister may choose to replace the Panel member.

By way of letter from the co-chairs, the Panel may request clarification of or an amendment to its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response in order to comply with the timelines of these Terms of Reference.

The Panel shall issue a notice to the public regarding any clarifications or amendments to its Terms of Reference and shall make those clarifications and amendments available on its website.

Upon appointment of the Panel, the Panel shall be provided the comments received during the comment period on the draft Terms of Reference. The input received through the online questionnaire "Improving Canada's Environmental and Regulatory Processes" will also be provided to the Panel.

### The NEB Modernization Secretariat

A Secretariat consisting of NRCan and NEB officials will be established within NRCan to provide administrative, technical, and procedural support to the Panel. The Secretariat will work closely with their counterparts in departments and agencies conducting other mandated reviews to share information and ensure a coordinated approach to communications and Indigenous engagement. Members of the Secretariat shall be guided in their work and professional conduct by the Values and Ethics Code for the Public Service.

### Stakeholder Engagement

In collaboration with the Secretariat, the Panel will develop a robust Engagement Plan that encompasses a wide-range of stakeholders interested in providing input in the review. The Panel shall directly engage with provincial and territorial governments to obtain their perspectives on NEB Modernization.

The Panel will prepare a Public Engagement Plan outlining how and when it will conduct public in-person events and other engagement activities. In preparing the Plan, the Panel will take into account the activities associated with the other mandated reviews. This Plan will be posted on the Panel's website. The

Panel shall put procedures in place to allow the public to input into the review in writing and/or in-person and consider this input in the development of its report and recommendations.

The results of stakeholder engagement activities shall be made available on the Panel's website.

### Indigenous Engagement and Consultation

The Panel shall directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to NEB activities.

The Panel shall prepare an Indigenous Engagement Plan, outlining how and when it will conduct Indigenous in-person consultation activities. The Panel shall engage with the leadership of National Indigenous Organizations in the preparation of the Plan. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This Plan shall be posted on the Panel's website. The Panel shall work with regional Indigenous organizations in the planning and hosting of Indigenous in-person consultation activities. The Panel shall also include any procedures necessary for the timely and efficient conduct of these activities. The Panel shall put a process in place to allow Indigenous peoples to input into the review in writing and/or in-person and consider this input in the development of its report and recommendations.

The procedures will allow for the events to be open and to be conducted in a manner that offers all participants an opportunity to provide input. The Panel shall ensure that a record of any Indigenous in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold Indigenous in-person consultation activities in regions or communities where project environmental assessments have been recently conducted or where communities have expressed interest in the review.

The Panel shall, where practicable, recognize and incorporate input and information (i.e., traditional knowledge) from Indigenous peoples on their traditional, cultural and rights-based practices in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of Indigenous in-person consultation activities.

### Expert Advice

The Panel may retain the services of independent non-government experts, such as establishing expert working groups, to provide advice or information on certain subjects within its mandate. Any advice or information provided to the Panel by those experts will be posted on the Panel's website.

### Participant Funding

Natural Resources Canada is offering participant funding to Indigenous organizations, groups, communities and individuals to support their participation in the review.

## Key Deliverables

The Panel shall provide a report to the Minister of Natural Resources that includes the following components:

- An executive summary;
- The findings, conclusions, recommendations, and rationale for the conclusions and recommendations of the Panel with respect to the relevant issues within the mandate provided to the Panel;
- An overall summary of the input received;
- An explanation of how the input was considered; and
- The report shall reflect the views of the Panel.

The Panel shall, on request of the Minister, clarify any of the conclusions and recommendations set out in its report.

## Timeline

The Panel shall conduct its engagement activities commencing in December 2016 and ending in March 2017. The Panel shall complete its review and provide its report to the Minister on or before May 15, 2017.

## Outcome

The results of this work will enable the development of potential legislative changes related to modernizing the NEB. The Prime Minister's approval would be sought for proposals that engage his prerogative for the machinery of government.

## Official Languages

The final report and any other documents produced by the Panel for public dissemination must be produced and made publicly available in English and French. The Executive Summary of the final report will be made available to the public on or before May 15, 2017 in both official languages and the final report in both official languages as soon as possible thereafter. Documents provided to the Panel will be made publicly available in the language that they were received.

## **Confidentiality**

All information gathered by the Panel in the course of its work is subject to the provisions of the *Access to Information Act* and the *Privacy Act*.

## Annex IV: Discussion Papers

These discussion papers are intended to provide background information on key issues related to the National Energy Board (NEB) Modernization review and stimulate public input. The Expert Panel is conducting a targeted review of the NEB's structure, role, and mandate pursuant to the National Energy Board Act (NEB Act). Specifically, this review focuses on: governance and structure; mandate and future opportunities; decision-making roles, including on major projects; compliance, enforcement, and ongoing monitoring; engagement with Indigenous peoples; and, public participation.

The discussion papers do not represent an all-inclusive list of issues to be examined by the NEB Modernization Expert Panel. As per the Expert Panel's Terms of Reference, they will consider the relationship between NEB processes and the Aboriginal and Treaty rights of First Nations, Inuit & Métis Peoples, as well as the relationship between NEB processes and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples. The Panel will also consider factors such as the ongoing transition to a low carbon economy in light of Canada's climate change commitments and its relationship with the NEB's structure, role, and mandate. As well, the decision-making clarity and fairness to meet the public interest, and the continuous enhancement of safety and environmental performance for projects that are deemed to be in the public interest, will be considered.

Input received in relation to these papers will be shared with the Expert Panel to assist in the development of their final report to the Minister of Natural Resources. In addition, the Expert Panel will consider input received during its cross-country engagement sessions and directly from Indigenous peoples, interested stakeholders, provinces and territories, as well as the public.

These papers were drafted by the Secretariat in collaboration with the Expert Panel, and were approved by the Expert Panel. Input from Indigenous peoples, interested stakeholders, provinces and territories, and the public was not sought in the drafting of the discussion papers.

## National Energy Board Governance

**TOPIC:** The National Energy Board's (NEB) governance structure.

**CONTEXT:** The NEB's governance is set out in the *National Energy Board Act* (NEB Act) and involves a Chair who also serves as the Chief Executive Officer (CEO), a Vice-Chair, Board Members, as well as a Secretary and other officers and employees necessary for the conduct of NEB business.<sup>1</sup> The NEB is comprised of up to nine permanent Board Members who are appointed by the Governor in Council (GIC)<sup>2</sup> on recommendation of the Minister of Natural Resources. Permanent Board Members serve a fixed term of seven years and are eligible for re-appointment for a term of seven years or less. Under the NEB Act, Permanent Board Members are full-time and must reside in, or near, Calgary, or at such other place in Canada as the GIC may approve. An unlimited number of Temporary Board Members may be appointed on an as needed-basis, on such terms and conditions set out by GIC. Eligibility requirements under the NEB Act require Board Members to be a Canadian citizen or permanent resident.

Furthermore, Board Members must not be engaged in or have investments in the hydrocarbon or electricity business. The NEB Act does not contain explicit provisions relating to Board Member expertise, language capabilities,<sup>3</sup> regional representation, gender or ethnicity. These criteria may be considered during the GIC appointment process. In fact, the Minister's mandate letter, received in 2015, directs the

Minister to ensure that the NEB's composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.<sup>4</sup>

The GIC designates one of the Permanent Board Members to be Chair. Because the Chair is also a Board Member, they have the same duties and responsibilities as other Board Members. At the same time, the Chair is also accountable for ensuring that Board Members fulfill their mandate as defined in the legislation under which they have responsibilities. The Chair apportions work among the Board Members, decides whether the NEB sits in a panel, and assigns Board Members to panels (e.g. to review a given project application), including a Board Member to preside over each panel. The Chair is also able to delegate authority for certain decisions or recommendations to Board Members. The Chair's powers and functions pass to the Vice-Chair if the Chair is absent or unable to act.

The Chair of the NEB is also the CEO under the NEB Act. The CEO is responsible for the operational and administrative function of the NEB. The CEO also may provide direction to staff on legislative and regulatory initiatives (related to the NEB Act or any other Act that imposes obligations on the NEB), which impact the NEB's operations. On matters that are not quasi-judicial in nature, he or she can liaise with the Minister of Natural Resources, the Department of Natural Resources and the rest of the federal government.

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<sup>1</sup> Additional details regarding the NEB's governance as set out in the NEB Act, as well as current practices, can be found in the NEB's Board Member Operating Model, available at: <http://news.gc.ca/web/article-en.do?nid=1052229>

<sup>2</sup> The Governor in Council is the Governor General of Canada acting by and with the advice and consent of the federal Cabinet.

<sup>3</sup> In accordance with the *Official Languages Act* (OLA), parties appearing before the NEB may choose to have a hearing conducted in either English or French, and the panel members assigned must be able to understand the language chosen by the parties, without the assistance of an interpreter. To comply with the OLA, the Board must maintain a certain number of members who are fluent in both official languages.

<sup>4</sup> Mandate letter of Minister of Natural Resources: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

Board Members make regulatory decisions and recommendations on issues that they have been assigned by the Chair (e.g. applications, ongoing oversight of regulated infrastructure). When making regulatory decisions or recommendations, Board Members act at arm's length and independently from the federal government. Their decisions are subject to judicial oversight by the Federal Court of Appeal, and ultimately, the Supreme Court of Canada. Board Members may also be assigned responsibility for functions that fall within the accountability of the CEO. For example, they may have a role in setting the NEB's Strategic Priorities.

Approximately 490 staff (including a Secretary and other officers) supports the NEB's mandate in the areas of energy project adjudication, safety and environment oversight, energy information and engagement. This staff provides technical assistance to assist Board Members in exercising their powers. The NEB Act does not have a mechanism for the Chair to delegate authorities for regulatory decisions and recommendations to NEB officers or staff. However, the NEB may designate any person as an inspection officer with powers to inspect, audit compliance and issue orders to protect the public and the environment. The NEB may also designate persons to issue notices of violation, which may incur administrative monetary penalties.

The NEB's role, has been and continues to be implement – not set – the policies affirmed by federal legislation. The NEB does not decide what changes to its legislation are considered by Parliament, this being the role of the Government or of Private members' Bills. The NEB is accountable to Parliament through the Minister of Natural Resources. For information regarding decision-making roles, please see the discussion paper on this issue.

#### **DISCUSSION QUESTIONS:**

- 1. What are appropriate requirements for Board Members (particularly regarding composition, expertise, regional representation, and Indigenous representation)?***
- 2. Where should NEB Board Members be located and why?***
- 3. Where should the NEB be located and why?***
- 4. What are your views with respect to the Chair of the Board also being the NEB's CEO?***
- 5. How should the Government of Canada provide the NEB with policy direction? What should be the role of the NEB in implementing Government policies and priorities?***
- 6. What NEB decisions, recommendations or functions should be delegated to Board Members? To NEB staff?***

## Mandate and Regulatory Framework

**TOPIC:** The mandate of the National Energy Board (NEB), and the regulatory framework within which the Board operates.

**CONTEXT:** The NEB was established in 1959 as Canada's national energy regulator. Its core responsibilities are energy adjudication,<sup>1</sup> safety and environmental oversight, energy information and engagement. The NEB reports to Parliament through the Minister of Natural Resources. The NEB has a specific mandate as set out in the *National Energy Board Act* (NEB Act), as well as responsibilities and authorities under other federal legislation.

### Mandate

The main responsibilities of the NEB are established in the NEB Act and include the regulation of:

- The construction, operation and abandonment of pipelines that cross international borders or provincial/territorial boundaries, as well as setting of the associated tolls and tariffs;
- The construction, operation and abandonment of international and designated interprovincial power lines; and
- Imports of natural gas and exports of crude oil, natural gas liquids, natural gas, refined petroleum products and electricity.

The NEB oversees approximately 73,000 kilometres of international or interprovincial pipelines and approximately 1,400 kilometres of international power lines.

The NEB also monitors aspects of energy supply, demand, production, development and trade, and publishes assessments to inform Canadians on trends, events and issues that may affect Canadian energy markets. Through its Energy Information Program, the Board produces independent and fact-based energy information for Canadians.<sup>2</sup>

Additionally, in specified areas, the NEB has regulatory responsibilities for oil and gas exploration and production activities under the NEB Act, *Canada Oil and Gas Operations Act*, the *Canada Petroleum Resources Act*, and the *Northwest Territories Oil and Gas Operations Act* and *Petroleum Resources Act*,<sup>3</sup> including offshore areas outside Newfoundland and Nova Scotia. However, no federal regime has yet been established for other emerging offshore energy sources such as offshore renewables or other emerging forms of renewable energy.

The NEB conducts a science-based environmental assessment during its review of applications for projects under its jurisdiction. For certain projects, the NEB also conducts environmental assessments as required by federal legislation, such as the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), the *Mackenzie Valley Resource Management Act*, and the Inuvialuit Final Agreement or the Nunavut Land Claims Agreement.<sup>4</sup>

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<sup>1</sup> In its adjudicative role, the NEB must decide or recommend if a project is in the Canadian public interest. See the discussion paper on Determining the Canadian Public Interest for further details.

<sup>2</sup> See the discussion paper on Energy Information, Reports, and Advice for further details.

<sup>3</sup> Matters related to legislation other than the NEB Act are not explicitly within the scope of the NEB Modernization review. However, the Panel may take Northern approaches and frameworks into consideration in developing its report and recommendations on the structure, role, and mandate of the NEB pursuant to the NEB Act.

<sup>4</sup> Federal environmental assessment processes, including CEAA 2012, are the subject of a different review process being conducted by an Expert Panel appointed by the Minister of Environment and Climate Change. Information about this review can be found on that Expert Panel's website: <http://eareview-examenece.ca/>.

### Regulatory Framework

The NEB's regulatory mandate extends over the lifecycle of a project – from the planning and application assessment and authorization,<sup>5</sup> through construction and operations,<sup>6</sup> and finally abandonment.

The NEB fulfills its mandate through its regulatory framework, by setting and enforcing regulatory requirements and expectations for its regulated companies. Requirements within the NEB's regulatory framework include legislation (e.g. NEB Act), regulations (e.g. *NEB Onshore Pipeline Regulations*) and other binding regulatory tools such as NEB Orders and terms and conditions to approvals. The NEB also relies on non-binding regulatory tools such as guidance documents to provide clarity to regulated companies on means of achieving compliance (e.g. NEB Filing Manual, Guidance Notes).

### **DISCUSSION QUESTIONS:**

- 1. What are your views on the NEB's existing mandate?***
- 2. Are there any areas over which the NEB's mandate should be changed?***
- 3. Are there emerging areas for which the NEB's mandate should be expanded? If so, what are they?***

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<sup>5</sup> See the discussion paper on The Hearing Process, for further details on the application phase.

<sup>6</sup> See the discussion papers on: (i) Safety and Environmental Protection, and (ii) Emergency Prevention Preparedness and Response: Tools and Requirements for further details on the operations phase.

## Energy Information, Reports, and Advice

**TOPIC:** Energy information collected and published by the National Energy Board (NEB).

**CONTEXT:** The NEB collects and publishes information on a range of Canadian energy supply, demand and market-related issues.<sup>1</sup>

### Advisory Functions

Under Part II of the *National Energy Board Act* (NEB Act), the NEB has a legislated mandate to review energy matters under federal jurisdiction. Upon request, the NEB must provide advice to the Minister on energy matters and may also provide advice to others within federal, provincial and territorial government departments or agencies.

For example, in 2014 the Ministers of Natural Resources and Industry requested that the NEB and the Competition Bureau work together to review propane market issues in response to price increases and limited availability. A joint final report was published in April 2014.<sup>2</sup>

### Authority over Exports and Imports

Under Part VI of the NEB Act, the NEB regulates the export of natural gas, natural gas liquids, crude oil and petroleum products, and electricity. In exercising this authority, the NEB collects trade data from regulated energy companies and public sources. Importers and exporters of energy commodities must provide monthly reports to the NEB, detailing the amount imported or exported as well as the point of importation or exportation, among other data.<sup>3</sup>

Before issuing a license to export oil or gas, the NEB must perform a ‘surplus test’ under section 118 of the NEB Act by ensuring that the quantity to be exported “does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada.” Before issuing a license to export electricity, the NEB must have regard to section 119.08 to “the effects of the exportation of the electricity on provinces other than that from which the electricity is to be exported.” NEB export authorizations are based strictly on the criteria set out in the legislation, and matters unrelated to these criteria cannot be considered.

In order to carry out its duties under Part VI of the NEB Act, the NEB collects energy statistics, monitors energy markets, assesses Canadian energy requirements, and identifies trends in energy systems. On its website, the NEB makes available statistics on the production and trade of crude oil, refined petroleum products, natural gas, natural gas liquids and electricity. Commodity-specific analyses are also published, including oil and gas resource assessments and electricity reports on renewable power.<sup>4</sup>

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<sup>1</sup> This information is distinct from the pipeline-related information collected and published by the NEB, such as what is found in the Safety Performance Portal: <http://www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/index-eng.html>.

<sup>2</sup> Propane Market Review - Final Report can be accessed at: <http://www.nrcan.gc.ca/energy/crude-petroleum/15927>.

<sup>3</sup> Commodity statistics are available on the NEB’s website, with commercially sensitive information removed, and can be accessed at: <https://apps.neb-one.gc.ca/CommodityStatistics/Statistics.aspx?language=english>.

<sup>4</sup> See web page ‘Statistics and Analysis’ at <http://www.neb.gc.ca/nrg/sttstc/index-eng.html>

In addition, the NEB publishes cross-commodity analytical publications, such as:<sup>5</sup>

- *Canada's Energy Future*: A long-term outlook with detailed projections covering all energy commodities, such as crude oil and natural gas, across all provinces and territories. Energy experts from government, industry, environmental organizations and academia across Canada provided input on the preliminary assumptions and results of this report. Supplemental products have included Province and Territory Outlooks and interactive data visualizations<sup>6</sup> which allow Canadians to view specific commodity, sector and scenario information.
- *Market Snapshots*: These are weekly articles on emerging trends in various segments of the energy market, including oil, natural gas, natural gas liquids, and electricity (including renewables).
- *Canadian Pipeline Transportation System*: This report provides an overview of NEB-regulated pipeline systems as well as analysis of pipeline capacity and throughput, pipeline tolls and tariffs, and the financial soundness of pipeline companies.

#### Other Sources of Energy and Climate Information

At present, the collection and dissemination of energy and climate information is undertaken by various federal, provincial, and territorial organizations given their different legal mandates and jurisdiction. In addition to the NEB, at the federal level, Statistics Canada,<sup>7</sup> Natural Resources Canada<sup>8</sup> and Environment and Climate Change Canada are among the major data providers for Canada's energy statistics. Provincial and territorial regulatory agencies, such as the Alberta Energy Regulator, the British Columbia Oil and Gas Commission, and the Ontario Energy Board, are also key sources of energy data in their respective jurisdictions.

With respect to greenhouse gas (GHG) emissions, Environment and Climate Change Canada (ECCC) is responsible for developing, compiling, and reporting on Canada's GHG inventory on an annual basis, with input from numerous experts and scientists across Canada. For example, ECCC produces a GHG emissions forecast, Canada's Emissions Trends, which uses NEB data provided in the Energy Futures Report.<sup>9</sup>

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5 These NEB publications can be accessed at: <http://www.neb-one.gc.ca/nrg/ntgrtd/index-eng.html>

6 'Exploring Canada's Energy Future' data visualization can be accessed at: <https://apps.neb-one.gc.ca/dvs/?page=landingPage>.

7 For instance, see Statistics Canada's subject page on energy at <http://www5.statcan.gc.ca/subject-sujet/theme-theme.action?pid=1741&lang=eng&more=0>.

8 For instance, see the 'Energy Publications' web page of Natural Resources Canada at <https://www.nrcan.gc.ca/energy/publications/6539>.

9 Canada's Emission Trends 2014 can be accessed at <https://www.ec.gc.ca/ges-ghg/default.asp?lang=En&n=E0533893-1>

## **DISCUSSION QUESTIONS:**

- 1. What energy information are you most interested in? Is there additional information that you would like to see collected and/or made publicly available by the NEB? How should the NEB engage the public to help determine priorities related to energy information and dissemination?***
- 2. What format would be most useful to you in accessing and using energy information (e.g., raw statistics, graphs and infographics, short and frequent reports, longer detailed reports)?***
- 3. What are the other major data sources you rely on to meet your energy information data needs?***
- 4. Does Canada need energy information to be coordinated by one entity? If so, what entity would best serve in this role?***
- 5. Should the NEB have a role in GHG data collection given ECCC's existing mandate to do this? If so, what should the NEB's role be?***
- 6. What GHG data and analysis should the NEB publish regardless of who collects the data?***

## Decision-Making Roles on Projects

**TOPIC:** Roles and responsibilities for making decisions under the *National Energy Board Act* (NEB Act).

**CONTEXT:** In 2012, there were legislative amendments to the NEB Act which, among other things, impacted decision making for some projects.

### Pipelines

For international and interprovincial pipeline projects *greater than 40 km in length*, the National Energy Board (NEB) makes a recommendation to the Governor in Council (GIC)<sup>1</sup> and the GIC makes the decision on whether a project should be approved. Under the NEB Act, the NEB has up to 15 months to submit its recommendation report to the Minister of Natural Resources following receipt of an application the NEB determines to be complete and the GIC has up to three months to make a decision.<sup>2</sup>

The NEB reviews applications it receives and conducts a hearing to allow the opportunity for participants in the hearing to express their point of view about a proposed project. Depending on the type of hearing, submissions can be either written or oral in format. Participants in the hearing can submit information that is relevant to the question of whether or not the application should be approved. This may include, for example, the need for the project, the design and safety of the project, environmental matters, potential impact of the project on the interests of Indigenous peoples and land owners. For additional information about hearings, please see the discussion paper on this issue.

Information submitted to the NEB is made public on the NEB registry. After considering the information, the NEB prepares and submits a report to the GIC, via the Minister of Natural Resources. The report includes its recommendation on whether the project is in the Canadian public interest<sup>3</sup> and whether a certificate should be issued. A certificate authorizes a project to proceed subject to the terms and conditions that the NEB deems necessary or desirable. The report includes the NEB's reasons and the recommended necessary terms and conditions that the project must follow even if the NEB does not recommend approving the project.

Once the GIC receives the NEB's recommendation report, GIC makes the decision.<sup>4</sup> There are three options available to the GIC when making its decision. The GIC can:

1. direct the NEB to issue a certificate;
2. direct the NEB to dismiss the application; or
3. refer the recommendation or any of the terms or conditions in the report back to the NEB for reconsideration.

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<sup>1</sup> The Governor in Council is the Governor General of Canada acting by and with the advice and consent of the federal Cabinet.

<sup>2</sup> The Minister may extend the NEB's time limit by a maximum of three months. The GIC may, on the recommendation of the Minister, further extend the time limit by any additional period or periods of time. The GIC may also, on the recommendation of the Minister, extend its own decision making time limit by any additional period or periods of time.

<sup>3</sup> See separate discussion paper on public interest.

<sup>4</sup> The interim principles, announced in January 2015, required additional information to be considered by GIC in its decision (e.g., upstream GHG assessment, additional Indigenous consultations). For further details, see: <https://mpmo.gc.ca/measures/254>.

If GIC decides to refer the NEB's recommendation or any of the terms or conditions back to the NEB for reconsideration, the NEB reconsiders the matter and then it submits a reconsideration report to the GIC, through the Minister of Natural Resources. A reconsideration request may direct the NEB to conduct the reconsideration taking into account any factor specified by the GIC. The GIC will then consider the reconsideration report and make a decision among the above three options. There is no limit to the number of reconsiderations.

For international and interprovincial pipeline projects *40 kilometres or less* in length and pipeline facilities, the NEB makes the final decision on whether the project should be approved. Pipeline facilities include, for example, projects such as construction of, or modifications to tanks, storage facilities, pumps and compressors. The NEB may hold a public hearing regarding such projects.

In all cases, whether requiring GIC approval or not, compliance with NEB regulations and associated standards must be met. Further discussion and questions related to that foundation for safety and environmental performance is outlined in the discussion paper on Safety and Environmental Protection.

It is the responsibility of the pipeline company to negotiate with private landowners the amount of compensation related to the use of their lands.<sup>5</sup> A land compensation dispute regarding a pipeline may arise when a company and a land owner disagree on the compensation payable under the NEB Act for things such as land acquisition or damages caused by the pipeline or any product it transports. In the event of a land compensation dispute regarding a pipeline, the Minister of Natural Resources is responsible for overseeing the appointment of a negotiator to help parties negotiate a settlement, or an arbitration committee to make a decision on the settlement. For information regarding how potential impacts on Indigenous rights and interests are considered in the NEB process, please see the discussion paper on Indigenous Engagement and Consultation.

For a licence to export oil or gas or to import gas, the NEB makes the decision including the necessary terms and conditions. An NEB decision to deny a licence is final. If the NEB decides to issue a licence, the decision is subject to the approval of the GIC.<sup>6</sup> The GIC can either approve or deny the decision. The NEB is not required to hold hearings for licences. However, for recent licence applications, the NEB has held written comment periods at its discretion. In determining whether an export licence should be issued, the NEB Act requires the NEB to only consider whether the exports would be surplus to Canadian requirements.<sup>7</sup>

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<sup>5</sup> See separate discussion paper on Land Acquisition and Compensation.

<sup>6</sup> Under the *National Energy Board Act Part VI (Oil and Gas) Regulations*, the NEB makes the final decision to issue short-term orders to export oil or gas or import gas.

<sup>7</sup> Under the *National Energy Board Act*, the surplus criterion is defined as “the quantity of oil or gas to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada, having regard to the trends in the discovery of oil or gas in Canada.”

### Power lines

International power line (IPL)<sup>8</sup> projects require either an NEB issued permit or certificate (more information below).<sup>9, 10</sup> The NEB conducts an environmental assessment (EA) under the Canadian Environmental Assessment Act, 2012 for permit and certificate applications of IPLs with a voltage of 345 kV or more that require a total of 75 km or more of new right of way. The NEB assesses and considers environmental impacts of all other IPL permit and certificate applications under the NEB Act. The NEB also provides funding to facilitate the participation of the public in hearings with respect to new IPLs.

If a company proceeds with a permit application, the NEB must issue the permit although the NEB may impose conditions on the permit. The NEB is required to issue the permit unless the GIC orders it to be constructed and operated under a certificate, or the company elects to change its permit application to a certificate. The decision to issue a certificate is subject to GIC approval, but a NEB decision to dismiss the application is final.

### Offshore and Canada Lands

Under separate legislation, the NEB also has decision making accountabilities related to oil and gas development in specified areas<sup>11</sup> outside of Newfoundland and Nova Scotia where separate regulatory regimes have been established. This is not being examined during the NEB Modernization review.

## **DISCUSSION QUESTIONS:**

- 1. *What principles should determine who should make the final decisions for the following projects and why:***
  - a. Major international and interprovincial pipeline projects (i.e., greater than 40 km in length)?***
  - b. Smaller international and interprovincial pipeline projects (i.e., 40 km in length or less)?***
  - c. International and designated interprovincial power line projects?***
  - d. Import and export licences?***

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<sup>8</sup> Provinces review and approve permits or licenses for lines within their own borders and interprovincial lines that fall under provincial jurisdiction.

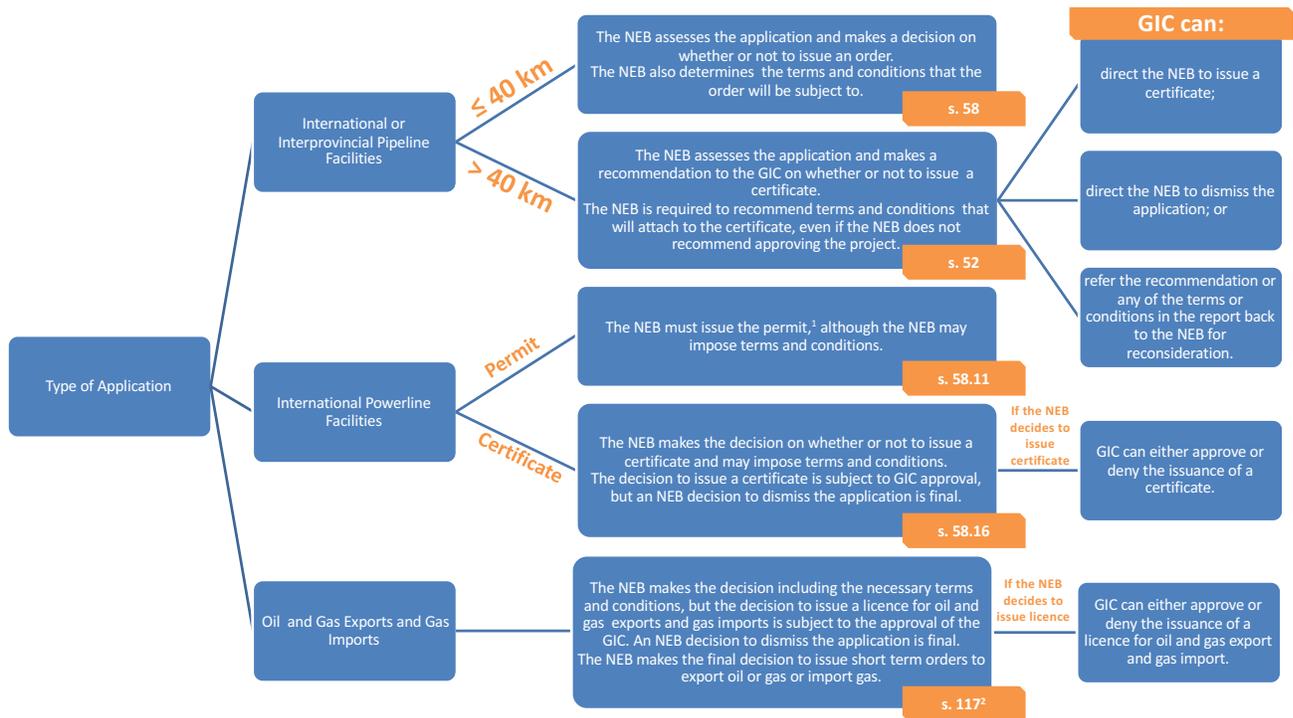
<sup>9</sup> The applicant for an IPL project decides to submit an application for a Certificate of Public Convenience and Necessity (certificate) (NEB Act section 58.16), or a permit (NEB Act section 58.11) to the Board. GIC can decide to designate an IPL permit application as an IPL application subject to a certificate process, either independently or on the recommendation of the NEB. When evaluating whether or not to make a recommendation to GIC to designate a permit application as an IPL application subject to a certificate process, the Board must avoid the duplication of measures taken by the applicant and relevant provincial governments, and have regard to all considerations that appear relevant including: the environmental impacts of the IPL and the effect of the IPL on other provinces.

<sup>10</sup> The NEB does not regulate System Operators (i.e. entities responsible for managing generating capacity and the transmission lines to ensure the system operates safely and efficiently). However, in some cases the power line owner may also be the System Operator (e.g., Hydro Quebec, Ontario Hydro).

<sup>11</sup> Areas to which such responsibilities relate include Nunavut; Sable Island; the Inuvialuit Settlement Region onshore; that part of the onshore that is under the administration of a federal minister (including Normal Wells Proven area and other miscellaneous parcels); that part of the internal waters of Canada or the territorial sea of Canada that is not situated in a province other than the Northwest Territories, or in that part of the onshore that is not under the administration of a federal minister; and the continental shelf of Canada, but does not include the adjoining area as defined in section 2 of the *Yukon Act*.

2. ***What is the role of government policy in guiding NEB oversight and decision making?***
  - a. ***As the lead Minister of the Crown, is there a role for the Minister of Natural Resources to clarify policy outcomes that are expected?***
  - b. ***How should the NEB incorporate and reflect “whole of government” policy direction, such as the new Federal Sustainable Development Strategy for Canada and Canada’s Mid- Century Long-Term Low-Greenhouse Gas Development Strategy, when setting out hearing orders, lists of issues, and ultimately, recommended decisions and conditions?***
3. ***What are your views with respect to the role(s) of other parties in the final decision-making process, such as Indigenous groups, provinces/territories or municipalities?***
  - a. ***Do you see an enhanced role for some or all of these parties? If so, please describe what these roles should be for each, with a short rationale for why.***
4. ***What are your views with respect to the current three options available to the GIC when making its decision for pipelines greater than 40 km in length? What can be improved?***
5. ***What are your views with regard to the legislated timelines for project reviews (i.e., 15 months for NEB recommendation and 3 months for a GIC decision)?***
6. ***What are your views with respect to NEB’s discretion to hold hearings for export licences?***
7. ***In determining whether an export licence should be issued, what are your views with respect to NEB’s obligation to only consider whether the exports would be a surplus to Canadian requirements (see footnote 7)?***
8. ***What are your views with regard to the land acquisition process and dispute resolution? What are your views with respect to the responsibility of the pipeline company to negotiate with landowners regarding the amount of compensation?***

## ANNEX: Pipelines, Power Lines, and Export and Import Decision-Making



Note: This is not an exhaustive list of NEB/GIC decision-making. Maximum timelines for the NEB are the following: international or interprovincial pipeline facilities – 15 months; international power line facilities requiring a certificate – 15 months; international power line facilities requiring a permit – none; oil and gas exports and gas imports – 6 months for licences, none for orders. For all decisions or recommendations described above that need to go to GIC for final decision, GIC has a maximum of 3 months to make its decision, but this can be extended, as can the NEB’s timelines in certain circumstances.

<sup>1</sup> Unless GIC designates the international power line to go through the certificate process upon recommendation by the Board to the Minister or by GIC making the designation order on its own initiative. The applicant can also elect a certificate application.

<sup>2</sup> s. 4 of the National Energy Board Act Part VI (Oil and Gas) Regulations specify that GIC approval is required prior to the issuance of a licence.

## Determining the Canadian Public Interest

**TOPIC:** What factors should be considered when determining whether a pipeline or power line project is in the Canadian public interest.

**CONTEXT:** In Canada, public perspectives regarding energy issues have evolved since the National Energy Board (NEB) was first created in 1959. Increasingly, many Canadians are expressing interest in a number of new issues, such as climate change, Indigenous rights and consideration of how a project fits into Canada’s proposed transition to a low carbon economy.

Under the *National Energy Board Act* (NEB Act), the NEB is required to examine applications to build and operate pipelines and certain power lines that cross inter-provincial or international borders. The NEB must decide or recommend<sup>1</sup> if a project is in the Canadian public interest and determine the terms and conditions<sup>2</sup> attached to any project approval that are necessary or desirable in the public interest.

Parliament has provided the NEB with direction through its legislation about the factors relevant to the Board’s consideration in reaching its public interest determination. The NEBA ct says:

*52(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:*

- a) the availability of oil, gas or any other commodity to the pipeline;*
- b) the existence of markets, actual or potential;*
- c) the economic feasibility of the pipeline;*
- d) the 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; and*
- e) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.*

The Canadian public interest is not explicitly defined in the NEB Act. However, the NEB has described the public interest in the following terms: “The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society’s values and preferences evolve over time.”<sup>3</sup> The NEB is responsible for estimating the overall public good a project may create and its potential negative aspects, weighing its various impacts, and making a decision or recommendation based on those considerations.

The above-referenced part of the NEB Act is broad enough that the NEB has discretion to consider factors other than those listed, based on the specific facts of a project application. The NEB uses this part of the NEB Act to consider environmental and socio-economic effects that are directly related to a project.<sup>4</sup>

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<sup>1</sup> See discussion paper on decision-making roles on projects.

<sup>2</sup> Conditions are legal requirements that must be adhered to should the proponent receive approval to build the project. If a project does proceed, the Board conducts ongoing regulatory oversight throughout the lifecycle of that project.

<sup>3</sup> As per NEB’s 2015 Annual Report to Parliament <http://www.neb.gc.ca/bts/pblctn/nlprpt/2015/nlprpt2015-eng.pdf>

<sup>4</sup> The NEB conducts environmental assessments as part of its review of all pipeline project applications, as well as other types of facility projects. More information about the NEB’s environmental assessment is available at <https://www.neb-one.gc.ca/glbl/ccct/nvrnmntlsssmnt-eng.html>.

Considerations that go into the NEB recommendation or decision could include, but are not limited to:

- Human health;
- Safety (e.g. whether the pipeline can be constructed, operated and maintained in a safe manner);
- Navigation and navigation safety;
- Soil, soil productivity and vegetation;
- Water and air quality;
- Fish and fish habitat, wildlife and wildlife habitat, including species at risk;
- Greenhouse gas emissions related directly to the project;
- Human occupancy and resource use (e.g. impact of project construction and operation on landowners and land users);
- Traditional land and resource use;
- Social and cultural well-being;
- Heritage resources (e.g. impact of the project on cultural heritage resources);
- Infrastructure, services, employment and economy; and,
- Acoustic environment.

The NEB assesses the need for a project and the other factors set out in legislation (subsection 52(2) of the NEB Act) and determined by the NEB to be directly related and relevant to the project and weighs the potential benefits and burdens of that project. Looking at all of this information together, the NEB then makes its recommendation or decision on whether a project is in the Canadian public interest and determines the appropriate terms and conditions.

#### **DISCUSSION QUESTIONS:**

- 1. What does the ‘Canadian public interest’ mean to you?***
- 2. What factors should be taken into account when determining whether a pipeline or power line project is in the ‘public interest’?***
- 3. For factors that fall within the jurisdiction of provinces and territories, such as land use planning, should the federal government and agencies take these into account in their public interest determination? If so, how?***

## Safety and Environmental Protection

**TOPIC:** Safety and environmental oversight of facilities regulated by the National Energy Board (NEB).

**CONTEXT:** The NEB is Canada's national energy regulator responsible for overseeing the safety, security and environmental protection of interprovincial and international pipelines, international power lines, and designated interprovincial power lines. As a lifecycle regulator, the NEB maintains continual oversight over safety and environmental protection associated with the projects it regulates from planning and application assessment, construction and operation and abandonment. Provinces are responsible for regulating companies operating pipelines and power lines that are contained wholly within their borders.<sup>1</sup>

Oversight of safety and environmental compliance is carried out by, among other things, setting regulatory requirements and standards, setting project specific conditions, conducting compliance oversight and applying enforcement tools where necessary. As a result, companies are required, on a continual basis, to anticipate, manage, and mitigate any potential threats to safety and the environment that may occur through the full lifecycle of their facilities. Some areas that the NEB's environmental oversight of a pipeline or facility may focus on include: soil, soil productivity and vegetation; wetlands, water quality and quantity; fish, wildlife and their habitat; species at risk or species of special status and related habitat; heritage resources; traditional land and resource use; human health, aesthetics and noise.<sup>2</sup>

Tools and requirements regarding safety and environmental protection are set out in the *National Energy Board Act* (NEB Act), and supporting regulations. In addition, there may be safety and environmental protection expectations of regulated companies as a result of other NEB initiatives.

Some regulatory requirements are also set out by other acts and regulations, both federally and provincially. For example, waterways crossed by NEB-regulated pipelines and power lines may also be subject to the *Fisheries Act* and *Species at Risk Act*, as well as provincial laws relating to water use.

### Conditions

When considering an application, the NEB assesses whether the project is in the public interest, including whether it can be designed, built and operated safely and in a manner that protects the environment. Under the NEB Act, the NEB may impose or recommend conditions on a project approval. These conditions are project-specific and are designed to protect the public and the environment by reducing possible risks associated with the project.<sup>3</sup> Conditions may include requirements pertaining to project engineering and safety; emergency preparedness; environmental protection; rights and interests of people and communities; and the company's financial responsibilities. The conditions must be published publicly with the NEB's Recommendation Report or Reasons for Decision, or as part of the authorization for the project.<sup>4</sup>

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<sup>1</sup> As well as international power lines authorized as a result of the permit process where a provincial regulatory agency has been designated under the NEB Act.

<sup>2</sup> As part of the NEB modernization review, the Expert panel will consider the NEB's environmental protection and oversight responsibilities during the planning, construction, operation and abandonment of facilities within its jurisdiction. Additional information on this issue is provided in the "Environmental protection and safety" section of the following fact sheet: <https://www.neb-one.gc.ca/bts/whwr/nbfcst-eng.html>. Note that this review does not cover matters related to environmental assessment (EA) processes, which are covered by the EA Expert Panel. For more information on the EA Expert Panel: <http://eareview-exameneec.ca/>.

<sup>3</sup> Conditions may also be imposed as a result of any other NEB order (e.g., an abandonment order).

<sup>4</sup> During the course of the project assessment, participants have the opportunity to comment on project-specific conditions the NEB is considering.

The NEB is responsible for verifying and enforcing compliance with all of the conditions. A condition may require a company to submit ongoing documentation to the NEB to demonstrate that it is meeting the requirements of the condition. As well, a condition may require Board approval of these filings. The NEB evaluates this documentation and follows up with the company if more information is needed. The company cannot modify any conditions without prior approval from the NEB and cannot proceed until all relevant conditions for the proposed work have been met.

The NEB publishes condition-related data on its external webpage in a searchable format. The NEB has also established a new Regulatory Document Index and Project Specific Lifecycle webpage to improve public access to this information.

### Compliance Tools

The NEB has many tools to verify a company's ongoing compliance with the NEB Act, regulations, relevant codes and standards, conditions and commitments. These tools include, but are not limited to:

- Inspections;
- Remediation plan approvals;
- Post-construction monitoring reviews;
- Emergency exercise evaluations;
- Management system audits;
- Compliance meetings;
- Review of key company manuals such as emergency procedures manuals.

The NEB evaluates regulated companies, their facilities and activities on an ongoing basis to determine the appropriate level of compliance oversight for each company. This risk-informed approach analyzes and considers incident data, compliance history, industry trends, complexity of activities, and safety and environmental impacts in order to focus on areas of the highest priority when planning compliance verification activities.

The NEB conducts approximately 150 to 200 inspections per year. The NEB posts information on its compliance and enforcement actions, including inspection reports and condition compliance.

### Enforcement Tools

The NEB uses its enforcement tools to obtain compliance, deter future non-compliance, and prevent harm. Enforcement tools available to the NEB include, but are not limited to:

- Notices of non-compliance;
- Orders issued by Inspection Officers;
- Safety orders issued by the NEB;
- Administrative monetary penalties;<sup>5</sup>
- Revocation of a company's authorization to operate;
- Prosecution.

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<sup>5</sup> Penalties range from \$25,000 for individuals to \$100,000 for companies per violation, per day and could apply in a variety of situations. For example, the penalty could apply to companies that do not comply with NEB orders.

NEB enforcement tools are not mutually exclusive and more than a single measure may be used depending on the situation. Actions taken may escalate depending on the severity of the non-compliance and the company's willingness to return to full compliance.

#### Other NEB Tools and Requirements

The NEB Act and associated regulations contain additional tools and requirements which the NEB can use to support safety and environmental protection. Examples include:

- The NEB Act contains tools and requirements regarding emergency preparedness and response. Further details are contained in the Emergency Prevention, Preparedness and Response Discussion Paper.
- The NEB Act allows the NEB to order a company to take any measure necessary to ensure that the company has the ability to pay for the abandonment of its pipelines. The NEB has ordered most pipeline companies it regulates to establish a trust or provide a letter of credit or surety bond for their abandonment funds.
- The *National Energy Board Onshore Pipeline Regulations* (OPR) requires companies to operate in a systematic, comprehensive and proactive manner that manages risks. The OPR also requires companies to have fully developed and implemented management systems<sup>6</sup> and protection programs that provide for continual improvement.

#### Management System Approach

Under a management system approach, companies could implement management system practices such as third party verification, incorporation of lessons from other sectors and jurisdictions, reporting/scorecards that address sustainability. A carefully-designed and well-implemented management system supports a culture of safety and is fundamental to keeping people safe and protecting the environment.

#### Other Related Initiatives

The NEB also undertakes initiatives in the areas of safety and environmental protection to promote continual improvement. For example, the NEB recently worked with industry associations, other regulators, and academia in the area of safety culture and publically released safety culture indicators.<sup>7</sup> The safety culture framework is intended to promote learning and shared understanding of safety culture, and articulates the NEB's expectation that companies must build and maintain a positive safety culture.

In addition, on recent pipeline projects (e.g., Kinder Morgan's Trans Mountain Expansion and Enbridge's Line 3 Project), the Government of Canada announced that it will fund and co-develop Indigenous Advisory and Monitoring Committees with Indigenous communities to report on commitments and observations during construction and operations. However, these committees are being set up on a project-specific basis, and do not exist on most other projects.

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<sup>6</sup> A management system is a set of interrelated or interacting processes and procedures that organizations use to implement policy and achieve objectives.

<sup>7</sup> See North American Regulators Working Group on Safety Culture, *Indicators Research Project: A Regulatory Perspective*, <http://www.neb-one.gc.ca/sftnwmmt/sft/sftycltr/sftcltrmdctr-eng.html> (March 2016).

## **DISCUSSION QUESTIONS:**

- 1. *What are your views with respect to the existing compliance and enforcement tools available to the NEB for safety and environmental protection?***
  - a. *What are your views as to adherence to these tools?***
  - b. *What are your views as to the current use of these tools to advance risk management and any barriers or remedies that would enhance safety?***
  - c. *What are your views as to the safety and environmental performance reporting that is currently done and areas for improvement?***
  - d. *Can the process by which the NEB evaluates compliance and adherence to conditions be made more efficient? If so, how?***
- 2. *Are there additional initiatives the NEB could undertake to help promote a positive culture for safety and environmental protection?***
- 3. *What are your views on monitoring committees?***

## Emergency Prevention, Preparedness and Response: Tools and Requirements

**TOPIC:** A key part of safety and environmental protection: emergency prevention, preparedness and response for pipelines regulated by the National Energy Board (NEB).

**CONTEXT:** The NEB is Canada’s national energy regulator responsible for, among other things, overseeing the safety, security and environmental protection of interprovincial and international pipelines. As a lifecycle regulator, the NEB maintains continual oversight over the projects it regulates from planning and application assessment, construction, and operation to abandonment. Provinces are responsible for regulating companies operating pipelines that are contained wholly within their borders.

Tools and requirements regarding emergency preparedness and response are set out in the *National Energy Board Act* (NEB Act), and supporting regulations.<sup>1</sup> These tools and requirements help to prevent pipeline releases from happening in the first place. If a release does occur, the NEB ensures all necessary measures are taken to protect the population, make the pipeline safe, protect the environment, clean up the spill and remediate the environment. The NEB Act also reinforces the polluter-pays principle. Information regarding the NEB’s compliance and enforcement activities is publicly available on its website.<sup>2</sup>

### Tools

As outlined in the discussion paper on *Safety and Environmental Protection*, the NEB has many compliance tools and enforcement tools including inspections, audits, compliance meetings, notices of non-compliance, inspection officer orders, NEB-issued safety orders, administrative monetary penalties, revocation of a company’s authorization to operate, and prosecution. These tools enable the NEB to monitor and enforce compliance with requirements concerning emergency prevention, preparedness and response.

The *Pipeline Safety Act* came into force in June 2016 and amended the NEB Act, providing additional tools related to emergency preparedness and response:

- The NEB may order a company to maintain specified types of financial resources and the amounts under each type. Financial resources enable companies to respond to and cover potential costs associated with a release from their pipelines.
- If there is a pipeline release, the NEB may order the company to reimburse costs and expenses of third parties for reasonable measures taken in relation to the release.
- In the event of an unintended or uncontrolled release of oil, gas, or any other commodity, the Governor in Council may “designate” a company in specific circumstances.<sup>3</sup> Upon designation, the NEB has the authority to take over the response to the release and reimburse costs and expenses of third parties for reasonable measures taken in relation to the release.

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<sup>1</sup> With respect to tanker safety, Transport Canada ensures that marine transportation is safe and efficient by establishing and enforcing marine safety regulations under the *Canada Shipping Act, 2001*. Tanker safety falls under the mandate of Transport Canada and is not part of this review.

<sup>2</sup> More information on what is made publicly available can be found here: <https://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/index-eng.html>.

<sup>3</sup> The Governor in Council may “designate” a company if it does not have or is not likely to have the financial resources necessary to pay the costs, expenses and damages associated with the release; or it does not comply with an order of the NEB with respect to the release.

## Requirements

The *National Energy Board Onshore Pipeline Regulations* require NEB regulated companies to have robust emergency management programs that will anticipate and prevent incidents and manage conditions during an emergency. Emergency management programs must include:

- Identification and analysis of potential hazards
- Evaluation and management of risks associated with all hazards
- An up-to-date emergency procedures manual that is filed with the NEB
- Liaising with agencies that may be involved in an emergency situation
- Taking all reasonable steps to inform all persons who may be associated with an emergency response activity on the pipeline of the practices and procedures to be followed
- Having a continuing education program for the police, fire departments, medical facilities, other appropriate organizations and agencies and the public residing adjacent to the pipeline to inform them of the location of the pipeline, potential emergency situations and the safety procedures to be followed in case of an emergency
- Procedures for the safe control or shutdown of the pipeline system in the event of an emergency
- Sufficient response equipment
- Training to instruct employees on the emergency procedures and emergency equipment
- Capability to respond to an emergency, demonstrated through emergency response exercises <sup>4</sup>

Companies operating NEB-regulated pipelines must have published their emergency procedures manual on their publicly available websites by 30 September 2016.<sup>5</sup>

Under the NEB Act, companies are also required to compensate those who have sustained damage as a result of exercising their powers under the NEB Act. Amendments to the NEB Act as a result of the *Pipeline Safety Act* gave rise to additional requirements related to emergency preparedness and response:

- Regardless of whether a pipeline release is the company's fault, companies are responsible for paying costs arising from a release on their pipeline up to an absolute liability limit. The absolute liability limit for major oil pipeline companies<sup>6</sup> is \$1 billion. For companies operating other sizes of pipelines (i.e., not classified as major), the absolute liability limit will be set out in regulation.<sup>7</sup>
- When a pipeline release is the company's fault, there is no limit to the costs they are responsible for paying arising from the release on their pipeline.
- The NEB Act requires companies to maintain sufficient financial resources to meet their absolute liability limits, and the NEB can require companies to maintain even greater amounts of financial resources. Financial resources can include the company's financial statements, letters of credit, guarantees, bonds or suretyships, and insurance.

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4 See "Fact Sheet: Emergency Management," on the NEB Website: <http://www.neb-one.gc.ca/bts/nws/fs/mrgncmngmnt-eng.html>

5 See *Order MO-006-2016 Compelling Publication of Emergency Procedures Manuals* on the NEB website at: <https://www.neb-one.gc.ca/sftmvrnmnt/mrgnc/rspns/nbl2016-04-05-eng.html>

6 This is defined in the NEB Act as a company that is authorized to construct or operate one or more pipelines that individually or in aggregate have the capacity to transport at least 250,000 barrels of oil per day.

7 A draft of the *Pipeline Financial Requirements Regulations* was published in Canada Gazette I: <http://canadagazette.gc.ca/rp-pr/p1/2016/2016-10-08/html/reg3-eng.php>

## **DISCUSSION QUESTIONS:**

- 1. In your opinion, are the existing emergency preparedness and response tools and requirements sufficient? If not, what additional tools or requirements are needed?***
- 2. What are your views with respect to the absolute liability limits that should apply regardless of whether a pipeline release was the company's fault (particularly \$1 billion for major oil pipeline companies)?***
- 3. In addition to information the NEB currently makes public about compliance and enforcement, is there additional information that should be made available over the lifecycle of a regulated project? If so, what?***

## Indigenous Engagement and Consultation

**TOPIC:** Indigenous engagement and consultation.<sup>1</sup>

**CONTEXT:** The National Energy Board (NEB) Modernization Panel (the Panel) has been asked to focus on a number of key issues, including Indigenous engagement and consultation.<sup>2</sup> Specifically, the Panel’s review is expected to provide findings and recommendations to the Minister of NRCan in the following areas (from the Panel’s Terms of Reference):

1. Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by a specific project under the NEB’s mandate;
2. Facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making;
3. Further integrating Indigenous traditional knowledge and information into NEB application and hearing processes;
4. Developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and
5. Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.

To address the five objectives noted above, it is important to understand the context around how Indigenous engagement and consultation has been approached and undertaken for NEB projects in recent years—including roles, responsibilities and authorities. This must also be considered within the broader context in which the Government of Canada is now working to uphold and respect Indigenous rights and interests in a way that strengthens reconciliation and relationship-building.

### *The Crown’s Duty to Consult, and Where Appropriate, Accommodate*

Section 35 of Canada’s *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.<sup>3</sup> The legal duty of the Crown<sup>4</sup> to consult, and where appropriate, accommodate Aboriginal groups, finds its source in the Honour of the Crown and section 35. It is triggered

whenever the Crown contemplates conduct (e.g., a project decision or authorization) that could adversely impact an established or asserted Aboriginal or treaty right. Expectations of the courts on what is required to fulfill this responsibility were first set out in detail in the *Haida* and *Taku River* Supreme Court of Canada decisions of 2004, and have been further clarified in subsequent court decisions.

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<sup>1</sup> While the Panel will use this discussion paper to support and inform its engagement with Indigenous peoples, a separate, dedicated engagement process on this discussion paper itself was not undertaken.

<sup>2</sup> For the purposes of this paper, “engagement” refers to the broader process of ongoing dialogue and relationship building on matters of interest and concern that generally lie outside the context of legal, section 35 Aboriginal or treaty rights. “Consultation” refers more to the Crown’s legal and constitutional duty to consult, in the context of section 35 rights.

<sup>3</sup> In this context, “Aboriginal peoples” refers to the First Nation, Inuit and Métis peoples of Canada.

<sup>4</sup> Federally in Canada, the ‘Crown’ refers to the Crown in Right of Canada and is the legal embodiment of the three branches of governance: executive, legislative and judicial. In the context of Crown consultations, it is shorthand for the executive branch of government and those entities exercising executive authorities. Federal officials that work within line departments which have Crown conduct (e.g., Natural Resources Canada, Fisheries and Oceans Canada, Indigenous and Northern Affairs Canada) generally undertake consultation activities on behalf of the federal Crown.

While the term “Aboriginal“ is used in section 35 and has significance with respect to “Aboriginal or treaty rights”, the term “Indigenous peoples” has been recently adopted by various organizations and institutions in accordance with terminology in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, UN Declaration, or the Declaration). This is also the term the Panel is using for most of its engagement activities.

The UN Declaration was first adopted by the UN in September 2007. It contains 46 articles describing the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances. It also encourages harmonious, cooperative relationships between States and Indigenous peoples based on the principles of equality, partnership, good faith and mutual respect. For a number of years, Canada provided its conditional support for the Declaration. In 2015, Canada announced its support for the Declaration’s implementation without qualifications. The Minister of Justice has been tasked by the Prime Minister with leading UNDRIP’s implementation for the Government of Canada, and has indicated that this requires an “interlocking set of laws, policies, institutions, structures and patterns of relations.” She has also clarified that a principles-based approach is required, acknowledging the centrality of the Honour of the Crown in all processes.

In this context, under its Terms of Reference the Panel has been mandated as follows: “the Panel shall, in reviewing the NEB structure, role, and mandate, consider the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the UNDRIP.”.

*Current and Recent Practice: The Crown’s Approach to Fulfilling the Duty to Consult on NEB-Regulated Projects*

In recent years, the federal Crown has relied on the NEB process, to the extent possible, to fulfill its duty to consult Indigenous groups. This approach is consistent with existing consultation and accommodation guidance for federal officials,<sup>5</sup> and has been done as a way of leveraging environmental assessment and regulatory processes to avoid and mitigate potential project impacts, including impacts on Indigenous rights and interests.

The extent to which the NEB process is relied on by the Crown for consultation or accommodation has depended on the nature of a proposed project or authorization being sought. For major pipeline projects regulated under section 52 of the *National Energy Board Act* (NEB Act) or transmission lines regulated under section 58.16 of the NEB Act, the Governor in Council (GIC)<sup>6</sup> has final decision making authority.<sup>7</sup> In these instances, the Crown has on some projects undertaken direct consultation at specific points in the process, in advance of a GIC decision. For projects regulated under section 58 of the NEB Act for which the NEB makes the decision (e.g., proposed pipeline projects less than 40 km in length, including extensions or replacements) the Crown generally relies entirely, or almost entirely, on the NEB process to meet its duty to consult.

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<sup>5</sup> *Consultation and Accommodation Guidelines for Federal Officials* (2008, updated in 2011).

<sup>6</sup> The Governor in Council is the Governor General of Canada acting by, and with the advice and consent of the federal Cabinet.

<sup>7</sup> For more information on decision-making roles for projects, see the discussion paper on this topic.

Aspects of the NEB process and related requirements that are considered or relied on by the Crown in the context of proposed projects include:

- Collaboration between federal departments and the NEB to identify Indigenous groups whose rights and interests may be impacted by the proposed project;
- Engagement between the NEB and Indigenous groups early in the review process to provide information about the NEB, its role and how to participate in the NEB's proceeding;
- Issuance of participant funding to support Indigenous involvement in the hearing process (written and/or oral);<sup>8</sup>
- NEB requirements for Indigenous consultation by proponents (e.g., providing information and opportunities to discuss the Project, and identifying concerns, potential impacts and mitigation measures to address impacts);
- Advising proponents, through the NEB Filing Manual, to integrate local and traditional information and knowledge into the design of the project, where appropriate;<sup>9</sup>
- Receiving direct evidence, including oral traditional evidence, from Indigenous groups outlining concerns about the project, potential impacts to Indigenous rights and interests, and possible avoidance or mitigation measures to address adverse impacts on these rights and interests;
- Allowing for the testing of direct evidence (either orally through cross-examination or in writing through information requests);
- NEB assessment of all the information provided to it (including on potential impacts to Indigenous rights and interests and possible avoidance or mitigation measures) and determination of possible residual impacts on Indigenous rights and interests;
- The development of enforceable measures to reduce potential impacts to Indigenous rights and interests (via proponent commitments, mandatory conditions and legislative requirements); and
- If a project is approved and construction proceeds, follow-up monitoring and enforcement by the NEB of regulatory requirements, including project conditions.

Consultation-related activities undertaken by the Crown may include:

- Maintaining an understanding of Indigenous groups whose rights or interests could be impacted by the project and communicating with these groups about the project review and consultation process;
- Confirming the Crown's List of Indigenous groups who may potentially be impacted by the project
- early in the review process in consultation with NEB and other federal departments;
- Tracking of issues raised by Indigenous groups throughout the NEB process, as well as responses to these issues by the NEB, proponent or other parties;
- In-person meetings with Indigenous groups to gather information on views or concerns with respect to the project, encouraging participation in the NEB process and efforts to establish and strengthen long-term relationships;
- In some cases, provision of separate participant funding (outside the NEB) to support Indigenous participation in consultations by the Crown;

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<sup>8</sup> The NEB's Participant Funding Program provides funding to facilitate public participation in certain hearings and environmental assessments of designated projects. For more information on the NEB's Participant Funding Program, see the discussion paper on this topic.

<sup>9</sup> See section 3.4 of the NEB's filing manual: <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/index-eng.html>

- In-person meetings with Indigenous groups to exchange information, gather feedback on the NEB’s project recommendations, and discuss potential Crown considerations on matters that may lie outside the NEB’s mandate;
- Developing a report summarizing the consultation process and potential accommodations
- In-person meetings with Indigenous groups to gather feedback on Crown consultation and accommodation reports;
- The sharing of Crown analysis to seek feedback from Indigenous groups;
- Assessing the adequacy of consultation;
- The implementation of additional measures, where appropriate, to address potential impacts that are beyond the NEB’s mandate to address; and
- Considering the issues raised and recommendations brought forward within NEB process to inform a GIC decision on a project.

*Current and Recent Practice: Indigenous Engagement during the Lifecycle of a Federally-Regulated Pipeline*

As a lifecycle regulator, the NEB is mandated to manage safety and environmental protection objectives at various phases of federally regulated projects under its purview (e.g., design and application, construction, operation and abandonment).<sup>10</sup> If a project is approved, the proponent must comply with conditions and other regulatory requirements (e.g., *Onshore Pipeline Regulations*, *NEB Pipeline Damage Prevention Regulations*). In addition, proponents’ consultation programs are required to continue throughout the life cycle of a project. The NEB verifies and enforces compliance with the use of different tools. Those who have concerns about potential impacts of projects can make those concerns known to the NEB, and the NEB can take remedial actions, as necessary.

Beyond these existing provisions, some Indigenous peoples have expressed concerns about their participation and role(s) throughout the life cycle of projects, particularly once NEB hearings have concluded and construction and operations phases begin. On recent pipeline projects (e.g., Kinder Morgan Canada’s Trans Mountain Expansion and Enbridge’s Line 3 Project), the Government of Canada has announced that it will fund and co-develop Indigenous Advisory and Monitoring Committees with Indigenous communities to report on commitments and observations during construction and operations. However, these committees are being set up on a project-specific basis, and do not exist on most other projects.

**DISCUSSION QUESTIONS:**

The questions below seek input on opportunities to further enhance Indigenous engagement, consultation and participation with respect to: (1) reviews of specific pipeline projects before and after a decision has been made; and (2) on a broader, non-project specific level:

- 1. What are your views on the approach the Government of Canada has taken in recent years to engage and consult Indigenous groups on projects regulated by the NEB? Specifically:***
  - a. Early engagement of Indigenous groups prior to a formal environmental assessment and regulatory review process by the NEB;***
  - b. Consultations with Indigenous groups on matters that fall both within and outside the NEB’s mandate;***

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<sup>10</sup> For more information on safety and environmental protection, see the discussion paper on this topic.

- c. *Adequacy of participant funding to support Indigenous groups' participation in the overall engagement and consultation process;*
  - d. *The roles of the NEB and the Crown in considering and addressing potential impacts to Aboriginal or treaty rights on NEB-regulated projects, and how these respective roles are carried out; and*
  - e. *Ongoing consultation and engagement of Indigenous groups during the construction, operations, and abandonment phases of projects that are approved.*
2. *How can Indigenous traditional knowledge (including Traditional Ecological Knowledge) and information be further integrated into the NEB application and hearing process? What are the potential benefits and constraints to this integration?*
  3. *How can Canada enhance its approach to Indigenous engagement and consultation to inform decision-making on NEB-regulated projects?*
    - a. *What should be the role of the NEB? The Government of Canada? Project proponents?*
  4. *Indigenous peoples (e.g., specific groups or communities?)*
  5. *How should the Government of Canada's approach to engaging and consulting Indigenous groups on NEB regulated projects support the Government of Canada's goal of renewing the nation-to- nation relationship with Indigenous Peoples and moving towards reconciliation?*
  6. *How can the Government of Canada best consider and address the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples when undertaking efforts to modernize the NEB and when making decisions on whether NEB-regulated projects are in the public interest?*
  7. *What could be done to enhance the involvement of Indigenous peoples in the full life cycle of NEB-regulated projects (e.g., ongoing monitoring of the operation of existing projects, economic development opportunities/participation, or other roles)?*
  8. *What are your views regarding how federal departments and agencies can and should balance and respect the interests and rights of Indigenous peoples with varied societal interests to inform decision-making on NEB-regulated projects?*

## The National Energy Board's Participant Funding Program

**TOPIC:** The National Energy Board's (NEB) Participant Funding Program.

**CONTEXT:** Preparing for and participating in a hearing before the NEB may require significant time and resources.<sup>1</sup> Hearing participation can involve costs related to travel, meetings, evidence preparation, and the hiring of lawyers and experts, among other expenses. Reducing financial barriers to participation supports increased public participation and facilitates the consideration of a greater diversity of concerns and perspectives.

The *National Energy Board Act* (NEB Act) was amended in 2010 to allow the NEB to establish a Participant Funding Program (PFP).<sup>2</sup> The NEB subsequently created the NEB Participant Funding Program Terms and Conditions (Terms and Conditions), which sets out the basic parameters for the program.<sup>3</sup> The NEB PFP is a transfer payment program intended to reduce the financial burden incurred as a result of participating in certain NEB public hearings and environmental assessments of designated projects.<sup>4</sup>

### Eligible Applicants

Eligible applicants for the NEB's PFP include Indigenous groups, landowners or individuals living on or near the proposed project area, not-for-profit groups or organizations, or other groups or individuals directly affected by a proposed project.

Funding is not provided to for-profit organizations, industry associations, anyone with a direct commercial interest in the project or government groups (except for Indigenous government groups). These groups may participate in an NEB hearing but are not eligible to apply for participant funding.

### Eligible Activities and Costs

The NEB's participant funding covers specific activities and costs related to preparing for and participating in an NEB hearing and should be incremental to a group or individual's day-to-day or ongoing activities. Eligible activities and costs for participant funding begin when a proponent files a project application and end once the NEB hearing record closes.

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<sup>1</sup> For more information on the hearing process, please see the discussion paper on this topic.

<sup>2</sup> The *Canadian Environmental Assessment Act, 2012* (CEAA 2012) also requires the NEB to establish a participant funding program to facilitate the participation of the public in environmental assessments of designated projects it carries out under CEAA 2012. The NEB's current PFP Terms and Conditions are for both the NEB Act and the CEAA 2012.

<sup>3</sup> The Terms and Conditions were created by the NEB with the approval of the Treasury Board of Canada, in compliance with the Treasury Board Secretariat Policy on Transfer Payments (2008) (Policy). The Terms and Conditions may be amended from time to time, as set out in the Policy: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14208>

<sup>4</sup> Eligible NEB public hearings include: applications for certificates of public convenience and necessity for a pipeline; exemption orders respecting pipelines; certificates of public convenience and necessity for an international or designated interprovincial powerline; abandonment of an international or designated interprovincial powerline; or abandonment of a pipeline. Eligible NEB Act or *Canada Oil and Gas Operations Act* hearings / environmental assessments of designated projects include: pipelines with a length of 40 km or more; electrical transmission lines with a voltage of 345 kV or more that require a total of 75 km or more of new right of way; offshore platforms, pipelines, or exploratory wells; sour gas processing facilities with a sulphur inlet capacity of 2 000 t/day or more; petroleum storage facility with a storage capacity of 500 000 m<sup>3</sup> or more; and facilities in a wildlife area or migratory bird sanctuary.

Examples of eligible costs are legal fees, expert fees, travel expenses, rental of office space or meeting rooms, honoraria and ceremonial costs, collection or purchase of information, translation of materials and other appropriate costs necessary for the proposed participation.<sup>5</sup> The maximum amount that any single group may receive is \$80,000 per project hearing. For individuals, the maximum is \$12,000. These amounts are reviewed annually based on the NEB's annual budget and the anticipated demand for funding.

Between 2010 and 2016, the NEB awarded over \$12 million in participant funding for 19 eligible public hearings. As of December 2016, Indigenous groups have received 74%, or over \$9 million of the total funds awarded under the NEB's PFP.<sup>6</sup>

The NEB encourages recipients to collaborate with others and seek out additional sources of funding; applicants are also requested to declare any other government sources of funding for their participation. The NEB's PFP is not capacity funding; it does not fund ongoing business costs, Crown consultation or other costs incurred outside of an NEB hearing.

### *Project Funding Amounts*

The total amount of available participant funding varies per project and is based on the project's size, location, possible effects, range of issues, the number of Indigenous groups and landowners affected, the anticipated level of public interest, and the funding approved by Parliament. The NEB may request to increase the total available funding, as was the case with the Energy East and Eastern Mainline Projects where the total amount increased from \$5 million to \$10 million.

Participant funding is a cost-recovered activity, meaning the NEB recuperates these costs from the companies it regulates. The money recovered from companies is deposited into the Government of Canada's consolidated revenue fund.

### *Process*

The NEB's participant funding process begins when a proponent files an application for a proposed project. The NEB notifies the public of participant funding opportunities through its website and may also engage more directly with potential applicants for funding through open houses and information sessions, where the NEB explains its hearing and PFP application processes.

Interested applicants must submit an application form setting out, among other things, the applicant's interest in the proposed project and the list of issues and unique information that the applicant intends to provide to the hearing. An independent Funding Review Committee may be established by the NEB, to review the applications. This Committee would be made up of at least one person who is not connected to government; all of the Committee members must have no interest or financial stake in the proposed project. Award decisions are sent to applicants with supporting rationale together with a Contribution Agreement that sets out the terms and conditions of the participant funding, if granted.

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<sup>5</sup> Full list of eligible costs are available in the NEB Participant Funding Guide: <https://www.neb-one.gc.ca/prtcptn/hrng/pfp/prgrmgd-eng.html>

<sup>6</sup> NEB Participant Funding Reports: <https://www.neb-one.gc.ca/prtcptn/hrng/pfp/llctnfd/index-eng.html>

Following participation in an NEB hearing, PFP recipients submit a claim form with supporting documents (e.g., invoices) to the NEB and are reimbursed for eligible activities, in accordance with the terms of the signed Contribution Agreement. The deadline to submit a final claim is generally 60 days after the hearing record closes. Interim payments may be provided for costs incurred and advance payment is provided in exceptional circumstances at the discretion of the NEB.

### Intervenor Status

Successfully applying for participant funding does not guarantee approval to participate in an NEB hearing. Funding is however conditional on applying for and obtaining Intervenor status, in the NEB public hearing.<sup>7</sup> This process is separate from the participant funding process and requires a separate application, has different timelines, different requirements, and is decided by the NEB Panel hearing the relevant application. The separation between the two processes ensures independence in decision making. Intervenor status is described in detail in the discussion paper on public participation.

If an applicant is approved to receive participant funding but is denied Intervenor status, then the applicant will be unable to participate in the NEB hearing and will therefore be unable to receive participant funding.

## **DISCUSSION QUESTIONS:**

- 1. *What are your views on the NEB's Participant Funding Program?***
- 2. *How could the participant funding process, administered by the NEB, be more efficient and effective in enabling public participation and Indigenous engagement in the hearing process?***

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<sup>7</sup> Under section 55.2 of the *National Energy Board Act*, there are two ways by which a person could seek to gain standing (Intervenor status), in an NEB hearing on an application to construct and operate a facility. Those people who are directly affected must be allowed to participate, and the Board has discretion, or may allow, but is not required to allow, the participation of those people who have relevant information or expertise.

## Public Participation

**TOPIC:** Public participation and the National Energy Board (NEB or Board).

**CONTEXT:** The public is expressing an increased interest in participating in various NEB activities, including in the NEB hearing process and in the development of ongoing safety and environment plans such as those related to emergency response.

### Public Participation prior to the Hearing Process<sup>1</sup>

As set out in the NEB Filing Manual,<sup>2</sup> the NEB requires companies, prior to submitting an application, to undertake an appropriate level of consultation with potentially affected groups and individuals, commensurate with the nature and magnitude of a proposed project.<sup>3</sup> Depending on the project scope, that could mean carrying out more extensive consultation activities such as hosting open houses in communities along the route of a proposed project, or a simple consultation activity such as notifying a single landowner.

### Public Participation in the Hearing Process

The NEB's public hearing process gives participants an opportunity to express their point of view and possibly ask or answer questions about a proposed project or application. The NEB supports participants in process-related matters for the hearing<sup>4</sup> and in some cases, travels to communities to provide information on the process and opportunities to participate.<sup>5</sup>

With respect to hearings for international or interprovincial pipelines, section 55.2 of the *National Energy Board Act* (NEB Act) sets out when the Board would allow a person to participate in a hearing. Specifically, the NEB “shall consider the representations of any person who, in the Board’s opinion, is directly affected by the granting or refusing of the application, and [the Board] may consider the representations of any person who, in its opinion, has relevant information or expertise.”<sup>6</sup>

Using the criteria outlined in section 55.2, the NEB decides whether a person should be allowed to participate in a particular hearing. To help it make this determination, the NEB requires prospective participants to fill out a form in which they have to demonstrate how they fall into one or both of the two categories described in section 55.2 of the NEB Act (i.e., are directly affected or have relevant information or expertise, or both). After reviewing the forms received, the NEB issues a ‘Ruling on Participation’ in which it indicates who can participate in the hearing and how they can participate— as an intervenor,<sup>7</sup> a commenter,<sup>8</sup> or in another way.<sup>9</sup> When applicants are denied status as participants, the ‘Ruling on Participation’ explains the reasons why.

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<sup>1</sup> For more information, please refer to the discussion paper on the hearing process.

<sup>2</sup> NEB Filing Manual available at: <https://www.neb-one.gc.ca/bts/ctr/gnmb/flngmnl/index-eng.html>

<sup>3</sup> NEB Filing Manual, Chapter 3.

<sup>4</sup> The NEB has a “Hearing Process Handbook” available on its website: <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngmpmplt-eng.pdf>

<sup>5</sup> For example, the NEB assigns a staff member as Process Advisors to support the public and Aboriginal groups who are participating in public hearings <http://www.neb.gc.ca/prtcptn/hrng/prcssdvsr-eng.html>

<sup>6</sup> For more information consult *Section 55.2 Guidance – Participation in a Facilities Hearing* on the NEB’s website: [https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnhrnggdncs52\\_2-eng.html](https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnhrnggdncs52_2-eng.html).

<sup>7</sup> Intervenors are, in addition to being able to provide their views in writing, able to question the evidence of others and give final argument. Intervenors may also receive questions about the evidence they file.

<sup>8</sup> Commenters are able to provide a Letter of Comment to the NEB Panel, which is filed on the public record and will be reviewed by the Panel prior to issuing a recommendation.

<sup>9</sup> For an example of a NEB decision on participation, see the ruling for the Trans Mountain Expansion Project:

[https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/130635/2445932/Letter\\_-\\_Application\\_for\\_Trans\\_Mountain\\_Expansion\\_Project\\_-\\_Ruling\\_on\\_Participation\\_-\\_A3V6I5.pdf?nodeid=2445819&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/130635/2445932/Letter_-_Application_for_Trans_Mountain_Expansion_Project_-_Ruling_on_Participation_-_A3V6I5.pdf?nodeid=2445819&vernum=-2)

Other requirements in the NEB Act potentially influence the hearing process and public participation. For example, there are statutory time limits of 18 months for major NEB applications requiring a certificate and 15 months for smaller pipeline applications. More broadly, the NEB must deal with all applications and proceedings “as expeditiously as the circumstances and considerations of fairness permit.”<sup>10</sup>

The NEB also administers a participant funding program that provides funding for intervenors to participate in hearings with respect to new or abandonment projects for pipelines or powerlines. Funding is meant to help intervenors cover a portion of the costs associated with their participation in the hearing. For additional information on the NEB’s participant funding program, please see the discussion paper on this issue.

#### Public Participation Outside of the Hearing Process

If a project is approved, the NEB undertakes environmental and safety oversight throughout the lifecycle of the project (i.e., from construction, operation, through to abandonment/decommissioning). The company’s consultation program must continue throughout the lifecycle of the project. Furthermore, input from certain members of the public may be required by a condition of a NEB certificate or order. Over the project lifecycle, anyone with continuing concerns about impacts of the project can make those concerns known to the NEB, and the NEB can take remedial actions if warranted.

There are no requirements in the NEB Act for general engagement activities (i.e. public participation that is not related to a specific project application). However, the NEB often seeks public input on specific issues. For example, the Land Matters Group,<sup>11</sup> which consists of landowner organizations, government agencies and industry, provides a forum for sharing insight and advice with the NEB on land matter issues.

The NEB also hosted Safety Forums in 2013 and 2015 as an open exchange of information on technical pipeline issues.

The NEB also engages Canadians when developing and amending its regulations. For example, the NEB held in-person workshops to seek input on its Administrative Monetary Penalties and conducted an online survey to understand how to improve its communications on pipeline damage prevention.

#### Public Participation and Emergency Response

One area of particular public interest is emergency response. The *National Energy Board Onshore Pipeline Regulations* (OPR) state that NEB-regulated companies must develop, implement and maintain an emergency management program that anticipates, prevents, manages and mitigates conditions during an emergency that could adversely affect property, the environment or the safety of workers or the public.<sup>12</sup>

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<sup>10</sup> NEB Act, subsection 11(4).

<sup>11</sup> For more information, see the Land Matters Group website: <http://www.neb-one.gc.ca/prtcptn/lndmttrs/lndmttrsgrp/lndmttrsgrp-eng.html>

<sup>12</sup> See: *National Energy Board Onshore Pipeline Regulations*, subsection 32(1), available on Justice Canada’s website at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-99-294/FullText.html>

The OPR also requires companies to establish and maintain a close working relationship with agencies that may be involved in an emergency response on a pipeline and consult with them in developing and updating their emergency procedures manual. Such agencies could include first responders, city planners, municipalities, and Indigenous groups.

Companies must also develop a continuing education program for police, fire departments, medical facilities, and other organizations and agencies and the public living near the pipeline.<sup>13</sup> The continuing education program informs these groups about the location of the pipeline, potential hazards and the emergency situations involving a pipeline, and the safety procedures to be followed in the case of an emergency.

To help elevate emergency management performance, increase public safety and make more emergency management information available to the public, the NEB issued an Order on 5 April 2016 that required NEB-regulated pipeline companies to publish their emergency procedures manual on their publicly available websites by 30 September 2016.<sup>14</sup>

## **DISCUSSION QUESTIONS:**

- 1. *What works well regarding public participation:***
  - a. *Prior to the hearing process;***
  - b. *In NEB hearings (including the criteria outlined in section 55.2 of the NEB Act);***
  - c. *In the development of emergency response manuals/ plans and their transparency;***
  - d. *Outside the hearing process, including opportunities related to:***
    - i. *The project life cycle;***
    - ii. *Specific issues; and***
    - iii. *Development of regulations.***
  
- 2. *What could be improved regarding public participation:***
  - a. *Prior to the hearing process;***
  - b. *In NEB hearings (including the criteria outlined in section 55.2 of the NEB Act);***
  - c. *In the development of emergency response manuals/plans;***
  - d. *Outside the hearing process, including opportunities related to:***
    - i. *The project life cycle;***
    - ii. *Specific issues; and***
    - iii. *Development of regulations.***
  
- 3. *What additional opportunities could be provided for the public and Indigenous peoples to provide input over the course of the entire lifecycle of NEB regulated facilities (i.e., from application to abandonment)?***

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<sup>13</sup> See: *National Energy Board Onshore Pipeline Regulations*, section 35.

<sup>14</sup> See *Order MO-006-2016 Compelling Publication of Emergency Procedures Manuals* on the NEB website at: <https://www.neb-one.gc.ca/sftnvrnmnt/mrgnc/rspns/nbl2016-04-05-eng.html>

## The Hearing Process

**TOPIC:** The hearing process at the National Energy Board (NEB) under the *National Energy Board Act* (NEB Act).

**CONTEXT:** Requirements for NEB hearings are set out in legislation in the NEB Act. They are further outlined in regulation in the *National Energy Board Rules of Practice and Procedure, 1995*.

Under the NEB Act, the review of certain types of applications requires the NEB to conduct a public hearing, including:

- applications for the construction and operation of major international or interprovincial pipelines
- (greater than 40 km) and certain international power lines;
- applications to abandon a pipeline; and,
- landowner opposition to the detailed route of an approved pipeline.

Except where a hearing is explicitly prohibited,<sup>1</sup> the NEB has discretion to carry out a public hearing for any matter that it considers advisable to do so. For example, the NEB has held hearings for pipelines less than 40 km in length.

The Chair of the NEB appoints a Panel, which is typically composed of three Board Members, to conduct an independent review of a major project application. The Chair of the NEB sets out time limits for the review of pipeline applications and applications for international power line certificates. The time limits cannot be more than 15 months from the date an application the NEB receives is determined to be complete.<sup>2</sup>

The NEB follows procedural fairness principles, and therefore before a decision adverse to a person's interests is made, the NEB must give that person an adequate opportunity to be heard. Under the NEB Act, the NEB has discretion over certain procedural aspects of its hearings, including whether to conduct a hearing entirely in writing or to include an oral component. NEB panels appointed to review applications determine a hearing process to respond to the specific circumstances of each application, consistent with procedural fairness principles. For example, the NEB includes an Indigenous Oral Traditional Evidence phase when Indigenous peoples are participating in the hearing.

Although the NEB's hearing process varies, basic steps typically include the following:<sup>3</sup>

1. An application is filed by the project proponent with the NEB. The NEB's Filing Manual<sup>4</sup> provides guidance regarding the information the Board expects to see in an application.
2. A time limit is established for the review of the application.

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<sup>1</sup> For example, applications for permits authorizing the construction and operation of certain international power lines and applications for electricity export permits. The prohibition for public hearings for IPL permit applications was added in 1990, when the federal government amended the NEB Act. The main policy objective articulated at the time was that there should be no unwarranted duplication of federal and provincial regulations. The amendments, among other things, provided the provinces with greater authority over the regulation of power lines.

<sup>2</sup> The Minister may extend the NEB's time limit by a maximum of three months. The Governor in Council (GIC) may, on the recommendation of the Minister, further extend the time limit by any additional period or periods of time. The GIC is the Governor General of Canada acting by and with the advice and consent of the federal Cabinet.

<sup>3</sup> Further details about the NEB's hearing process can be found in the *Hearing Process Guidebook*: <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngmpmplt-eng.pdf>

<sup>4</sup> The NEB filing manual is available <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/index-eng.html>.

3. A Panel is appointed to consider the application.
4. A decision is made on whether the application is complete.
5. A Hearing Order or process letter is prepared and the public is notified about the hearing.<sup>5</sup>
6. The Hearing Order includes a list of issues to guide the primary topics of consideration.
7. Anyone wishing to participate in the hearing must apply to the NEB.<sup>6</sup>
8. The Panel decides who can participate and how.
9. The project proponent and those who are allowed to be Intervenors file written evidence.
10. Information requests (i.e. written questions) are submitted and answered based on the evidence that is filed.
11. People who have been allowed to participate in ways other than as an Intervenor follow the directions listed in the Hearing Order. For example, Commenters may submit a letter of comment.
12. If there is an oral hearing, Intervenors may gather on a specific date to ask oral questions of witnesses and provide final argument.
13. 12. For major pipeline project applications, the Panel prepares a report containing its recommendations. This report is sent to the GIC<sup>7</sup> via the Minister of Natural Resources. The GIC is the decision maker for major pipeline projects. For other types of applications or projects,
14. the Panel will make the decision on the application.

Aside from information approved by the Board to be filed confidentially,<sup>8</sup> all documents on the hearing record are publicly available online on the NEB registry, including: the application; all procedural decisions made by the NEB; the evidence submitted by participants; and, transcripts of oral hearings. In its report, the Panel typically summarizes what they heard during the hearing and explains the views of the Panel. A major component of the NEB hearing process involves gathering and addressing input from Indigenous groups, including rights and interests. The discussion paper on Indigenous Engagement and Consultation explores this issue in greater detail.

### Public Inquiries

Also, in the case of a serious incident, the NEB may call a public inquiry to evaluate emergency, safety, and environmental protection procedures and associated regulations. However, the hearing process for public inquiries does not follow the same process as for project applications.

### **DISCUSSION QUESTIONS:**

1. ***In your view, what core principles and elements should be reflected in the hearing process?***
2. ***Not all applications currently have to undergo a public hearing process. Which applications do you think should have a public hearing process?***
3. ***What are your views with respect to the basic steps of the public hearing process? What are the areas that can be improved?***
4. ***How could the NEB enable public participation in hearings in a less formal way?***

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<sup>5</sup> Public notifications may include online and print advertising, in-person or online information sessions or mail-outs.

<sup>6</sup> More information on public participation is available in the Public Participation discussion paper.

<sup>7</sup> The Governor in Council is the Governor General of Canada acting by and with the advice and consent of the federal Cabinet.

<sup>8</sup> Parties to a hearing may be able to file information confidentially, in accordance with sections 16.1 and 16.2 of the *National Energy Board Act*.

## Land Acquisition and Compensation

**TOPIC:** Land acquisition and related dispute resolution for facilities regulated by the National Energy Board (NEB). This paper does not focus on Aboriginal land title rights.

**CONTEXT:** When the NEB issues a certificate, upon the Governor in Council's direction, the company can proceed with acquiring land for the pipeline or certain power lines within a defined corridor (normally around 150 meters wide). When the precise pipeline route is selected by the company, it must obtain approval for the detailed route and acquire the necessary land rights in accordance with the *National Energy Board Act* (NEB Act).

Under the NEB Act, companies must apply to the NEB with a plan, profile and book of reference setting out the proposed detailed route and must also notify landowners and the public. If there is opposition from landowners who anticipate that their lands may be adversely affected, the NEB must conduct a hearing<sup>1</sup> to decide whether the company has proposed the best possible detailed route and the most appropriate methods and timing of construction. If there is no opposition, the NEB may consider approving the route as found in the application.

After the detailed route approvals process, the company may acquire the lands necessary to construct, maintain and operate its pipeline or power line. A company can acquire the necessary rights to use the land through a land acquisition agreement, frequently referred to as an easement or right-of-way agreement. The NEB Act sets out the requirements for land acquisition agreements which include compensation for the acquisition of lands and damages caused by the company's operations.<sup>2</sup> The amount of compensation paid is a private matter negotiated between the landowner and the company.<sup>3</sup>

Disputes over compensation are outside of the NEB's jurisdiction. If a landowner and a company cannot agree on the amount of compensation, either the company or the landowner may apply to the Minister of Natural Resources to request the services of an independent negotiator, or to have the dispute settled by binding arbitration by an independent panel of at least three members, appointed by the Minister. More information is available on Natural Resources Canada's website for the Pipeline Arbitration Secretariat.<sup>4</sup>

If a company and a landowner are unable to negotiate an agreement, the company can apply to the NEB for a right of entry order for an immediate right to enter the lands without the landowner's consent. If the NEB grants the right of entry order, the company has to register, record or file that order at the local land titles or registry office. The company then has the right to enter the lands for the purposes stated in the order, subject to the terms and conditions as specified by the NEB in its order.

If the NEB decides to grant a right of entry order, landowners are entitled to receive advance compensation from the company. The compensation offered as an advanced payment following a right of entry order is also subject to the negotiation or arbitration process administered by the Minister of Natural Resources if the landowner disagrees with the amount of compensation provided.

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<sup>1</sup> For more information on hearings, please refer to the discussion paper on the Hearing Process.

<sup>2</sup> See *National Energy Board Act* (R.S.C., 1985, c. N-7), Sections 86 and 87.

<sup>3</sup> Compensation for the acquisition of lands can be paid in a lump sum or in annual or periodic payments over a period of time. Annual or periodic payments can be reviewed every five years.

<sup>4</sup> Pipeline Arbitration Secretariat, Natural Resources Canada Website: <http://www.nrcan.gc.ca/energy/infrastructure/natural-gas/pipeline-arbitration-secretariat/5907>

Once the pipeline is in operation, the company must compensate landowners for any damages caused by the company during inspection, maintenance or reparation activities, or damages caused by the pipeline or anything carried by the pipeline.<sup>5</sup> In addition, negotiation and arbitration services provided by the Minister of Natural Resources are available to settle any compensation disputes over damages.

More information about Land Matters is available through the NEB's publication "Pipeline Regulation in Canada: A Guide for Landowners and the Public (Revised September 2016)."<sup>6</sup> For the purposes of land acquisition, there is little difference between private and Aboriginal ownership.

### Aboriginal Title Rights vs Private Property Owners

Aboriginal title rights are distinct from those of private property owners. Aboriginal title refers to the inherent right of an Aboriginal group to land or territory. Additional information on this issue can be found in the discussion paper on Indigenous Engagement and Consultation.

### **DISCUSSION QUESTIONS:**

- 1. How has having a pipeline or powerline on your land affected how you use your land?**
- 2. What are your views with respect to:**
  - a. Land acquisition agreements, its required clauses and the NEB oversight?**
  - b. Compensation and dispute resolution processes and the private nature of agreements?**
  - c. Right of entry process and authority?**
- 3. In your opinion, are the existing processes described in this discussion paper fair and sufficient? If not, what improvements could be made (e.g., additional tools for land acquisition, compensation and dispute resolution)?**
- 4. Who should make the final decisions for land compensation disputes?**
- 5. What are your views regarding the process of determining whether to authorize right of entry?**
- 6. What are your views with respect to the company's right of entry without the landowner's consent if a company and a landowner are unable to negotiate an agreement?**
- 7. Should there be a more consistent approach for companies to compensate landowners for access to their land (e.g., defined frequency of payment, opportunities for review)? Would policy or regulatory direction from the Government of Canada be helpful?**

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<sup>5</sup> See *National Energy Board Act (R.S.C., 1985, c. N-7)*, section 84

<sup>6</sup> Pipeline Regulation in Canada: A Guide for Landowners and the Public. Available online: <http://www.neb-one.gc.ca/prtcptn/Indwnrgd/index-eng.html>

# Annex V: Expert Panel Engagement Process

## Panel Engagement Process

### *Engagement Planning*

The Panel members first met in late November 2016 to establish engagement plans (we are referring to sessions of dialogue rather than formal consultations with indigenous peoples), and receive technical briefings on the subject matter they would be reviewing. As a starting point, we established principles for engaging with Canadians:

- **Genuine:** we will engage meaningfully
- **Inclusive:** we will engage with a broad and diverse group of Canadians and Indigenous peoples
- **Respectful:** we will create an environment for engagement that is open, honest and respectful of various opinions and cultures
- **Responsive:** we will listen to people engaging in this process and demonstrate how we respond to their perspectives and advice
- **Transparent:** we will share information publically on engagement plans, who we have engaged and key outcomes
- **Iterative:** we will share our reflections on an ongoing basis to enable the Expert Panel and those involved to learn from one another and help find common ground.

Our terms of reference required us to develop a Public and an Indigenous engagement plan. We considered it essential to develop the Indigenous engagement plan in collaboration with Indigenous peoples, and we met with each of the five National Indigenous Organizations (NIOs) the first week of December to listen and learn about how we could best shape our plan. Our Indigenous engagement plan indicates what we heard from the NIOs, and outlines four additional guiding principles to the ones listed above:

- **Respecting UNDRIP:** In keeping with the Government of Canada's support for UNDRIP, the Expert Panel will be guided by relevant provisions in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to help guide engagement
- **Nation to Nation:** The Expert Panel will be guided by the Government's commitment to a renewed relationship with Indigenous peoples, one based on the recognition of rights, respect, co-operation, and partnership
- **Rights-Based Lens:** The Expert Panel will familiarize themselves with the recent court cases regarding duty to consult and Indigenous title
- **Indigenous Collaboration:** The Expert Panel will work through existing governance structures within the national and regional Indigenous organizations and governments to plan and host engagement activities.

In consideration of these key principles and the task outlined in our terms of reference, we identified engagement activities and locations for in-person events. The locations for events were chosen to minimize the distance that key stakeholders and rights-holders would have to travel to participate in sessions. The locations for engagements sessions were:

1. Saskatoon, SK – January 25–26, 2017
2. Toronto, ON – February 1–2, 2017
3. Vancouver, BC – February 8–9, 2017
4. Winnipeg, MB – February 15–16, 2017
5. National Capital Region (Ottawa, ON – Gatineau, QC) – February 22–23, 2017
6. Fort St. John, BC – March 1–2, 2017
7. Edmonton, AB – March 7–8, 2017
8. Yellowknife, NT – March 10, 2017
9. Saint John, NB – March, 21–22, 2017
10. Montreal, QC – March 28–29, 2017

In each location, we held public and Indigenous sessions as outlined below<sup>1</sup>.

### **Day 1**

- Presentations (8:30am – 12:00pm): We heard short presentations to help set context for the session planned for the afternoon<sup>2</sup>.
- Dialogue Sessions (1:30pm - 5:00pm): The dialogue sessions allowed participants to provide input on all the themes from the Terms of Reference.
- Open Houses (7:00pm - 9:00pm): We heard additional presentations from participants.

### **Day 2**

- Indigenous Engagement (8:30am - 5:00pm): In each location, we engaged with Indigenous peoples to share dialogue on the needs and interests of the local peoples being engaged.

Recognizing that we could not possibly visit every community in Canada within the timeframe of our engagement process and that many people prefer to participate by writing to us, we considered it essential to provide opportunities to participate online. Individuals and groups were able to submit general comments and documents online, and were also able to read discussion papers and respond to questions within them.

### ***Discussion Papers***

The discussion papers are 2-5 page technical documents relevant to the themes identified in the terms of reference. The topics of the papers are:

- National Energy Board Governance
- Mandate and Regulatory Framework
- Energy Information, Reports and Advice
- Decision-Making Roles on Projects
- Determining the Canadian Public Interest
- Safety and Environmental Protection
- Emergency Prevention, Preparedness and Response: Tools and Requirements
- Indigenous Engagement and Consultation

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<sup>1</sup> In Yellowknife the Panel combined public and Indigenous engagement sessions into a one-day session.

<sup>2</sup> When there were many participants, we had to extend the presentations in the afternoon and shortened the dialogue session of the afternoon.

- The National Energy Board’s Participant Funding Program
- Public Participation
- The Hearing Process
- Land Acquisition and Compensation

In plain language, the papers describe the NEB as it is now, and the questions at the end of each paper drive towards what the NEB could be in the future. The papers are intended to be helpful background information for participants, and the questions have shaped the in-person dialogue sessions.

### ***Funding to support participation***

Several funding programs were provided by Government to support participation in this review.

Funding was made available for Indigenous organizations, groups and communities to support their participation in the Governments’ review of environmental and regulatory processes, which included the NEB Modernization review as well as the review of federal environmental assessment processes and restoring lost protections and introducing modern safeguards to the *Fisheries Act* and the *Navigation Protection Act*. The funding was intended to support the following activities related to the reviews:

- Preparation for and/or participation in meetings of Indigenous community, group or organization members, including virtual network activities and outreach activities, with the aim to gather views, enhance knowledge and strengthen awareness of Indigenous groups, or contribute to one or more components of the review;
- Preparation for and/or participation in meetings with review bodies or government officials in order to contribute to one or more components of the review;
- Preparation of written submissions, and/or supporting studies, that represent the views of Indigenous organizations, groups, or communities relevant to one or more components of the review; and,
- Review of documents in support of contributing to one or more components of the review.

Through this program, \$4M was made available to Indigenous organizations groups and communities.

Natural Resources Canada made funding available to support the development of research, studies or position papers related to the six themes of NEB Modernization. This program provided up to \$25,000 to undertake research relevant to the Panel’s mandate, and we received 16 research studies as a result of this work from the following organizations:

- Canadian Chamber of Commerce:
- Canadian Environmental Law Association
- Centre for Indigenous Environmental Resources
- Centre québécois du droit de l’environnement
- Ecology Action Centre
- Environmental defence
- Équiterre
- Femmes Autochtones du Québec Inc.
- Front commun pour la transition énergétique
- International Institute for Sustainable Development
- Ivey Energy Policy and Management Centre

- Lake Ontario Waterkeeper
- Native Women's Association of Canada
- Pembina Institute
- Shared Value Solutions
- University of Ottawa's Positive Energy project

Finally, NRCan also provided funding for public travel to participate in engagement sessions. Individuals and groups were eligible to apply for up to \$1000.00 to attend a session.

### ***Technical Briefings***

To provide the necessary background information we needed to understand all the issues in detail, we received briefings on several technical issues throughout the course of our review, as indicated below.

<b>Organization</b>	<b>Date</b>	<b>Location</b>	<b>Topics Covered</b>
<b>National Energy Board</b>	29 November 2016	Ottawa, ON	Technical briefing on the NEB's structure, role, and mandate
<b>Justice Canada</b>	29 November 2016	Ottawa, ON	Government of Canada's approach to nation-to-nation relationship and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
<b>Environmental Assessment Expert Panel Secretariat</b>	8 December 2016	Ottawa, ON	The Environmental Assessment Expert Panel Secretariat's experiences
<b>National Energy Board</b>	11 January 2017	Calgary, AB	Technical briefing on the NEB's structure, role and mandate for filming purposes
<b>Dr. Wilton Littlechild</b>	11 January 2017	Calgary, AB	The process of drafting UNDRIP, and its relevance to the review of the National Energy Board
<b>Values and Ethics Programs, Natural Resources Canada</b>	13 January 2017	Teleconference	Values and Ethics, and Conflict of Interest as it relates to Panel review processes
<b>Stratos</b>	19 January 2017	Teleconference	Briefing on results from cross-jurisdictional review of energy regulators
<b>Indigenous and Northern Affairs Canada</b>	20 January 2017	Teleconference	Technical briefing on Aboriginal Rights and Title

Two of the briefings we received were especially relevant and we wanted to make this information available to others as well. We filmed our 11 January 2017 briefings from the National Energy Board, and from Dr. Wilton Littlechild, and these videos are available on our website.

### ***Public and Indigenous Participation***

We heard from a wide range of Canadians: Indigenous peoples and communities (Indigenous organizations, groups, communities and individuals), Non-governmental organizations, local politicians, provincial governments, municipalities, academics, industry representatives, youth and Elders, Indigenous women, and individuals who care deeply about the future of the National Energy Board. Over the 10 public sessions, we heard formal presentations from 112 individuals and groups, and there were 847 participants in the sessions. Through our Indigenous engagement, we heard presentations from 74 individuals and groups, and 326 individuals participated in sessions.

To round out the information we received through online comments and in-person sessions, we also held bilateral meetings; we invited Provincial Deputy Ministers and Energy Regulators to discuss with us by teleconference. We held discussions with the Land Matters Group, the Federation of Canadian Municipalities, with provincial Energy Deputy Ministers and the executive of the Assembly of First Nations. The Panel co-chairs also accepted invitations to address the Assembly of First Nations (AFN) Special Chiefs Assembly in December 2016 and the AFN National Energy Forum in March 2017. More recently, Panel co-chair Gary Merasty also participated in two AFN Technical Working Groups in Montreal and Edmonton to discuss NEB modernization.

As evidenced by the lengthy and detailed meeting summaries of the engagement sessions, we found the in-person sessions to be incredibly valuable for us to learn about the experiences of Canadians. We would like to say a heartfelt thank you to all the participants who took the time to attend sessions and share their knowledge and opinions with us.

We also received many valuable comments online; we had 118 online comments, received 202 documents, and 89 comments on discussion papers. It is clear that people took a great deal of time and care to develop presentations, and we have been most appreciative to have this information to help us make the best possible recommendations.

# Annex VI: Summaries of Public and Indigenous Engagement Sessions

## Saskatoon, SK

### **Expert Panel on National Energy Board Modernization Public Consultation Saskatoon, Saskatchewan – January 25-26, 2017**

The Expert Panel for the modernization of the National Energy Board (NEB or Board) met in Saskatoon, SK, January 25-26, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the NEB Modernization focus areas, which include:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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### **Public Session – January 25, 2017**

The Panel heard that the composition of the NEB is critical to its ability to function well. Participants stressed that the Board must be representative of Canadians, in terms of regional representation and Indigenous communities. Moreover, participants suggested that Board members should bring to bear a diversity of important skills and expertise, such as law, engineering, environmental science, traditional knowledge, accounting, and other competencies. The Panel heard that having a range of skills and knowledge is essential for the Board to perform its function as a credible and independent entity. Furthermore participants suggested that that it is important that the NEB be supported by skilled and competent staff.

The Panel heard that the NEB could delegate some of its responsibilities to senior staff, in order to speed up processes that currently require formal Board involvement and approval.

The Panel heard that the NEB must reflect a governmental policy agenda in its decision-making. Participants expressed views around the degree to which the NEB must be consistent with existing government policy, and identified points of tension where NEB decisions must be made in the absence of clear expression of government intent or policy in certain areas. The issue of how the NEB reflects or interprets government policy garnered much interest.

In particular, how the NEB considers climate change policy and objectives was raised as an issue. Participants expressed the view that government direction and international agreements regarding climate change in particular must inform NEB decisions.

Long-term focus was also introduced into the discussion. In particular, participants noted that the NEB should be mindful of taking a long term view in its decision making, as many issues under its consideration have far reaching ramifications and lifecycles that go beyond the short-term considerations of the day.

The real and perceived independence of the NEB was raised as an issue, with perceptions that the NEB represents an industry view and/or is an instrument of the government of the day, rather than an independent body. Ensuring that the Board does and appears to act with independence is important for ensuring its credibility.

### **Indigenous Engagement Session – January 26, 2017**

The Panel heard that representation is critical for ensuring the credibility and independence of the NEB. Participants suggested that today's criteria and practices for membership appear to entrench an industry point of view in the Board and its decisions. With respect to representation, participants stressed that tokenism is not a viable solution. Board members must bring real knowledge and expertise to the table, and the Panel was encouraged to expand the criteria used to appoint members to include more than just an industry perspective.

The Panel heard a suggestion that existing Indigenous political entities be leveraged to recommend appointees to the Board.

More generally, the Panel heard that Indigenous representation at the Board is critical for enabling meaningful consideration of many Indigenous concerns. As an example, participants spoke about the importance of traditional knowledge and how it must be used to guide decision-making. Where there is no Indigenous representation at the decision-making table these concerns can – through no fault or design of any individual – be marginalized due to a lack of deep understanding; different conceptual models of the world need to be at the table in order to balance the western and Indigenous viewpoints, and to ensure that Indigenous concerns are really taken into account on their own merits.

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*THEME: Mandate and Future Opportunities*

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### **Public Session – January 25, 2017**

The Panel heard suggestions that the NEB should be a center of excellence and expertise for energy information, acting as a clearinghouse for data available both to the NEB itself to inform decisions, and also to the public. The US Energy Information Administration was cited as a potential model. This can also include compliance and monitoring information, information on climate change, as well as economic modelling. The Panel heard that in the future the NEB could develop multiple scenarios for projected

resource demand to inform consideration of proposals – i.e. imagining a future where efforts to reduce fossil fuel demand are successful, thereby lessening future production needs.

Participants discussed the concept of defining “public interest” – which underlies the NEB’s mandate – and providing clearer guidelines to balance environmental, economic, and social interests. There was discussion of adopting quantitative measures (as we have for gross domestic product or job growth) to assess the social cost of carbon to help bring an empirical basis to this decision-making and compromise. However, participants were of mixed views as to whether this is possible, and how it could be done.

Where mandate expansion may occur, participants suggested that adequate resourcing should follow, and there was discussion of how this should be fairly carried out, as currently industry funds NEB activities through levies on regulated activities. It was suggested that future funding increases for new NEB activities should not be borne by regulated parties exclusively.

The panel also heard that there needs to be careful consideration of where the NEB fits within the framework of provincial decisions around energy, and that the Board should not be used to negate provincial decisions or impose a federal viewpoint.

A further topic of discussion involved the Environmental Assessment process for projects, and particularly how the NEB relates to the Canadian Environmental Assessment Agency (CEAA). It was suggested that the NEB could harmonize its processes with those of CEAA, with CEAA conducting all environmental assessments as part of the NEB project process. It was suggested that the Needs Assessment proceed first in a project approval process, followed by a separate, CEAA-led Environmental Assessment. Beyond this specific suggestion, it was proposed that the Expert Panel should coordinate with its counterparts conducting a concurrent review of the environmental assessment process; there may be opportunities for synergy or cooperation as these respective reviews share complementary elements and may review similar issues or come to synergistic conclusions.

Views were expressed that the NEB should formally adopt the principles of the UN Declaration on the Rights of Indigenous Peoples into its mandate.

### **Indigenous Engagement Session – January 26, 2017**

The Panel heard view that the NEB mandate should be revised to reflect both the duty to consult and accommodate Indigenous communities, and to act in the broad public interest.

Participants suggested that the NEB formally recognize its obligation to act in a manner consistent with the Constitution with respect to the role of Indigenous communities. It was suggested that this obligation supersedes considerations of public interest, and is not to be weighed against other factors, in the same way that the Board must balance social and economic considerations. This includes specific acknowledgment by the Board of its duty to consult and accommodate Indigenous peoples.

In this regard the panel heard a suggestion to create an independent compliance office for aboriginal rights to ensure respect for treaty and inherent rights in NEB decision-making, and to coordinate between federal and provincial governments. Furthermore, the Panel heard views suggesting that a tri-partite process with proponents submitting proposals decided on by the NEB, and a separate Crown entity responsible for discharging the Crown duty to consult and accommodate (with the participation of, but not delegated to, industry). In this schema the NEB’s role would be to ensure that adequate consultation had occurred, but not to conduct said consultation itself. This is bound up with defining and reconciling the NEB role as a quasi-judicial body, and an instrument of government policy.

The Panel heard the view that the obligation to consider social and environmental factors should be more clearly enshrined in the NEB mandate.

The Panel heard a view expressed that Indigenous peoples are not akin to municipalities or other orders of government: the relationship is nation to nation. Some expressed the view that this and constitutional rights entail effective veto power on the part of Indigenous communities over any proposal before the NEB.

It was suggested the Environmental Assessments be made the exclusive responsibility of the Canada Environmental Assessment Agency, so that relevant expertise and accountability can be concentrated in a single center of expertise within the federal house.

Related to a similar comment on the importance of representation on the Board, the Panel heard that Indigenous perspectives are critical for a complete understanding of the concept of public interest. Indigenous spiritual and philosophical frameworks of public interest are based on a fundamentally different understanding of how we relate to the natural world, as compared to traditional western conceptions. Indigenous definitions of “public interest” are fixed concepts based on Indigenous rights and beliefs, whereas in the western model “public interest” can be a more flexible idea evolving with changes in society and technology, for example.

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*THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – January 25, 2017**

The Panel heard a variety of views on the role of the Governor-in-Council in the decision-making process. On the one hand it was suggested that the NEB’s primary role is that of an independent licensing authority, and that as such, its decisions should not involve the Governor-in-Council, as doing so inherently politicizes what should be evidenced-based decisions. Participants also expressed opposing views, that if the NEB is meant to be in any way an arbiter of the public interest then it is essential that democratic institutions – i.e. the Cabinet – play a role in approving NEB recommendations. This point was stressed particularly in the case of Indigenous communities where possible barriers to consultation and accommodation may require recourse to elected representatives to ensure that Indigenous viewpoints are adequately recognized and incorporated into decisions.

The timing of decision-making processes was raised, as participants noted that lengthy processes, particularly where criteria or policy context evolve, can be unfair to proponents who may have proposals denied after long and resource-intensive processes, and where – in their view – the role of the NEB is to define and assess criteria for approval, and not to move the goalpost during the approval process.

### **Indigenous Engagement Session – January 26, 2017**

The Panel heard views on the role of the NEB as a decision making body. The view was expressed that the NEB should make all decisions, rather than making recommendations to the Governor-in-Council. This is in part because Cabinet confidence inherently limits transparency around Governor-In-Council decisions.

It was further suggested that the NEB make a practice – as courts do – of providing a rationale for its decisions, showing the factors considered, and perhaps including minority decisions. Participants suggested that absent the reasons underlying a decision, it can be difficult to understand whether the

Board has – for example – adequately taken into account Indigenous or other viewpoints, which can in turn erode confidence in judgments and the workings of the Board.

Determinations of standing for proceedings were raised as an issue. Under current practices standing may be limited to groups more directly affected by individual projects. However, for some communities the cumulative effect of many projects is impactful, but those communities may be deemed to be below the threshold for standing on any individual project.

The Panel heard concerns that Federal and Provincial roles and laws often overlap or are complementary. This may necessitate streamlined processes, and better coordination between levels of government. With respect to Indigenous engagement in particular coordinating and respect Federal and Provincial roles and obligations is important.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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**Public Session – January 25, 2017**

The Panel heard that the NEB is a lifecycle regulator, and that while project approvals may be the most public-facing of its responsibilities, the Board is responsible for regulating a range of activities from project inception to abandonment and remediation. Participants urged the Panel to keep this range of responsibilities in mind in formulating its recommendations.

With respect to monitoring, transparency emerged as a key theme, as participants expressed an interest in better understanding and having information related to compliance criteria and the monitoring processes. Transparency in this regard is viewed as critical to earning and maintaining public trust; citizens need to see the full range of risks, actions, plans, and safeguards arrayed to ensure public safety and environmental protection. Communities want to know what risks are associated with projects, plans for emergency response, and expected timelines for action.

The Panel heard that eliminating all risks is not a realistic goal, and that the NEB must do its utmost to ensure adequate safeguards are in place, and furthermore, in the event of spills or other incidents, should be transparent about lessons learned and revised practices as a result of incident response. Showing how practices have adapted is important. Where regulators are opaque about the history or follow-up it can erode public confidence in the regulatory system.

The Panel heard that compliance requirements range between very prescriptive and more goal-oriented, and that a balance can be struck between the two. While well-meaning, overly prescriptive compliance requirements can make regulated parties focus exclusively on meeting the exact letter of those requirements, and in so doing defeating the overall spirit of compliance goals. Other participants felt that prescriptive requirements are critical to holding industry accountable and assuring public safety.

The Panel heard that while there is a focus on safety and a safety culture, other considerations, including overall environmental and spiritual concerns are also important. In addition, industry is responsible for cleanup and remediation after an incident, but independent monitoring of clean-up projects, for example, is important to ensure that industry conducted the cleanup and remediation properly.

### **Indigenous Engagement Session – January 26, 2017**

The Panel heard that monitoring is very important and that there are opportunities to improve both monitoring approaches and transparency around reporting.

With respect to how monitoring is conducted, participants suggested that reforms could be made to enhance monitoring activities, specifically to increase on the ground observation. The Panel heard that practices today can be insufficient (for example flyover monitoring which is focused on observing spills after they have occurred). Participants encouraged the Panel to explore options for enhanced monitoring to identify issues before they occur (including greater Indigenous participation in monitoring activities), and to leverage technologies in innovative ways. Indigenous communities want to participate in monitoring and compliance activities, supported by training and mentoring necessary to build the requisite skills.

With respect to monitoring information, the Panel heard views that monitoring data should be more freely available, and not just in the context of incidents and incidents responses. It was suggested that Canada establish an independent monitoring agency to perform monitoring activities and provide reports. In addition, reporting information could be used to inform approval decisions. That is, if an operator has compliance issues on existing projects, a new project application could include reference to that entity's compliance track record.

The view was expressed that self-regulation or self-monitoring on the part of industry is inadequate, and that government should play a larger role in this area.

Participants noted that spills and incidents, even in the best system, will be inevitable, and that therefore ensuring the availability of adequate resources for mitigation and remediation is a critical element of the compliance and monitoring framework.

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#### *THEME: Engagement With Indigenous Peoples*

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### **Public Session – January 25, 2017**

The Panel heard concerns expressed that there exists a clear duty on the part of government to consult with and accommodate Indigenous peoples. However, this function is often performed by industry, and the views of Indigenous peoples are then represented to the Board through an industry lens. Participants stressed that the duty to consult with and accommodate Indigenous communities is exclusively that of the Crown.

There is an important role, at the very least, for government to provide industry with strong guidance on how to consult and accommodate Indigenous communities. Indigenous participation in consultations should not affect post-approval participation in economic activity resulting from projects. Participants noted that there is informal pressure to “play nice” with industry during consultation and engagement, in order to be part of economic activity later on.

Participants also mentioned that funding for Indigenous communities is critical to enable full and meaningful participation, which often involves hiring consultants and experts that would otherwise be beyond the means of smaller communities. In addition, federal and provincial overlap can result in duplicative processes that cost more time and money; this is something the Panel should consider.

A further suggestion was offered that the NEB compile and make accessible Indigenous information, so that communities might better learn from each other and save time, and improve the quality of participation in future projects.

### **Indigenous Engagement Session – January 26, 2017**

Participants stressed to the Panel the importance of engaging in meaningful consultation with Indigenous communities. Consultation in this sense cannot just be a conversation at a point in the project approval process, but must be an ongoing practice. Moreover, the Panel heard that Indigenous engagement in NEB decision-making is fundamentally different than that of the public at large in light of the principles enshrined in the constitution, jurisprudence, and the UNDRIP, which define a duty on the part of the Crown to consult and accommodate Indigenous peoples.

The Panel heard concerns that current practices raise questions about how the duty to consult and accommodate Indigenous peoples is discharged. Specifically, the view was expressed that today project proponents are delegated *de facto* responsibility for Indigenous consultation, which leaves industry to assess whether or not adequate consultation and accommodation has occurred. This issue is related to the mandate of the NEB, as there is an important question about the Crown's obligations to discharge its responsibilities in this area, and debate as to whether and how the NEB can perform its role as a licensing body while also playing the role of assuring Indigenous engagement. A suggestion was made that the NEB should limit its role to ensuring that consultation and accommodation have taken place, while a separate Crown entity should assume responsibility for overseeing and guiding the process itself, without delegating those responsibilities to project proponents.

The Panel also heard that Indigenous engagement goes beyond project approval processes, and includes participation in construction, monitoring, and remediation activities. Participants noted that Indigenous communities want to be involved in all aspects of projects, and at higher levels than simply labour. This means contracts for a range of activities. Participants further noted that in many cases Indigenous peoples may be best positioned to perform these roles – for example, opportunities for monitoring activities in local communities, performed by people who know and live on the lands in question.

Funding was raised as an important consideration enabling Indigenous engagement. Without timely access to independent experts, communities cannot engage on an equal footing with project proponents. Dividing a pool of resources amongst many communities, such that each has only a small dollar amount is not practical. Moreover, the Panel heard that communities face tension here, in that non-participation in a process may be viewed as consent or support, but meaningful participation is resource and time intensive, which can be taxing for small communities in particular.

Training and mentoring to build skills and experience were highlighted as important pre-conditions for enabling meaningful, high-level participation in monitoring and other activities.

The Panel heard that better processes for notification of engagement opportunities, including realistic timelines, and materials made accessible with sufficient time to develop considered responses, would enhance Indigenous engagement. This is particularly true for remote communities with limited access to the Internet.

Participants raised particular issues relating to Métis engagement, with different models for governance, political representation, and funding than those of First Nations. Recognizing and accounting for these differences will be important to ensure the full engagement of all Indigenous peoples in Canada.

**Public Session – January 25, 2017**

The Panel heard that there is much interest in who can participate in NEB hearings and consultations, and to what extent. The current definition in the NEB Act (55.2) specifies that those who can participate in a hearing are those who are directly affected by a proposed project or have relevant expertise. Participants expressed views that this definition is too narrow, and has had the effect of excluding many individuals and organizations who may have important perspectives. Participants stressed an understanding that not all public participation must be of equal weight and time; it is reasonable to limit formal participation in tribunals, for example. However the NEB should examine new ways to expand its engagement with the public. This may include written submissions, town hall sessions, online fora, or other means by which to broaden the scope of public participation and seek a greater diversity of views. Participants suggested that the NEB should not rule on *who* should or should be listened to, but should focus on evaluating the information it gathers.

In addition, the Panel heard that currently public participation is focused on the consideration of new projects. However, the NEB is a lifecycle regulator, and can do more to engage the public on the other dimensions of its mandate, such as emergency response, operations and maintain, and others. This could go some distance toward reinforcing confidence in the NEB itself.

## Toronto, ON

### **Expert Panel on National Energy Board Modernization**

#### **Public Consultation**

#### **Toronto, Ontario – February 1-2, 2017**

The Expert Panel for the modernization of the National Energy Board met in Toronto February 1-2, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas area as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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#### **Public Session – February 1, 2017**

The Panel heard that there exist serious questions on the part of participants about the real and perceived independence of the NEB. To some the NEB appears to be largely aligned with the interests of traditional industry, and participants suggested several possible revisions to address this. First, the requirement that Board members reside in Calgary was noted as being unnecessary, and seemingly reinforcing an industry perspective on the Board.

Also, Panel members heard that a more representative Board would be important for the future. Representativeness in this sense means Indigenous Peoples (including Indigenous language competency), regional diversity, and a wider range of knowledge and expertise. Participants suggested that important areas of knowledge include: the oil and gas industry, climate change, traditional knowledge, emerging energy technologies, governance, and public engagement. There was also a suggestion that Board members receive training in various issues or disciplines to bridge any knowledge gaps, particularly climate change. Moreover, participants indicated that merit must be at the heart of NEB appointments to ensure public trust in the institution.

The Panel heard that the roles of Board Chair and CEO should be separated, as is most often the case in other organizations.

Finally, participants stressed the importance of addressing real and perceived conflicts of interest, particularly around relationships between Board members and the energy sector. This includes not just direct industry relationships or investments on the part of Board members, but also their families. This may also include an exclusion period between when individuals and their families may be employed in the energy industry and with the NEB.

### **Indigenous Engagement Session – February 2, 2017**

Participants suggested that the composition of the Board is critical to ensuring that its decisions take into account Indigenous worldviews. It was suggested that the Board ensure Indigenous representation. Participants acknowledged that there is no single Indigenous perspective or culture, with a wide variety of peoples across Canada, and including First Nations, Inuit, and Métis peoples. The Panel heard that participants do not expect to see every group or region formally represented at the Board, as this would be impractical, but do expect to see an Indigenous worldview at the table, this could include formal consultation with Indigenous groups and delegation of a specific individuals. Achieving this might include some degree of training or outreach to ensure that Indigenous Board members hear a diversity of views from Indigenous communities.

Participants discussed the importance of language as it relates to representation. The Panel heard that many elements of Indigenous worldviews and traditional knowledge are fundamentally embedded in Indigenous languages, and may not be directly translatable. When English or French speaking decision makers are considering these concepts they must do so on the basis of imperfect translation, that can lose or distort the essence of the philosophical concepts at issue. For this reason, it was suggested that the Board consider Indigenous language capacity as an important competency.

Participants were clear that tokenism is not desired, and is a threat to progress.

It was also suggested that the NEB establish an advisory panel of Indigenous peoples to guide the Board in its decisions. Further, it was noted that such an advisory Board could include both experienced members and youth participants to reflect a diversity of views and build capacity for the next generation of leaders.

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### *THEME: Mandate and Future Opportunities*

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### **Public Session – February 2, 2017**

Participants told the Panel that NEB activities must be aligned with government policy objectives and commitments (including international agreements) in general, and to do with climate change in particular. Participants offered the view that the NEB of today appears to operate as if the policy context around climate change does not exist. Participants stressed that if Canada is serious about meeting the commitments set out in the Paris Agreement, as an example, then significant changes in energy policy must occur. The NEB as a regulator of the energy sector, then, should take these objectives into account when considering individual projects and the cumulative effects of many projects. Participants noted a seeming disconnect between stated government goals around de-carbonization of the economy, and NEB forecasts which present scenarios of increasing global demand for fossil fuels.

With respect to NEB forecasts, participants suggested that the NEB develop a broader range of forecasts that include scenarios where Canada and the global community are successful in reducing fossil fuel use, and where renewable energy sources – whose growth may not be linear as barriers to adoption are overcome – are factored into future scenarios. It was further suggested that the NEB develop tools to compare the reality of energy sector effect on climate change against policy objectives. More generally, the Panel heard views that forecasts should take a longer-term view, looking ahead 20 to 30 years, and not just the immediate future.

The Panel heard many views around the NEB's role as a centre for energy information. Participants suggested that the NEB greatly enhance its role in this regard in order to inform debate and discussion with a more robust view of the energy sector, trends, and new factors such as renewable energy sources which have a bearing on national energy policy and regulatory activity. Participants noted that today researchers will gather information about Canada from sources in the United States, as Canada lacks an authoritative, single source of information on energy matters (today the NEB, NRCan, ECC, Statscan, and Transport are all responsible for pieces of the overall picture). Participants offered the view that there should be one government centre for energy information, and that the NEB seems best-positioned to play that role, which would carry with it a requirement for increased resources. Participants also noted that provincial and even international data can be essential for a complete picture of the energy sector, and that the NEB could work to find ways to integrate information from other jurisdictions.

Accessibility of data is also important, as raw data files must be made available, not summaries or formats that cannot be downloaded and used. The Panel heard that NEB information provision is important to inform decisions but also more generally that there exists a public education role for the NEB.

Participants raised the question of funding for peer-review of information, which would help establish a level playing field for all parties to a proposal, and remove a barrier to participation.

The Panel also heard views around the concept of public interest, most pointedly that public interest be defined formally and that that definition include a reflection of environmental considerations. It was further suggested that public interest formally include the interests of future generations, and sustainable development, to ensure long-term oriented decision-making (Lake Ontario Waterkeeper was cited as an example in this regard). On this subject, the Panel heard that Indigenous interests are not subordinate to or part of an evolving concept of public interest. Indigenous rights and concerns are distinct from public interest considerations.

The notion of aligning energy regulation to environmental policy objectives was raised, with the specific suggestion that the NEB adopt a climate test, as outlined at [climatetest.org](http://climatetest.org).

Participants suggest that the Board look to Strategic or Regional Environmental Assessments as a means to establish broad baseline information for regions or ecosystems. As of today, some participants felt that project-based reviews make it difficult or impossible to consider overarching issues and effects which may not be decisive in the context of any individual project.

Participants suggested that land acquisition without landowner consent should not be permitted.

### **Indigenous Engagement Session – February 2, 2017**

Participants discussed the concept of “public interest” in the NEB’s current mandate, and stressed that Indigenous rights and views represent a special public interest – acknowledged by the courts – that supersedes general social and economic interests. The Panel heard serious concern that the NEB not attempt to balance these interests, as they are fundamentally different. The concept of public interest does involve finding a balance within the public sphere and the many competing groups and viewpoints therein, however this is separate from consideration of Indigenous interests.

The Panel heard that participants would like to see a broader range of energy futures considered, and that the NEB should consider its work in the context of an overall future that relies on renewable sources of energy.

The Panel heard that Indigenous peoples expect to engage with Canada on a nation-to-nation basis, in the spirit of the UN Declaration on the Rights of Indigenous Peoples, to which Canada has pledged its support. Doing so entails a reconsideration of how the NEB views its own mandate and processes, particularly around how the duty to consult and accommodate Indigenous peoples is discharged. The Panel heard suggestions that the NEB not take on the Crown duty to consult and accommodate Indigenous peoples, nor delegate this responsibility to proponents. Participants suggested that a separate Crown entity be made formally responsible for this function, with the NEB role being that of assessment that adequate consultation had taken place during a project review. It was further suggested that Canada establish a separate office to ensure compliance, on the part of government entities, with the duty to consult and accommodate Indigenous peoples.

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### *THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – February 1, 2017**

The Panel heard that participants would like to see clearer criteria for NEB or Cabinet decisions (including alignment to government policy and climate objectives), and also greater transparency around decisions.

Participants suggested that transparency around processes and decisions is critical, particularly in explaining how a decision was reached, and what factors were or were not considered. This transparency was cited as important not just for purposes of establishing a jurisprudential record of decisions, but also for demonstrating to intervenors that their views have been considered, and general public education on issues before the Board.

Participants suggest that which body takes an ultimate decision on a project – the NEB or the Governor-In-Council – is less important than the process by which recommendations and decisions are made. It was put forward that making the NEB the decision-making authority may seem like a simple way to depoliticize its decisions, but that that structural change will do little absent other reforms to assure strong and credible review and decision-making processes. However, with respect to the role of the Governor-In-Council, participants suggested that the GIC not be asked to review project proposals that the NEB does not recommend for approval. In any case, participants stressed the importance of transparency in decision-making.

Regarding timing, the Panel heard that the time required to thoughtfully review project proposals can be a serious consideration, with project documents numbering in the tens of thousands of pages. This can make it difficult for any party to participate fully and in a timely matter, as the simple act of reading all of the relevant materials can be very time and resource intensive. This is exacerbated when project information changes during a process, making it that much more difficult to stay abreast of evolving proposal content. The Panel also heard differing views on fixed project timelines. On the one hand some suggested that timelines should not be in place, so as not to rush decisions, whereas others offered that predictable timelines for a process are reasonable and helpful to all involved, but that they should scale to the nature of the project in question.

It was suggested that there be a moratorium on all major NEB decisions until the Expert Panel has tabled its recommendations.

Furthermore, it was suggested that – linked to the concurrent CEEA review – environmental assessments be made the responsibility of the Canadian Environmental Assessment Agency or a future central body with responsibility for all environmental assessment duties within federal jurisdiction. Panelists were urged to coordinate to the extent possible with the Expert Panel for CEEA review, as these roles overlap and complement one another.

Overall, participants emphasized the NEB decisions should be evidence-based, and should take into account the upstream and downstream effects of a project.

### **Indigenous Engagement Session – February 2, 2017**

The Panel heard views that the specific roles of Indigenous peoples in project approval decision-making processes are not adequately defined. Participants suggested that today language around a duty to “consult” Indigenous peoples can be interpreted on a wide spectrum, sometimes being seen merely as a duty to inform communities of planned activity in their immediate area, and little more. Without clear guidelines it is difficult for communities or proponents to understand what “consultation” means, to know when it has actually occurred, and – critically – to know what role this duty creates for Indigenous groups in formal decision making.

Participants expressed the view that the UNDRIP espouses a requirement for free, prior, and informed *consent* on the part of Indigenous peoples, for projects affecting them. This requirement is fundamentally different than ambiguous notions of consultation, and must be incorporated into NEB decision-making models.

The Panel also heard concerns around the transparency of NEB decisions. Participants expressed the view that they need to see and understand what the NEB has decided, why it has reached its conclusions, and what factors it has considered to inform its decisions. Today Indigenous peoples are left to wonder if their submissions and worldviews have been rejected, considered, or even properly understood. For this reason it was suggested that the NEB be given the mandate for all decision making, as the current model involves Cabinet confidence, which prevents any discussion or scrutiny of NEB-recommended decisions.

### **Public Session – February 1, 2017**

The Panel heard interest particularly in first responders, and issues of preparedness for emergency response to NEB-approved pipelines. Participants expressed the view that many local first responders – such as fire departments – may not even be aware that they have pipelines located in their communities, much less processes for responding to incidents. In this sense, monitoring is about more than just the NEB role, and includes ensuring that industry works with first responders to have clear plans in place to deal with issues and clear lines of communication in managing responses. Participants urged the Panel to consider action move from mere notification of incidents to true involvement of first responders and local communities.

The Panel also heard concerns around responses to safety issues identified by the NEB through its existing monitoring activities. Participants suggested that action to address identified issues can be lacking, either because of a lack of follow-up to confirm that a project owner has addressed a compliance issue or, more broadly, by not levying penalties sufficient to change systemic non-compliance patterns. The Panel also heard that the NEB could play a stronger role in supporting and protecting whistle blowers who may come forward with information on issues within their organizations, as there may be cases where industry does not follow its own guidelines.

The Panel heard that some substances and practices are untested, and that this introduces a greater amount of risk into projects than is currently accounted for. In spite of good-faith plans for responses to major spills, for example, it may not be possible to fully cleanup and remediate after a catastrophic spill whose real effects on the environment cannot be known before the fact.

Participants suggested that the reliability of monitoring technologies may be overstated, and overvalued in project approvals, as in practice it may well be passersby or local community members who first observe a spill. The idea of a specific review of safety practices was suggested.

In addition, the Panel heard that Indigenous peoples could be engaged to perform on-the-ground monitoring of projects. Indigenous communities know and use the lands and question, and are often best suited to perform this function.

The Panel heard views that when conditions are imposed on a project, the NEB should more clearly show whether those conditions are met, and the results of any follow-up monitoring.

It was further suggested the industry players be required to pool resources in order to create a standing body capable of responding to incidents, so as to mitigate the risk that a company responding to its own spill, for example, might address the issue to the lowest standard possible.

Participants mentioned integrity digs specifically, and suggested that in total, large numbers of integrity digs on a pipeline – which are considered normal maintenance procedures – may require greater oversight. It was suggested that Indigenous peoples be more involved in these digs, as they can affect lands in ways similar to pipeline construction projects.

### **Indigenous Engagement Session – February 2, 2017**

The Panel heard that existing pipelines are just as important as new project approvals. The large network of pipelines already in the ground, many of which are 30-40 years old, represent real risks and merit increased monitoring activity. Participants noted that aging infrastructure may be used to transmit new

fuel products, which may be more corrosive or abrasive, and these effects and risks should be considered. Moreover, the standing of those involved in reviewing and monitoring compliance around existing pipelines should be considered, as previous decisions, some decades old, may reflect earlier attitudes and narrower definitions of the interests and rights of Indigenous Peoples.

Participants also mentioned the 2012 omnibus Budget Act as having a major effect on compliance objectives and activities. It was suggested that the Act significantly diminished environmental protections for species at risk and inland fisheries, issues which are inherently connected to NEB-approved projects. The Panel was urged to consider its recommendations in the context of a holistic federal government approach to the environment, where environmental regulations, monitoring, and compliance actions under the jurisdiction of many different entities interact with and complement each other.

Compliance, monitoring, and enforcement, and the ability to understand the cumulative effects of many projects, are of particular importance to Indigenous Peoples because many NEB-approved projects are directly on traditional lands, and near Aboriginal communities, who have a greater inherent connection to the land than people living in large cities. As an example, the Panel heard that the cumulative effects of heavy-metals in the environment are directly observable by Indigenous peoples when harvesting animals for food. These are not abstract considerations or numbers in report.

The Panel also heard that Indigenous peoples, and the public at large, should have direct access to monitoring data, so that it can be reviewed and analysed in public fora.

Participants expressed interest in emergency preparedness, and more information about plans, scenarios, and risks associated with emergencies.

The Panel heard that Indigenous peoples would like to see more involvement in cleanup projects, especially in overseeing overall integrity, and that there should be guidelines in place to ensure consistent remediation standards across different projects.

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*THEME: Engagement With Indigenous Peoples*

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### **Public Session – February 1, 2017**

The Panel heard that definitions of impact and proximity do not reflect the reality of Indigenous communities and their connection to their lands. Specifically, the NEB or proponents may deem a certain community to be not affected by a project because the location of a reserve is not immediately proximate to a project. However, participants stressed that Indigenous land use is inherently broader than just a specific reserve, and includes all traditional lands and hunting grounds in areas that can be much larger than the legal boundaries of a reserve. For this reason, communities can be scoped-out of projects where they should not be. Moreover, the Panel heard that the ancillary components of a project – winter roads, loading areas, transmission lines to pumping stations – must be considered as the total impact of a project.

The Panel heard that the principles of the United Nations Declaration on the Rights of Indigenous Peoples and Canadian Constitutional rights as they relate to the duty to consult and accommodate Indigenous Peoples are often left to project proponents and First Nations communities to sort out, with the Crown only playing a role later in the process. Further to this topic, participants questioned the need to “balance” Indigenous concerns with economic or environmental considerations. The Panel heard that Indigenous rights supersede other considerations, and the very notion of trying to balance these

viewpoints misunderstands the nature of the nation-to-nation relationship Canada has with Indigenous communities. It was suggested that the concept of free, prior, and informed consent for projects on the part of Indigenous communities is a decision-making authority, not a “consultation”.

The Panel heard views around Canada’s legal standing with respect to Treaties. Specifically, it was proposed that certain established treaties (in this case the example cited was Treaty Nine, 1905) were and are between Indigenous communities and the Crown directly, and that these agreements and obligations were not and cannot be delegated to Canada via the Constitution or any other means. For this reason, inherent and treaty rights supersede Canada’s Constitution, and do not constitute an obligation to consult, but call for a nation-to- nation relationship that is fundamentally different than how Canada relates to other organizations.

It was further mentioned that guidelines for meaningful Indigenous engagement would be helpful for all parties, to understand expectations, roles, and process. There are existing best practices, such as First Nations who have developed sovereign environmental assessment processes, which may be of some guidance in this area.

### **Indigenous Engagement Session – February 2, 2017**

The Panel heard an overarching comment that Indigenous considerations and concerns are everywhere, and not limited to special discussions or one-offs. For example, it was noted that Indigenous issues were woven into almost all of the discussion during the Panel’s public consultations on February 1st.

Participants raised concerns about NEB proceedings, and their exclusive nature. The Panel heard the experiences of individuals who were barred by police from attending hearings, or deemed not to have standing. This can create an oppositional environment where groups or individual with differing views are treated as obstacles, not as partners. Participants acknowledged the open nature of the Expert Panel on NEB Modernization’s consultation proceedings, and stated that including a blessing and ceremony from a local Elder is an example of how to put ideals of inclusivity into practice.

The Panel heard that the current definition of standing, limited to those directly affected, does not adequately account for how Indigenous people view their lands and communities. Today, standing is defined largely on the basis of where people formally reside, rather than on the basis of connection and traditional use of larger territories. Participants cited examples of being informed that they did not have standing for a project review because that project was situated in a location far from a formal reserve boundary. The Panel heard that this limited definition fails to account for traditional Indigenous land use and treaty rights.

The Panel heard that there are many systemic barriers to Indigenous participation that must be addressed. Information about upcoming hearings is often limited or difficult to access. The physical location of public meetings can present barriers, especially for people in rural or remote areas, but also for people within cities who face challenges of limited mobility. Timing is critical for enabling real engagement. When events are announced a few days in advance, or when materials are presented on-site, participants have little time to prepare deep and thoughtful responses, and must instead engage on surface issues.

Participants suggested better use of existing media: radio, television, newspapers, and Facebook, as well as directly engaging and inviting Indigenous communities to participate in consultations, so as to ensure that a broad range of voices can be heard. A participant noted that the same small community of engaged leaders is consistently represented at public events, and a wider group would be beneficial.

The Panel also heard that it is important to allow for adequate time for decision-making within Indigenous communities. The approval of positions and submissions requires formal decision-making with communities, and this requires time which may not be budgeted for in the NEB's project timelines.

Participants raised the current, adversarial nature of NEB proceedings as an issue. This model was presented as problematic because of the requirement it creates to refute statements or characterizations by proponents, instead of working together to develop an agreed-upon set of baseline information upon which to base decisions. More than this, though, the adversarial system itself can create real barriers for Indigenous participation, because it is inherently legalistic and requires the participation of lawyers (often at great cost), not communities. The Panel heard the view expressed that the current system of reviews, consultations, and other activities serves the interests of lawyers more than the people and lands in question, and that those involved today have an inherent interest in perpetuating the design of that system. For communities this can mean exclusion from processes because of a lack of resource to pay legal fees.

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*THEME: Public Participation*

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### **Public Session – February 1, 2017**

The Panel heard about several barriers to public participation: funding, access to expertise, and standing.

Regarding funding, participants stressed the importance of public funding to enable real participation in NEB proceedings. Without these funds the barriers around hiring experts and legal counsel would be simply too great for many organizations. In addition, the Panel heard that current practice will make a certain amount of resources available for groups, but that in instances of great demand that resource pool will be split amongst participating groups, thereby reducing amounts allotted by as much as fifty percent. This has the effect of making quality participation that more difficult on precisely those projects which attract the most attention and interest. Participants suggested that interested non-governmental organizations or First Nations could pool resources to mitigate against this (and some do today), but this is an imperfect solution that still leaves organizations to face difficult choices about which aspects of a project they wish to engage on fully, as a holistic review is simply not within financial resources.

Participants told the Panel that a major issue is the affordability and availability of experts to review technical aspects of project proposals. In its simplest form this is a resource issue, with simply not enough money available to procure scientific advice in a timely manner. More broadly, though, the Panel heard that access to expert advice and testimony can be challenging because so many experts are already employed by industry, or because certain experts do not wish to work for ENGO clients as they feel it may jeopardize more lucrative industry-funded opportunities. Participants suggested that this dynamic is the product of the current adversarial system that has project proponents present their own findings, and leaves intervenors to challenge these findings, rather than working from a more neutral set of established facts. The Panel also heard a suggestion that funding be established to support centres of independent expertise that could be called upon when needed.

Regarding standing, the Panel heard that the limitation on standing to those “directly affected” by a project is problematic. Participants suggested that this is too restrictive, and scopes out large classes of intervenors unnecessarily. Critically, not all parties may wish to attend formal hearings, and may instead wish to send a letter to the Board, or submit some form of evidence to the public record. The Panel heard that today these types of interaction are disallowed, and only those who meet the narrow definition of

standing may participate in any way. Participants also raised questions around standing for projects already in operation, where the issue is not around project approval, but around ongoing issues through the lifecycle of a project that may have been approved thirty years prior. It was suggested that NEB public participation is currently geared toward project approval, and not reflective of the lifecycle management nature of the NEB's mandate.

Participants hear that pre-registration for NEB hearings should be accessible to elders and people with disabilities. In addition, written submissions should be accepted, and there were questions raised about the reliability of current web site technology in receiving those submissions.

The Ontario Energy Board was cited during the session as a potential model for public consultation including a wide array of affected and interested parties.

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### *GENERAL COMMENT*

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*In addition the Panel heard that the Expert Panel's own public engagement process entails some barriers, as locations may be difficult to access, public awareness is low, and timing is tight for preparation of both in-person and online participation. The Panel acknowledged this feedback and committed to examine its own practices to ensure that future sessions are publicized and accessible.*

## Vancouver, BC

### **Expert Panel on National Energy Board Modernization Public Consultation**

**Vancouver, British Columbia – February 8-9, 2017**

The Expert Panel for the modernization of the National Energy Board met in Vancouver February 8-9, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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### **Public Session – February 8, 2017**

The Panel heard concerns expressed about the independence of the NEB, and its ability to fully consider the issues before it. Participants expressed the view that the NEB appeared to represent the views and concerns of the oil and gas industry, above the interests of the broader Canadian public interest. Whether a real or perceived conflict, the Panel heard that some participants felt the NEB was a captured regulator, operating too closely to the sector it is meant to oversee.

Specifically, the Panel heard that Board representation, residency requirements, and the location of the Board offices all play a role in diminishing public trust in the institution. Participants suggested a crisis of confidence with both the Board's structures and its current members, and expressed the view that incremental adjustments would be insufficient to address these fundamental issues.

Regarding Board representation, the Panel heard concerns that Board members are overwhelmingly drawn from the oil and gas industry, to the seeming exclusion of other fields or disciplines, including climate science and Indigenous viewpoints. Participants recognized the challenge of requiring people with deep technical expertise on the Board to consider complex issues, and that many of the people in Canada who would have such expertise would almost necessarily be connected to industry. At the same time, the Panel heard a desire for balance, particularly with respect to Board members coming from a science, rather than industry, background. The Panel heard further comment that this lack of diversity is felt

especially in NEB panel hearings, made up of only three members, who may all share an industry background and apparent orientation. Participants suggested that the Board's membership should be completely overhauled with these principles in mind, to include representation from non-governmental organizations, expertise in public consultation and community development, Indigenous peoples and municipalities.

Participants discussed the residency requirements for Board members, who must live in and around Calgary, and suggested that this requirement – unique amongst most federal entities – furthers the view that the NEB is a partner with industry, not a separate body, and makes it less likely that diverse voices will sit at the NEB table. It was also mentioned that many NEB hearings actually take place in the affected communities, meaning that the requirement to live in Calgary may not be as useful as intended.

Similarly, the Panel heard concerns about the NEB's offices being located in Calgary, with suggestions that it be relocated to Ottawa, where the NEB had been until moving to Calgary in the 1980s. Participants told the Panel that as a federal body they expected it should be located in the capital, again to avoid any appearance of conflict of interest. One participant noted that the NEB's location in Calgary had not previously been seen as conflictual, and that perhaps the many other concerns around the Board's independence had driven this particular view.

As a final point, Participants suggested changes to term limits, and particularly to the practice of temporary appointments, which can be renewed ad infinitum, and may compromise the independence of Board members who serve at the pleasure of the Governor in Council rather than under fixed terms, as do permanent NEB members. If temporary Board members can have their terms renewed, this defeats the purpose of appointing temporary members in the first place.

The Panel heard that recent NEB efforts to create regional offices in Vancouver and Montreal are a positive step toward a more national approach, however those offices are small.

### **Indigenous Engagement Session – February 9, 2017**

The Panel heard that the composition of the NEB is critical to changing the relationship with Indigenous peoples and taking reconciliation seriously. Participants expressed serious concerns about the Board's independence, particularly in the wake of the Energy East Panel recusing itself after meeting with representatives from industry. As it relates specifically to Indigenous issues, the Panel heard that the NEB should have knowledge and understanding of a range of Indigenous issues and concerns, including traditional knowledge, governance, and, issues of title and rights.

Participants stressed the significance of Indigenous worldviews that differ fundamentally from traditional Western conceptions of nature and man's relationship to nature. As an example, a participant mentioned that typical western food webs – which depict the organisms in an ecosystem and their relationship to each other as predator and prey – do not include humans as apex predators, thereby reinforcing the idea of man as a being outside of or apart from the natural world. Where NEB Board members do not have a background or understanding of Indigenous worldviews, it can be very difficult to properly incorporate them into Board decision-making. It is important to note that participants did not suggest that NEB members willfully disregard traditional knowledge or Indigenous viewpoints. The issue is at a more fundamental level: an NEB that does not include members with a deep understanding of Indigenous worldviews will always struggle to properly consider those views.

Similarly, the Panel heard that understanding of issues around Aboriginal title and rights underlie many NEB decisions, and those decisions can have a major impact not just on the Indigenous lands, but on

Indigenous governance structures as well. Participants suggested that NEB members should have knowledge of these issues.

It was suggested that each NEB Panel consist of a member from locally effected communities, or that the NEB be guided in its decision making by a council of Elders, though participants acknowledged that in some cases this could be difficult from a practical perspective where larger projects are concerned. More generally, the Panel heard that Indigenous issues involve a wide array of subjects, knowledge, expertise, and experience, and that a future NEB will have to employ strategies, including representation and education, to ensure that these many and diverse considerations are factored into decisions. Token representatives will not be sufficient in this regard.

The Panel also heard a suggestion that existing Indigenous political entities be involved in recommending members for appointment to the NEB.

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*THEME: Mandate and Future Opportunities*

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**Public Session – February 8, 2017**

The Panel heard discussion around the tension between the NEB's role as an implementation arm of government policy, but also as a body pressed to make or further define government policy through its decisions. This can make any particular project review challenging, as the project must be considered on its merits, but also in the context of overall government strategy. As a practical example, participants suggested that major pipeline expansion would be symptomatic of decisions that run counter to the government's stated objectives around emissions reduction, and that these activities would be fundamentally at odds. Participants pointed to the lack of a comprehensive national energy strategy or plan as a major roadblock for ensuring that NEB approved projects align to national objectives. This is particularly the case with respect to climate change. It was further suggested that the lack of a national strategy forces higher level debate into individual pipeline project reviews, which are not well equipped to handle these higher order issues, but may be the only public fora available. As a result participants may feel frustrated that their voices are not heard, while the regulator may not feel as though it has a mandate to consider bigger strategic questions. In any event, the NEB's decisions do contribute to Canada's *de facto* energy strategy, which today may contain inconsistencies and diverging goals.

The Panel heard considerable interest in the NEB's role as a provider of energy information. Participants suggested that this data is essential for informed and open public debate, and that current information offerings could be expanded to include more of the upstream and downstream effects of projects. There was discussion of whether the NEB, in its role as a regulatory body, should have the mandate for providing data and reports, with the suggestion that a separate body be formed to perform this function.

Also on the subject of information and reports, participants suggested that the current forecasting performed by the NEB is too limited in its scope, and does not consider alternative scenarios (i.e. alignment with government climate change objectives and reduced fossil fuel use), or a range of possible futures. The Panel heard that this is critical because NEB forecasts are used as the basis of much further analysis, and this has the effect of calcifying a particular view throughout the system.

Participants suggested that the NEB mandate be expanded to include data collection and oversight over the cumulative effects of NEB-regulated projects.

The Panel heard discussion around the NEB's mandate for the conduct of environmental assessments, with suggestions that the NEB limit its role to assessing other aspects of projects, but to rely on the Canadian Environmental Assessment Agency for the conduct of environmental assessments. It was suggested that doing so would consolidate expertise in a single, and improve the consistency of assessments, as well as their overall quality.

Participants spoke about the importance of the public interest, and the current state of ambiguity around what that really means in relation to NEB decisions. Absent a clear practical definition, the balancing between social, economic, and environmental factors may be inconsistent. The Panel heard that public interest should be better defined, but also that such a definition should be reviewed regularly and not calcified in formal legislation, as public interest evolves with time.

### **Indigenous Engagement Session – February 9, 2017**

The Panel heard views on the concept of “public interest” and its relationship to Indigenous rights. Participants offered they view that public interest is an evolving balancing act, finding harmony between social, economic, and environmental benefits and risks. However, the Panel heard that Indigenous rights are not to be traded against other factors in this way, and that doing so fundamentally misunderstands where Indigenous rights sit in the Canadian constitutional context.

The Panel also heard views that the NEB should expand its information holdings to include more data, and different types of data, such as on food consumption and land uses, amongst others. Moreover, participants suggested that the NEB explore better ways of sharing this information (including protecting sacred or proprietary information), so that everyone involved in reviews can work from the same baseline, and so that changes over time can be observed.

The Panel heard that strategic environmental assessments have great potential for resolving many bigger picture issues that today play out inadequately in individual project reviews, which cannot account for cumulative effects, or answer questions about the total carrying capacity of a given ecosystem. It was suggested that projects be considered against regional development strategies, in order to bring a more holistic planning view into decisions.

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### *THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – February 8, 2017**

The Panel heard concerns from several participants about the NEB's role vis-à-vis municipalities. Unlike Indigenous peoples, and federal & provincial governments, the role of municipalities is not defined in the Constitution, but rather delegated from provinces. For this reason, the NEB does not formally consider the interests of municipalities in guiding its decision-making. Beyond the natural interest of municipalities in going-on in their jurisdiction, it was suggested that there are important considerations of cost for pipelines which run through cities, and that these costs are borne entirely by municipalities, and are not included in the total cost calculation of pipelines. Costs incurred by municipalities that can be related to pipelines may include road work, sewage maintenance, water mains, etc. The Panel heard that municipalities would like some standing to influence decisions and would like to see the total costs – including costs incurred by cities – accounted for. Municipalities expressed interest in being compensated for their on-going costs and suggested that some BC utilities may have allocation formulas in place now that might be useful models in this regard. NEB should include a role for municipalities in decision-making, and assure that project proponents comply with municipal bylaws.

The Panel also heard that cities may be reported to the NEB by industry for unauthorized activity on pipelines (for things like ditch cleaning) and do not have an opportunity to correct the record with the NEB, but instead are served with warnings. For some activities, warnings may be appropriate, but for others there should be blanket exemptions in place as there are for routine agricultural activities that represent a low risk to safety and security.

Participants also discussed the role of the Governor-In-Council with respect to approving NEB recommendations. The Panel heard differing viewpoints, with the current Cabinet role representing an important public accountability for NEB decisions, and also that a system that empowers the NEB to make final decisions would mirror other regulatory tribunals. Participants converged around the importance of transparency in decision-making. Today large projects are approved by Cabinet, who can claim confidence when asked about their decision-making process. Therefore decisions are explained only broadly, without a full accounting of the weight of evidence considered. The Panel heard the suggestion that the NEB operate as a regulatory tribunal, with published and appealable decisions, in an effort to increase transparency and add rigour to decision-making.

Participants spoke about problems with mandatory project timelines. For larger projects the mandatory timelines may be too short, and do not allow for adequate consideration and participation. Moreover, mandatory maximum timelines may have the unintended effect of making less complex processes take longer, as they expand to fill the time allotted, instead of simply running their natural course.

The Panel heard that the NEB should consider alternatives when reviewing projects. For example rail transportation might represent a viable, or even preferable, alternative to a proposed pipeline.

The Panel heard that three-person hearing panels may be too small to adequately incorporate the wealth and breadth of knowledge and expertise necessary for some projects.

Participants suggested that consideration of the effects of spills should be broadened to include effects on sectors like tourism or the film industry, and that these potential effects should be included in risk assessments.

The Panel also heard concerns around the ability to cross-examine proponents. In written proceedings, participants felt that they had no ability to examine evidence presented by industry, or challenge the assumptions underlying projects. As a consequence, NEB hearings may be seen as tilted toward a proponent viewpoint.

The Panel also heard that municipalities are not indemnified in the same way that other parties are, and that this should be rectified to be consistent.

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*THEME: Engagement With Indigenous Peoples*

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### **Indigenous Engagement Session – February 9, 2017**

The Panel heard that decision-making roles must fundamentally change, in light of existing Indigenous rights (including, but not limited to, those enshrined in the Constitution), Treaties, Canada's endorsement of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the concept of free, prior, and informed consent, and the government's stated commitment to reconciliation and nation-to-nation relationships. Participants expressed the view that Indigenous rights and roles in decision making are not

optional, or still under litigation. Participants stressed that Indigenous peoples do not and should not have to spend time *proving* that their rights exist. This is often the case today, and represents a distraction from groups actually *exercising* those rights.

The Panel heard that the idea of the Crown’s duty to “consult” contributes to confusion in this area, as the meaning of consultation is ambiguous and poorly understood by all parties, and can bog down into academic debates, or revert to a belief that Indigenous peoples need only be informed of issues affecting their rights and communities. Instead, participants suggested that Indigenous communities need to be formally involved in actual decision- making.

The Panel heard that Indigenous peoples – especially in light of the findings of the Truth and Reconciliation Commission, which found that Canada’s practices amounted to cultural genocide – cannot operate simply on goodwill and faith that Canadian governments will act in their best interests. Indigenous law, governance models, and decision-making rights must be formally recognized and incorporated into NEB processes, to move to models based on consent, not consultation.

The Panel heard a suggestion that, in the spirit of building nation-to-nation relationship, the NEB should submit its recommendations to both the Governor-In-Council and affected Indigenous governments.

The Panel also heard views around the adversarial nature of NEB proceedings, and how this can create a system the drives to outcomes of winning and losing, not compromise and consensus.

Participants suggested that cross examination of proponents’ evidence be permitted for all hearings. In written-only processes it is easier to provide low-quality responses or general answers that do not address the issues in question.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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**Public Session – February 8, 2017**

The Panel heard several concerns about industry readiness to respond to incidents, and about NEB capacity to effectively monitor performance and respond in cases of crisis. These were not simply academic concerns, but reflected real fears and concerns about the safety of current and proposed energy projects and infrastructure.

Participants expressed concern that existing and future pipelines represent greater risk to their communities than is accounted for in the current system. The Panel heard several examples of individuals who question whether their communities are exposed to significant disaster risk (from fire or seismic events, as examples), and do not see plans and resources in place to respond in the event of a major emergency. The Panel heard examples of pipelines and storage facilities located not in remote areas, but in the heart of population centres and important economic zones. Participants voiced concern that public engagement on new projects is the NEB’s priority, but compliance issues and incident risk may in fact be greater for existing projects, where it is much more difficult for groups or communities to become involved in understanding and influencing oversight activities. The Panel also heard that there is limited information on existing pipelines, and that many might be surprised to know that they already live on or near a pipeline. A participant noted that they were notified of risks in the event of an emergency in their community because they operated a business, whereas normal citizens were not given the same notice.

It was also suggested that emergency response personnel and resources are located far from possible incident sites. In the event of a major incident, there was concern that response times would be long due to transportation and organization in distant locations.

The Panel heard concerns that monetary penalties are not sufficiently high so as to represent a real deterrent for non-compliance, and that announced penalties may be lowered on appeal, but that the revised amounts are not communicated to the public by the NEB. In addition, there exists concern that companies may violate conditions and then have those conditions reviewed and scaled back, outside of active public scrutiny.

Participants discussed landowner issues, and suggested that there be clearer rules in place for land acquisition and that information on land acquisitions be made public, so that all parties could see trends and prices in particular areas. It was suggested that the NEB adopt a protocol whereby all landowners must be informed of their rights before being contacted by a project proponent. The Panel also heard that the application process may require companies to access and survey lands under consideration, but that doing so – in the absence of any decision on the viability of the project in question – is unfair to the landowner. From an industry perspective, this activity must be done in order to complete the application that then allows for debate on the merits of a project, creating a catch 22 for landowners. In addition, proponents should notify landowners when entering land to do maintenance or other work, and should abide by rules and conditions of behaviour while on that land.

The Panel heard concerns expressed that emergency response drills are not conducted, and that emergency plans are secret, out of security concerns, and therefore shielded from public scrutiny.

Participants expressed concern specifically about the nature of diluted bitumen, which may be difficult or impossible to fully clean up if released into water. The Panel heard that specific science around remediation techniques and limits should be included in project decisions.

### **Indigenous Engagement Session – February 9, 2017**

Participants noted that lifecycle monitoring and oversight is an important feature of the NEB mandate, and that project approvals must include monitoring provisions and issues at the time of approval, not after the fact.

The Panel heard that often projects are approved with many and varied conditions imposed by the NEB. However, those conditions may be worded in very general terms that allow proponents to interpret them as they choose. It was suggested that the NEB create annotated guides to imposed conditions, so that their provisions are more clearly stated and understood by all parties.

The Panel heard that there are significant opportunities to include Indigenous peoples in ongoing monitoring activities, as they are on the land and are often best positioned to identify issues quickly. On this point, it was raised that proponents have used Indigenous staff to do monitoring, but not individuals who are actually local to the communities in which they're working.

### **Peoples**

#### **Public Session – February 8, 2017**

Participants expressed the view that the United Nations Declaration on the Rights of Indigenous Peoples must underpin NEB relations with Indigenous Peoples. The Panel heard that nation-to-nation relationships must be established, and that guidelines must be developed to help all parties understand their roles and obligations in this regard. This is especially pertinent in British Columbia, where many Indigenous communities – unlike in other parts of Canada – do not have relationships defined by

Treaties. As these issues of rights and title have not yet been fully dealt with, participants expressed concern that such issues be left to a regulator to resolve.

The Panel heard the view that Indigenous communities bear a disproportionate share of the risk associated with pipelines and other projects, not just because of direct territorial proximity, but because Indigenous ways of life are inherently connected to large networks of lands and waters, and all of the life within them. In this way, damage to the environment may affect Indigenous peoples more directly and profoundly than other peoples. The Panel also heard that the benefits of these projects do not accrue proportionate to where risk is borne. In British Columbia this can be seen in the form of pipelines designed to enable the export of fuels to foreign markets, who benefit from environmental costs and risks assumed in Canada.

The Panel heard views on the duty to consult Indigenous Peoples, and the notion of free, prior, and informed consent. The duty to consult may be inappropriately delegated to project proponents, rather than discharged conducted by the Crown. This relates to a question of the real weight given to Indigenous traditional knowledge and viewpoints in NEB proceedings.

The Panel heard a desire for clear guidelines of how these concepts and goals are to be realized on the ground.

### **Indigenous Engagement Session – February 9, 2017**

The Panel heard extensive comments on Indigenous engagement, many of which relate specifically to issues around NEB governance, mandate, and decision-making, and which are accounted for in those sections of this summary. This points to an overarching theme expressed by participants, which is that Indigenous engagement is not a single process or formula, but a larger concept to be imbued into all of the NEB's activities.

The Panel heard that the duty to consult and accommodate Indigenous peoples is that of the Crown, and the Crown alone. Certain procedural elements may be delegated to other parties, but overall responsibility for this critical function cannot lie with proponents or with the NEB itself, as a regulatory body, not a direct representative of the Crown. Participants suggested that today project proponents play the de facto role of consultative body, and therefore Indigenous views are filtered through an industry lens and that it would not be in industry's best interest to communicate the full extent of Indigenous peoples' concerns to the NEB.

Further to this, participants spoke about the idea of "consultation" as poorly understood, and overly limited. All too often this can be interpreted to mean a requirement to check a box that Indigenous communities have been spoken to, and not that they have been heard, much less incorporated into actual decision-making processes and outcomes. Consultation, as it is commonly understood, is much different than the stronger standard of free, prior, and informed consent as articulated in the UNDRIP. The current model creates conflict that then results in litigation, which serves no one, and incurs major costs for all parties.

Participants suggested that clear guidelines for consultation and accommodation be developed, and that this role be more formally incorporated into legislation. In this way all parties would have a better understanding of the roles and expected outcomes involved. It was also suggested that an independent body be established to perform the Crown consultation role, outside of the NEB.

The Panel heard that Indigenous communities expect to be involved throughout the life of a project application, not just at a single decision-making gate. This includes involvement at the very beginning of

project inception. It was suggested that early involvement on the part of Indigenous communities may alleviate many issues that would otherwise derail or complicate project approvals.

Participants discussed project review timelines, and found the current system inflexible and not responsive to needs on the ground. For complex projects the 15 month timeline is not feasible, especially given the massive volumes of information involved, which might take months to read, let alone respond to adequately. Also on the subject of timing, participants noted examples of hearings scheduled during traditional hunting and fishing times, when Indigenous peoples would be unable to participate. It was suggested that the NEB work with communities to schedule hearings at times that accommodate such practices.

The Panel also heard that NEB hearings should be designed in ways that are conducive to receiving traditional knowledge, and that accommodate the participation of elders, whose knowledge and experience is crucial for achieving good project outcomes. Participants suggested that subjecting elders to adversarial cross-examination, insisting that all traditional knowledge be validated by western science, and requiring that traditional knowledge be codified or written down, are all major barriers to inclusion, and are symptomatic of a misunderstanding of the role and nature of traditional knowledge. Participants expressed that their communities have customs with respect to how traditional knowledge can be shared and by whom, and that they would like to see assurances that the knowledge they share would be kept confidential and proprietary when requested.

The Panel heard that Indigenous peoples should not just be viewed as a source from which to extract enough traditional knowledge to get a project approved.

Participants noted a need for flexibility of approach in dealing with Indigenous nations, whose histories, languages, governance models, and decision-making processes may vary considerably across Canada. The Panel heard that no single approach will adequately include every nation.

The Panel also heard that adequate funding is critical for real and meaningful participation in processes, without which many communities would be entirely unable to take part. In some cases, particularly large and complex projects spanning large areas, amounts like \$40K cannot possibly cover the range of legal and expert scientific services needed.

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*THEME: Public Participation*

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### **Public Session – February 8, 2017**

Participants raised several concerns around public participation, most notably in the context of recent NEB hearings in British Columbia.

The Panel heard that the definition of standing – restricted to those directly affected by a project – excludes large classes of people from any sort of substantive participation in NEB decision-making. Participants told the Panel about NEB hearings that were ostensibly public, but which physically barred anyone who did not have official standing from being in the hearing room, which sat largely empty. This suggests a disconnect between the NEB's role to engage stakeholders and its practices, and participants told the Panel that these experiences have eroded their trust in the NEB, even to the point of some intervenors withdrawing from processes that they did not view as fair or open. Some participants believed

that they were denied intervenor status primarily based on their public statements opposing a particular project, and not on the criteria for standing.

In addition, participants expressed the view that the definition of “directly affected” – which defines who is granted standing – is too restrictive and excludes people living very close to but not directly on pipeline infrastructure. It was suggested that were the NEB a less formal, and not a quasi-judicial, body that it would have more flexibility to include a wider range of participants.

The Panel heard from participants that, in their own experiences at NEB hearings, they did not feel as though Board members were engaged or interested in what the public had to say.

The NEB’s participant funding program was raised as an important issue, with many communities receiving amounts that allow them only to hire legal counsel, or only to retain experts, but not both. Moreover, there may be limits imposed on the type of expertise that funding may cover, which can limit participation. This can severely limit the ability of groups or communities to play a meaningful role in NEB processes. Participants said that they would like to be able to use funding as they see fit, knowing that they are accountable for how money is spent. There was also a question around the transparency of public funding; it was suggested that funding should be and should be seen to be distributed equitably amongst participating groups.

More generally, the Panel heard concerns about the adversarial nature of NEB proceedings, which force conflict and can entrench opposing viewpoints, instead of finding points for compromise and collaboration. The Panel was encouraged to examine alternate models focused more on consensus building and compromise than on refuting evidence. These issues are not just about how the public participates in NEB processes, but directly affect its decision-models and processes as well.

On a general note, it was observed that the NEB was established in 1959, in an era when public participation as we understand it today simply did not exist. Communities were not involved in decision-making, and Indigenous peoples (referred to as “Indians” at the time) were not even allowed to vote, much less exert political power. It is therefore reasonable that the current model is outdated and in need of significant overhaul.

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### *GENERAL COMMENT*

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The Panel committed to finding answers to the following questions that arose during the Dialogue Session:

- 1) Is there publicly available information on how many times right of entry orders have been issued and how much landowners were compensated? How many landowners have had to be compensated?
- 2) How often are there multi-agency or multi-department emergency response drills and exercises?

The Panel will pose these questions to the NEB and the responses will be posted to the Panel’s website.

## Winnipeg, MB

### **Expert Panel on National Energy Board Modernization Public Consultation Winnipeg, Manitoba – February 15-16, 2017**

The Expert Panel for the modernization of the National Energy Board met in Winnipeg, MB February 15-16, 2017, for in-person sessions that included public and Indigenous presentations, and a public dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel’s review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas area as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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### **Public Session – February 15, 2017**

The Panel heard discussion on the NEB’s Calgary location and the Calgary residency requirement for Board members. It was suggested that these factors contribute to a perception of the NEB working too closely with industry, and that its location creates, at the very least, a perception of a regulator integrated into the practices and culture of the energy industry. Specifically regarding the residency requirement, participants voiced opposition and suggested that this prevents ensuring that the Board is made up of the most qualified members.

The Panel heard that merit-based appointments, and a reflection of Canadian diversity are critical to the Board’s composition. Some participants suggested that the Board’s industry- heavy makeup creates at least the appearance of a regulator captured by industry. It was suggested that the Board be reformed to ensure members from various backgrounds, regions, and skillsets. “Merit” in this context can mean more than just an engineering background, and includes climate science, indigenous legal traditions, traditional knowledge, public engagement, and many other fields. Participants noted that no individual is without biases or paradigmatic thinking; it is only through diversity and open communication, that such biases can be overcome.

The Panel heard suggestions that groups should be able to select their own representatives on the Board, or that some form of democratic appointment should be employed.

Moreover, the issue of Indigenous representation was noted by many parties. It was suggested that the Board be mandated to include Indigenous representatives, and that training be provided to members to help them understand their obligations with respect to treaty and inherent rights, and the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The Panel heard that suggestions that the Manitoba Law Reform Commission and the Northwest Territories Land and Water Boards would serve as useful governance models from which to draw.

Participants suggested that the NEB Chair and CEO roles should not be performed by the same individual; these two roles are most commonly separate in other organizations.

### **Indigenous Engagement Session – February 16, 2017**

The Panel heard concerns about the NEB's ability to act both independently, and in the interest of Indigenous peoples. Participants suggested that the NEB's current Board composition creates an inherent bias toward the interests and perspectives of the energy industry, as its members seem to come exclusively from that background. It was suggested that the current Board composition creates, at the very least, an apparent conflict of interest, and raises questions about whether the NEB can properly consider a holistic set of views about energy issues. It was suggested that the NEB should be required to have Indigenous representation.

The Panel heard views that Indigenous representation on the NEB is not for appearances' sake or for political reasons. Several presenters, including elders, stressed the important difference between traditional Western worldviews and those of Indigenous peoples. There is no single Indigenous viewpoint, but speakers stressed the common themes shared by many Indigenous cultures. A principle idea here is that traditional Western approaches view the natural world as a resource to be controlled and exploited by man. This view posits nature as something different and outside of essential human experience. Speakers at the Winnipeg session contrasted this view with Indigenous thinking, which views humanity as merely one of a universe of living beings, each with its own purpose, goals, and value. According to this point of view, humanity's mission is not to dominate nature, but to achieve reciprocity, balance, and harmony within a world in which all life is connected.

This point of view leads to a fundamentally different approach to issues related to resource development and remediation, and how we interact with the world around us. It is for this reason that many speakers pointed to a need for Indigenous representation within the NEB: this alternative worldview is valuable and has a direct bearing on the decisions that the Board faces.

Further to this point, speakers raised the issue of language, noting that many concepts of Indigenous worldviews are inextricably linked to the languages from which they come. This has implications for Board governance and finding ways to include Indigenous languages.

The Panel heard that merit is important for Board members, but that the concept of merit must be expanded to include a wide range of knowledge and expertise, from traditional knowledge, to climate science, to knowledge of the UN Declaration on the Rights of Indigenous Peoples, to engagement. These and many others are important disciplines that directly relate to the NEB's work; engineering is important, but it is not the only relevant expertise.

The Panel also heard from representatives of the Métis nation, who stressed the importance of acknowledging the variety and diversity within Canada's Indigenous communities. The Panel heard that sometimes Indigenous representation can mean predominantly First Nations representation, but that this does not account for many other peoples.

Finally, participants discussed the challenge of representation on a Board with a finite number of members, and on project review panels that typically feature only three members. It may simply not be logistically possible to represent every nation, people, or field of expertise directly on the Board. For this reason, it was suggested the NEB staff also have diversity of expertise and backgrounds and that other strategies be examined (for example, advisory panels made up of affected groups) to ensure appropriate representation.

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*THEME: Mandate and Future Opportunities*

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**Public Session – February 15, 2017**

The Panel heard much discussion about the need for an overarching energy policy to guide NEB decision-making. Participants suggested that the NEB of today is in a difficult bind as it is expected to make energy decisions in the absence of a clearly expressed energy policy. Canada is a signatory to the Paris Agreement, and the government has made high level commitments, however, Governments needs to provide clearer direction to the NEB so that the regulator can reflect these commitments when assessing projects. As an example, some scenarios suggest that for Canada to meet its stated emissions reduction goals it would require the virtual elimination of all fossil fuels by 2065, or perhaps 2050. Additionally, some demand projections suggest that Canada should have no need to explore for or exploit any further fossil fuels, as existing supplies will be sufficient. Participants expressed their view that these planning assumptions play a major role in guiding NEB action, and there is no consensus on how to align policy with longer-term climate goals.

In addition, participants suggested Canada should create a carbon budget, against which to evaluate its progress and allowable emissions within those limits. Such a budget would define the amount of carbon permitted in a region or province, and would guide regulators like the NEB (and others) in making decisions. Similarly, the idea of Strategic Environmental Assessments was raised as another tool to bridge the policy gap on energy and the environment. Strategic Environmental Assessments would take a holistic look at an ecosystem or area, and provide further information on that area's ability to bear further development, and under what conditions. It is not necessarily the case that the NEB should create or operate these enabling frameworks. Rather, it would serve as a mechanism for enabling the NEB and Government to make informed decisions related to project approvals.

With respect to environmental assessment, the Panel heard the view that the NEB should not be involved in environmental assessments. Rather, this work should be left to the Canadian Environmental Assessment Agency (CEAA), for two reasons: first, that CEAA is a centre of federal expertise for this type of work, and second, that performing this function creates a conflict for the NEB, as both a licensing body and environmental monitor.

In this vein, the Panel was encouraged to work in close collaboration with the Expert Panel on the federal review of environmental assessments, as the mandates of the two panels are complementary in many respects.

The Panel heard a suggestion that the government establish a national, public forum on energy policy. Such a forum would allow for public input at the strategic level around energy policy, and would help build consensus about energy goals and coordination with environmental objectives. In this way NEB hearings could focus on regulatory issues, and not the larger policy universe.

Participants suggested that energy information should be enhanced, and that forecasts should reflect a wider range of planned or possible outcomes (specifically a future reflecting decarbonisation efforts and goals). This includes a greater role in public education about both the energy industry and the NEB and its processes. In addition, it was suggested that an independent body be responsible for producing energy information, not the NEB, as this creates a conflict or tension with its regulatory role.

The Panel heard discussion related to defining public interest. Participants suggested that the current standard is far too vague, and is wanting with respect to environmental protection and climate change. Some suggested codifying a clearer definition in the NEB Act, while others suggested that processes like Strategic Environmental Assessments would better define public interest.

It was suggested that the NEB Act be amended to formally acknowledge climate goals and the international agreements, as a component of the definition of public interest. This could also include any provincial policy, such as emissions caps. It was also suggested that the NEB mandate be reframed to that of managing the decarbonisation of the energy industry.

The Panel heard that the NEB should formally recognize the principles of the UNDRIP in the NEB's mandate and enabling legislation.

The Panel also heard interest in expanding the NEB role with respect to transmission lines. As the future will likely see declining fossil fuel use, and greater electrification, the NEB could play a role in coordinating provincial approach to electricity, and enabling more efficient transmission between provinces. As an example, one participant observed that Manitoba, with its hydro energy resources, could assist Saskatchewan in accelerating its move away from coal power.

### **Indigenous Engagement Session – February 16, 2017**

The Panel heard discussions regarding the concept of public interest which currently underlies the NEB's decision making process. Speakers raised two major points: first, that Indigenous rights are Constitutionally protected rights that cannot be balanced against social or economic concerns; and second, that the NEB requires a much clearer definition of public interest which explicitly acknowledges environmental protection.

Participants noted that “public interest” is an evolving balancing act of many factors: social, economic, environmental, etc. across many regions. Some may view Indigenous issues to be one of those many concerns to be balanced in NEB decisions. However, the Panel heard that Indigenous interests are enshrined as Constitutional and Treaty rights, and that infringement of acknowledged and protected rights cannot simply be justified by the creation of jobs in another region of the country. To this end, participants suggested that the NEB Act be amended to formally recognize Indigenous rights and the principles espoused in the UNDRIP, and that these rights supersede any concept of public interest.

The Panel also heard that the current definition of public interest guiding NEB decisions is vague and open to interpretation (interpretation that many feel is inherently biased in favour of industry), and should be more clearly spelled out. In particular, participants suggested that the notion of environmental protection should be noted in any definition of public interest. Social and economic interests are naturally represented by affected constituencies, but the “Mother Earth” does not always have a voice and should therefore be recognized.

Participants also talked about cumulative effects of projects on the environment, and that considering each project in and of itself masks the overall impact of NEB-regulated activity.

The Panel heard discussion of the Environmental Assessment process, and it was suggested that the NEB should not be responsible for conducting these assessments. Instead, participants suggested that this responsibility should lie with the Canadian Environmental Assessment Agency (CEAA). CEAA is the centre of expertise for environmental assessment within the federal government, and participants expressed views that NEB-conducted environmental assessments may inherently favour project proponents, especially in that they rely on proponent-supplied information and analysis.

Broadly, the Panel was encouraged to coordinate its work and recommendations with those of the concurrent reviews of the Environmental Assessment processes, *Navigation Protection Act*, and *Fisheries Protection Act*. All of these acts and processes are interconnected and participants urged the Panel to take a holistic view of the issues at play.

The Panel also heard suggestions that the NEB should not be responsible for conducting consultation with Indigenous peoples (as this is a duty borne by the Crown, exclusively), but instead should limit its role to certifying that adequate consultation with Indigenous peoples had taken place during a project review.

The Panel heard views that the NEB mandate be expanded and strengthened to enable a more effective pan-Canadian electrical transmission grid. In light of increasing electrification, and given the various barriers to moving electricity across provincial boundaries, this was seen as a potential area of opportunity for the future.

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*THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – February 15, 2017**

The Panel heard that transparency and evidence-based criteria are paramount for a trustworthy decision-making process. Participants expressed frustration with the current system of Governor-in-Council decisions, based on NEB recommendations, because of the practice of Cabinet confidence, which limits information about why a decision was taken, and what factors influenced the outcome. It was suggested that the NEB develop a decision-making matrix that clearly defines the criteria to be considered in making project approval decisions.

Opinions were mixed as to who should make project approval decisions, with issues of transparency notwithstanding. Some participants suggested that only an independent body with full decision-making authority could play an impartial, evidence-driven role. Others suggested that the Cabinet role in decision-making is important as it adds an important element of political accountability.

In addition, it was stressed that room must be made in the decision-making model should include the consent of Indigenous peoples, who have an important, but still not clearly defined, role in decision-making, in the spirit of free, prior, and informed consent.

Related to questions of mandate, above, participants suggested that NEB decision-making be taken in a broader context overall energy policy, carbon budgets, and strategic environmental assessment. Participants pointed out that the NEB faces a difficult task as regulator, if its decisions cannot be grounded in higher-order direction on climate policy, and understanding of the environments that will bear the

impact of projects. Furthermore, it was suggested that strategic environmental assessment is of particular importance in providing a lens through which to consider the cumulative effects of many projects. The Panel heard that the current focus of assessing projects individually is problematic. At this level no individual project can be held accountable for the larger environmental and economic costs which are the sum of many projects.

One participant suggested that the principle feature of a well-functioning decision-making process is the extent to which proponents are willing to redesign projects based on feedback, and the extent to which proponents will accept “no” from other parties. This is emblematic of a decision-making relationship, more so than any specific process.

Participants also highlighted the mandatory process timelines as a point of interest. It was suggested that, for major projects, the current 15-month timeline is far too brief, as it may take parties a long time just to read an applicant’s proposal, let alone develop an evidence-based position on it.

The Panel heard that the current process operates as though information provided by proponents is accepted by default, and that is the burden of other parties to a hearing to disprove the science offered by proponents. Whereas independent studies offered by intervenors are not afforded the same level of authority.

Participants expressed the view that the NEB exercises too much discretionary authority throughout a project review, and not just at the final decision-making step. The NEB can choose who can or cannot participate and how, what the scope of a project is, whether processes will be oral or written, and whether or not to allow cross-examination. All of these decisions have an effect on the eventual outcome of a project review.

The Panel heard a desire to better integrate NEB decisions with provincial policy and decision-making process. There is significant complementarity between federal and provincial roles with respect to pipelines and transmission lines.

The Panel heard concerns that applications are not complete at the time of decision-making. Missing elements could include emergency preparedness plans, or monitoring plans, which inform the risk of a project.

It was suggested that the NEB designed a hierarchy of decision-making tools and gates, beginning with land use studies, proceeding to environmental assessment, then to social impact studies, and finally to a project review itself.

### **Indigenous Engagement Session – February 16, 2017**

The Panel heard extensive comments about issues related to consultation and decision-making, not just within the context of NEB projects, but as part of relationships between Indigenous people and Canada dating back to the earliest Treaties. It is vital to note that the NEB does not exist in a structural or historical vacuum, and that past history and relationships must be acknowledged and understood in order to achieve progress. Speakers expressed a clear expectation to have a real voice in decisions affecting their communities and practices, and not just to be “consulted” as a means to check a box as part of a project application.

The Panel heard views that the NEB does not have any legitimacy to make decisions affecting treaty lands, and Indigenous rights and title. According to participants, these are systems and processes imposed upon Indigenous peoples without their involvement or consent, which is the antithesis of how things might work in relationships guided by nation-to-nation relationships.

Participants suggested that Indigenous decision-making processes and legal orders based on natural law are fundamentally different than those of Canada. Speakers expressed frustration with actions designed to fit Indigenous practices within Canadian models, rather than treating them as equally valuable decision-making models.

As an example, a speaker described the process of meeting to discuss and make decisions in the Turtle Lodge. This gathering features important protocols and ceremonies, sacred objects, allows everyone to be heard, gathers knowledge from Elders in their languages, and is designed to achieve a consensus. It was stressed that the ceremony and content of these processes are inextricably linked. There is no bullet-point version without the ceremony and protocols. It was further suggested that the NEB participate in these types of decision-making processes, in sacred spaces, with Indigenous peoples.

One participant suggested that the NEB should submit its recommendations to the Governor-in-Council and affected Indigenous nations simultaneously.

The Panel heard concerns that there are no clear guidelines regarding Indigenous roles in decision-making. Participants stressed that they expect the principle of free, prior and informed consent (as enshrined in the UNDRIP) to be the guiding principle at play and that this should not be obscured by unclear processes designed to inform Indigenous peoples of already-taken decisions that will affect them.

Participants also suggested that NEB hearings should always allow cross-examination of proponents' evidence.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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**Public Session – February 15, 2017**

The Panel heard considerable discussion about the risks of oil spills and participants' uncertainty regarding the part of participants as to adequacy of emergency response plans and preparedness measures. Participants spoke at length about potential hazardous consequences of pipeline ruptures, with a particular focus on the dangers of drinking water contamination. Concerns were expressed that NEB conditions require only that emergency response plans be created by companies, but that the NEB exercises little qualitative oversight over those plans. Moreover, it was suggested that emergency preparedness plans and evacuation plans in the event of catastrophic failures should be prepared as part of project applications, not after projects are approved, as the feasibility of such plans should have some bearing on project approvals. The group discussed the practical and far reaching implications of disaster planning at this scale, suggesting that water contamination for a city like Winnipeg would require the emergency import of water for hundreds of thousands of people for weeks, and that this is not something for which any party is seriously prepared. In addition, the Panel heard concerns about various chemicals, like hydrogen sulphide, which may have potential effects for which companies and governments are unprepared.

The Panel heard a desired for more and better information about ongoing monitoring activities and results, as well as compliance outcomes. Furthermore, it was suggested that this information be made public and accessible.

Participants expressed concern that existing infrastructure may not be adequate, for example double-walled pipes for water crossings, or that new substances may be more corrosive than the substances for which existing infrastructure was originally designed. It was further suggested that new bitumen products may be significantly different than the original substances for which pipelines were intended, necessitating a review of whether original permits and approvals apply to new activities.

It was suggested that the current practice of surety bonds established by proponents to guarantee resources required to clean up and remediate damages in the face of a release is insufficient. First, because these bonds are not indexed for inflation over the several-decade life of a project, and second because this practice offers little protection for taxpayers in the event that the company goes out of business, there is a possibility that the public will be responsible for any remaining issues. Participants expressed concern that remediation may not be possible, not for want of resources, but because techniques do not exist to – for example – to recover diluted bitumen that has sunk into a body of water.

The Panel heard that on the ground inspections are limited in number and in scope (relying on above-ground visual observation), with some ~200 inspections annually, against 73,000 km of federally regulated pipelines. It was suggested that the 2015 Commission of the Environment and Sustainable Development report on Oversight of Federally Regulated Pipelines should be examined for an overview of some of the issues and challenges associated with compliance monitoring.

With respect to land acquisition, the Panel heard views that landowners should be able to decline consent for the use of their lands for pipelines or transmission lines. In addition, it was suggested that the NEB could play a bigger role in informing landowners of their rights and processes; as opposed to having project proponents play the primary role in educating landowners, as they have an inherent conflict in doing so.

The question of protection of transboundary waters also arose, as many watersheds, lakes, and river systems are connected to the United States, and are affected by regulatory policy and action there. It was suggested that a member of the International Joint Commission (IJC) could sit on the NEB, or at the very least that coordination between the IJC and the NEB be strengthened.

### **Indigenous Engagement Session – February 16, 2017**

The Panel heard many views on compliance and monitoring, but it should be noted that an overarching theme of the day was the protection of the environment, and the protection of water in particular. It was stressed that clean water is the lynchpin of all ecosystems on earth, without which virtually all life would be impossible. NEB-regulated activities present risks to rivers, lakes, watersheds, and drinking water sources for millions of Canadians, and the Panel was urged to consider the seriousness of these risks and consequences in its deliberations.

Speakers noted the importance of ongoing monitoring for all NEB-regulated projects, and suggested that too much focus is being placed on initial project reviews and approvals, while existing projects – which are in place for decades – are subject to much less scrutiny.

The Panel heard that the current approach to project approvals appears to view monitoring as a secondary consideration, with proponents promising to develop monitoring systems and emergency response plans as part of project implementation. Participants suggested that this practice makes it impossible to understand or comment on the full impacts of a project, and this has an important bearing on whether a project should be approved in the first place.

In addition, the Panel heard serious concerns over the reliability of monitoring equipment – which has failed to observe releases that have only been discovered by direct observation by people on the land – and the feasibility of recovery plans. It was suggested that Indigenous peoples should be more engaged in monitoring processes.

With respect to compliance it was suggested that some communities have established their Land Codes, that govern impacts on their lands, and that these codes should be incorporated into compliance monitoring.

The Panel also heard that companies may use “upgrades and maintenance” of existing projects, improperly, when in fact those maintenance projects may have major impacts akin to new projects. For example, integrity digs – to physically inspect the integrity of *in situ* pipelines – may be minor, but the cumulative effect of hundreds of such digs, and the infrastructure required to support them, is not insignificant.

Participants noted that Indigenous communities bear a large share of the risk of NEB- regulated projects, as they affect traditional and treaty lands across the country. It was noted that Indigenous peoples should benefit from projects to the same extent that they bear project risks.

The Panel heard that traditional knowledge is not limited to First Nations. Métis traditional knowledge is also a distinct and important input for decision-making.

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*THEME: Engagement With Indigenous Peoples*

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**Public Session – February 15, 2017**

The Panel heard strong support for taking real steps to establish nation-to-nation relationships between Canada and Indigenous peoples, and that the Prime Minister has made clear that the nation-to-nation relationship is the most important relationship for Canada. This means moving past the limited consultation models of the past. Participants suggested that consultation with Indigenous peoples to date has been largely perfunctory, designed primarily to do that which is necessary to receive a permit. Some participants shared their experience of being consulted on issues when decisions had already been made, and the community in question had no realistic opportunity to influence the outcome.

The Panel heard that Indigenous people frequently bear the risk associated with projects (as they are situated on traditional territories), but do not share in the benefits of those projects, which largely accrue to urban centres or even foreign markets. In this sense, Indigenous engagement can be seen to include the goal of ensuring that those who assume risk have a say in projects, and receive a share of the benefits.

Participants also mentioned the variety of Indigenous communities across Canada, and the important implications this has for engaging these communities. The NEB must be knowledgeable and attuned to the fact that different communities have different ceremonies, different legal traditions, and different expectations. There is no single “Indigenous viewpoint” or practice, and the NEB cannot be guided in its relationships by a one-size-fits-all model.

The Panel also heard that existing Indigenous governance models – some a product of colonialism – may not speak for or represent all Indigenous peoples.

More broadly, the Panel heard an urgent call to action to begin to address the destructive legacy of Canada’s past relationships with Indigenous people. NEB regulated activities represent only a small portion of the many issues at play, but nonetheless success here can set a positive example and establish a precedent for tackling the challenge of reconciliation with Indigenous peoples.

### **Indigenous Engagement Session – February 16, 2017**

The Panel heard that adequate funding and realistic timelines are critical for enabling real and meaningful engagement with Indigenous peoples. On funding, the Panel heard that the amounts available are often so low that communities have to choose between hiring experts or lawyers, and further have to reduce the scope of what they can examine. In some cases the amounts available will be reduced if many applicants apply, and as funding is allocated on a cost-recovery basis, groups without large amounts of resources on hand may be excluded.

Timelines can be challenging, as organizing the resources required to review project proposals, vetting reports, and working through community governance structures can take far longer than the formal time allotted.

Project scoping was raised by several speakers, who observed that the NEB has taken decisions to limit or expand the scope of what is considered in projects, without any apparent input from affected parties. This includes upstream and downstream effects as well as transmission lines required to power pipeline infrastructure.

The Panel heard that current practices present barriers for ensuring the real participation of Indigenous peoples. Formal hearings are not designed to respect or accommodate Elders and their knowledge, and the Panel heard emphatically that traditional knowledge equals Western science and should not bear the burden of being proven with Western techniques to be considered valid. Engagement in this sense can include everything from ceremony and protocol, to language, to the physical location of hearings.

Speakers also suggested that more effective forms of communication be employed to engage Indigenous peoples and explain activities and impacts in terms familiar to them. This can include local languages and using visual aides to depict the terms in question, as opposed to volumes of scientific information designed by and for experts in those fields. The Panel heard of examples of success in this regard using factsheets in local dialects, and with clear layman’s language. This applies especially to engaging Indigenous youth, who may have lower levels of knowledge and awareness of issues. Youth engagement is particularly important, as it represents investment in the next generation of leaders.

The Panel heard serious concerns with the definition of standing in NEB hearings applying only to those “directly affected” as this can be a limited definition. Participants stressed that traditional land use is not limited to reserves or dwelling areas, and that Indigenous peoples have an inherent interest over the full extent of all traditional lands and territories. Indigenous peoples are therefore “affected” by activity anywhere in Canada where they may exercise their rights. The current definition of standing is too restrictive generally, and fundamentally flawed in applying concepts of land ownership and direct interest to Indigenous practices that do not follow such patterns.

The Panel heard that the NEB must do more to actively engage affected parties, and not rely on proponents to do so, nor on Indigenous peoples to find out about projects themselves. As an example, a recent project affected a widely acknowledged ceremonial ground inside a Manitoba Provincial Park. This area is used by many nations, and the question was asked: why can the NEB not reach out actively to inform those nations?

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*THEME: Public Participation*

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**Public Session – February 15, 2017**

The Panel heard that participants see some significant flaws in the current public engagement practices of the NEB, and would like to find new ways to ensure that members of the public can be heard and influence NEB decision-making.

The issue of standing was discussed at length. The current limitation of standing to those “directly affected” by a project or those with “relevant information and expertise” is seen as overly limiting by some. Participants spoke about their own experiences attempting to take part in NEB processes, and found that their roles were very limited if they were not able to gain formal intervenor status. Participants acknowledged that it is not practical for thousands of people to make formal presentations to NEB panels, but in many cases interested parties wish only to have a venue to make their concerns known. The Panel heard that today members of the public must fill out a ten-page form to be permitted to be an intervenor or commenter.

Also with respect to standing, it was suggested overlapping representation can be problematic. One participant characterized an experience of being denied intervenor status, as a Winnipeg resident, because the City of Winnipeg was an intervenor and its citizens were therefore already represented.

The Panel also heard that participant funding is critical for meaningful participation from the public, but that in many cases the participant funding amounts are so low that funded groups can only conduct a portion of the work they had planned.

Timing can also be problematic for participating groups, as it can take considerable time to review applications, procure experts, and review results. This leaves commenting parties feeling as though they are playing catch up and fighting a ticking clock.

It was suggested that criteria for permitting oral or written testimony in hearings is arbitrary or unclear, and that all hearings should require oral testimony and cross examination. The process for written questions and responses was characterized as slow and insufficient and fail to enable an appropriate review of proponents’ proposals.

The Panel heard discussion on how to enable real participation for large numbers of people. Many participants may wish to simply add written comment to the record of a project, and there should be avenues by which to do so. However, some matters required face to face communication and participation. Overall, the group determined that work must be done to enhance and expand participation opportunities for the public. More broadly, it was noted that “participation” is a one-stop event, whereas quality engagement is reflective of a positive, ongoing relationship.

It was suggested that the Ontario Energy Board public engagement process for the Energy East project be looked to as a best practice.

The Panel heard expressions of frustration with the NEB website. Proponents' project information is not indexed or searchable, and there are file-size limits on uploads which make it difficult to provide information. In addition, the application process for funding and intervenor status was described as difficult to navigate, with little resources or assistance.

## National Capital Region (Ottawa, ON - Gatineau, QC)

### Expert Panel on National Energy Board Modernization

#### Public Consultation

Ottawa, Ontario – February 22-23, 2017

The Expert Panel for the modernization of the National Energy Board met in Ottawa February 22-23, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas. Comments were welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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*THEME: Governance and Structure*

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### Public Session – February 22, 2017

Participants raised questions as to the independence of the NEB. There was significant concern expressed over real or perceived conflicts of interest due to the proximity of NEB board members to the oil and gas industry. Many potential solutions were offered by participants. Of these, the panel heard most often of the need to ensure that Board members can live in locations other than Calgary, as is required in the NEB Act today, and to consider a move of the NEB from Calgary to Ottawa. It was expressed that the NEB's location in the heartland of the energy industry carries with it an inherent bias, though it was recognized that Calgary is home to many with expertise relevant to the board. Another solution offered to the panel was to mandate a minimum wait period between working for the NEB and in private sector or advocacy organizations.

The Panel heard that there is a need clear criteria for board member selection to ensure diversity of perspectives and experience. Participants suggested that appointment requirements should include regional and Indigenous representation, a variety of disciplines of expertise, including the lived experience of non-expert Canadians. Participants also supported a separation between the roles of NEB Chair and CEO, to reflect their respective orientations vis-à-vis policy vs. operations.

Participants also expressed concern that the NEB receives funding from the industry it is mandated to regulate, which is believed to pose a high risk for biased decision-making. There was also question as to which government body is responsible for overseeing the work of the NEB. The panel heard that sound process and transparency can lead to satisfaction on behalf of all parties in spite of final outcome.

### **Indigenous Engagement Session – February 23, 2017**

Participants brought into question the number of members sitting on the NEB and wondered if it was large enough given the NEB's importance and work volume. One participant posited that a body should be tasked with overseeing the NEB and that it should represent more Indigenous people than the current size of the NEB allows.

Participants also discussed the importance of the NEB's impartiality, voicing a perception that NEB decisions have been skewed in favor of the oil and gas industry.

Participants discussed what might constitute adequate Indigenous representation. One idea was to include a representative from each of the following: Métis, Inuit, Status Indians and Non-status Indians. Another was to have Indigenous representation from each province and territory. Overall, it was suggested that all NEB board members should have a high overall awareness and knowledge of Indigenous issues, acquired either by life experience or training.

Furthermore, one participant specified that, if Indigenous interests and sources of knowledge and evidence were to hold equal footing with those of others, as per the terms of reference, the number of indigenous representatives on the board itself would become less important. Similarly, if the UNDRIP provision of conferring the right of free, prior, and informed consent to Indigenous peoples were to be operationalized by the NEB, there would be less concern about having enough Indigenous board members.

Finally, participants suggested that the expert panel consider whether those deciding on a project should represent the communities most likely to be affected by it.

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### *THEME: Mandate and Future Opportunities*

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### **Public Session – February 22, 2017**

Participants remarked that the NEB is now operating in the context of the Paris Climate Agreement which will soon be enshrined in Canadian law and that the NEB Act and mandate should reflect government priorities and commitments with respect to climate change, and reconciliation with Indigenous peoples, among others. As such, it is important to expand and enhance the NEB's mandate to reflect these larger commitments and policy objectives.

The panel heard a call by participants for the development of long-term federal energy strategy from which the NEB would derive its decision-making priorities. Such a strategy should be comprehensive and include policies pertaining to all relevant areas, including but not limited to: transportation, environmental, and economic considerations. It should also link to a national carbon budget that would define specific emissions limits that would inform the context for NEB-reviewed projects.

The absence of such an overarching strategy is one of several public policy gaps that were identified as impeding the NEB's ability to make decisions with clear policy direction, more adequately reflect changing social values and national interests. Participants encouraged the panel to reflect these shifts in its recommendations for modernizing the NEB.

With respect to regulatory policies directly impacting NEB's decision-making, the Panel heard that it may be best to entrust regulatory policy development and regulatory enforcement to two separate entities, or at least to two separate sub-divisions of the NEB to ensure that decisions reflect the intended policy direction of the government.

The Panel heard that it will be essential to better define "Public Interest" as it relates to the NEB's mandate. Public interest is an evolving concept, that changes with shifting norms, technology, and public expectations. Major changes have occurred in Canada since the NEB's inception in 1959 that must be reflected; as one presenter put it, "the horses have left the barn". Participants recognized that a lack of policy coherence and the avoidance by many governments to do the hard work of addressing evolving expectations can make regulators like the NEB "sitting ducks" in terms of credibility and perceived fairness. Fundamentally, the modernization of the NEB in and of itself is an important step, but is unlikely to be sufficient in isolation to fully regain public trust and confidence.

Participants shared with the Panel their concern that industry and economic interests currently hold too much sway relative to other interests in determining public interest, particularly those relating to environmental impacts, public safety, intergenerational justice, Indigenous interests and planning. It was noted by some participants that such a definition will inevitably hinge on a vision that the NEB has of the pursuit of Canada's climate targets embedding the assumption that Canada will meet its targets, rather than a risk of complacency or assumed failure

In light of climate targets and global trends, participants suggested that it is paramount that the NEB expand its focus and mandate to encompass more than oil and gas. Particularly, it should place a strong focus on renewable energy sources, environmental impact assessment, and acquiring adequate scientific and traditional evidence. Some participants urged the NEB to shed light on lesser-known alternative energies including those of biological origin.

Several participants suggested an important role for the NEB to guide or manage greater research and studies into energy alternatives and related policy options to accelerate change.

Also supporting climate change initiatives, one participant proposed that the NEB's mandate be expanded to regulate both energy production and expenditure. The example given was that the Board could set, and monitor progress towards, municipal energy expenditure targets.

The importance of the NEB's role and mandate in financial regulation and perhaps eventually in market oversight was also pointed out. Scrutiny and informed cross-examination are crucial to ensure just and reasonable tolls. One participant voiced their overall appreciation of the mandate's focus on consumers.

On the topic of sufficient data, the panel heard two distinct views from participants: one envisions more comprehensive, reliable and readily-accessible scientific data as the purview of the NEB, while the other favours severing this responsibility from the regulatory role of the NEB, and locating data collection and analysis role in a body outside the NEB. Participants characterized the NEB as demonstrating strength in collecting production data and weakness in gathering accurate demand and environmental data.

Participants also shared differing views on the scope of the NEB. One participant suggested that the NEB be limited to regulating energy exports and imports, while allowing the provinces to regulate energy within their borders. Another offered a vision of the NEB as a broker of communication and collaboration among provinces. Yet another felt that the federal government should be involved in provincial negotiations with Indigenous peoples. Another participant felt that all decision-making functions should be returned to the Governor-In-Council, and another told the panel that the NEB of the future may act like the Canadian Nuclear Safety Commission, ensuring the safe stewardship and decommissioning of existing pipelines, without developing new ones.

Finally, a few participants suggested that oversight of dams and fresh water resources that flow over provincial and international borders be included in the NEB's mandate.

Ultimately, participants remarked that the role of determining the NEB's mandate belongs to the federal government and should first and foremost fit within the government's legislative agenda.

### **Indigenous Engagement Session – February 23, 2017**

The panel heard that the NEB's mandate should cover “off-grid” communities, which describes many remote Indigenous communities. This means that the mandate could reflect and support more decentralization of energy systems addressing energy cost, reliability and GHG emissions.

One participant shared concerns that alternative forms of decentralized energy, such as energy storage and repurposing human and animal waste, have been overlooked by the NEB though they may hold the highest potential for bringing lower cost energy to remote Indigenous communities. Participants suggested in general that the NEB's mandate be revised to include a broader focus – beyond a pipeline-centric approach – that would include renewable energy sources.

The panel heard that the NEB should be responsible to increase public confidence in its regulatory processes.

Participants told the panel that the NEB in its current form is ill-suited to carry out section 35 consultations on behalf of the Crown; it is believed to lack expertise on indigenous issues, including how to consider and weigh traditional evidence.

Finally, it was specified that the NEB's mandate should stem from the federal Government's policy initiatives on related topics, especially climate change.

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*THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – February 22, 2017**

Specific comments were made as to the importance of the NEB ensuring the rights of indigenous peoples under section 35 of the Canadian Constitution. Participants suggested that the NEB's mandate include ascertaining whether the Crown has fulfilled its constitutional duty to consult and accommodate Indigenous peoples in coming to its decisions. There was some discussion as to what constituted accommodation. One participant expressed that accommodation so-far has felt one-sided, in favor of the Crown. Another noted that industry's efforts to accommodate are always of quantifiable monetary value.

The panel heard from some participants who did not believe that the Crown's duty to consult should be delegated to another body, including the NEB. Others believed that the NEB Act should make explicit the Board's authority and relationship relative to the Crown, in order to determine whether or not it can undertake consultations on behalf of the Crown.

Participants shared a marked interest in evidence-based decision-making, largely understood to mean impartial scientific evidence, though some participants reminded the panel of the importance of considering traditional sources of information and knowledge from Indigenous peoples. One participant noted that there was significant government research investment and a deep scientific knowledge base within the federal public service years ago but that it has since disappeared. The question was raised as to how to best engage with and support scientific research as a foundation for sound decision-making.

The panel heard numerous times of a lack of trust in the current process and that the public perception is that the NEB exists to determine how to develop pipelines, rather than to decide whether they should be developed. The low number of project refusals was cited in support of this. At the same time, one participant voiced the perspective that such low refusal ratings may reflect that fact that, with so much on the line, companies will screen the compliance of projects before presenting them to the board.

Considering international, national and provincial initiatives and commitments, the Panel heard views that the NEB's decision-making process must include an assessment of carbon emissions and environmental impact throughout project lifecycles, using relevant data benchmarks. The panel also heard that an integrity management program (IMP) and an emergency response plan (ERP) should be made compulsory elements of a complete application.

The Panel heard serious concerns with the definition of standing in NEB hearings and participants expressed that they wish to have their say and not be excluded on the basis that they are not a "directly affected party" or that they do not have "relevant expertise or information". The Panel further heard that Indigenous peoples have an inherent interest over the full extent of all traditional lands and territories and are therefore "affected" by activity anywhere in Canada where they may exercise their rights. The current definition of standing is too restrictive generally, and fundamentally flawed in applying concepts of land ownership and direct interest to Indigenous practices that do not follow such patterns. Practically speaking, larger participation could be handled through townhalls and roundtables; the Ontario Energy Board's engagement process for the Energy East project was identified as a best practice of public participation.

The panel also heard that indigenous and local community participation in the decision-making process is very important (the example of good practice given was of the participatory processes that the Cree Nation put in place as a result of the James Bay and Northern Quebec Agreement).

Participants felt that transparency in decision-making would be beneficial. For example, the data sets used by proponents to produce the calculations found in their applications should be disclosed for cross-examination. Furthermore, the Panel was told that it is advisable to explain how different factors, including public consultation, lead to any given decision for the purposes of accountability and legitimacy.

Participants voiced a need for greater coordination between different levels of government in favor of a single process which would make the regulatory process less redundant, confusing and burdensome.

With regards to municipalities, the Panel heard that there are important considerations of cost for pipelines which run through cities, and that these costs are borne entirely by municipalities, and are not included in the total cost calculation of pipelines. Costs incurred by municipalities that can be related to pipelines may include road work, sewage maintenance, water mains, etc. The Panel heard that municipalities would like some standing to influence decisions and would like to see the total costs – including costs incurred by cities – accounted for.

Considering the attraction of investment to Canada and significant uncertainty to financial decisions, some participants advocated for a tiered approval system. An early stage (one year) determination of public interest and need for the project, likely involving a strategic NEB hearing, would conclude with a decision at the political level. Following that early stage decision, if approved, detailed determination of project parameters would then be decided by the NEB. The Panel heard that such a system is intended to minimize the risks posed to investors who currently face regulatory review costs of over \$500 Million for large projects which could be halted or overturned by political decisions much later in the process. Others expressed disagreement with limiting such considerations to the beginning of the process.

One participant expressed support for the government of Canada's interim measures for pipeline reviews. Another suggested that the province of Ontario's Pipeline Principles could serve as an example in modernizing the NEB's own decision-making.

With respect to land acquisition, the panel was offered the idea of establishing a single government body to manage land acquisition processes for all major projects deemed to be in the public interest including energy, mining and transportation. It was noted that the rules governing land acquisition (from non-Indigenous private citizens) for mining projects differ greatly from those pertaining to energy projects.

One participant shared the following "10 principles for decision-making" with the panel, to inspire their work in modernizing the NEB:

1. Think about a new role for the National Energy Board and abandon a large part of its decision-making role. From now on, the Board could be considered a forum for reflection and consultation. Given the changing values in society, the decision-making power could be restored to the political authorities, who are accountable to the public.
2. Develop a long-term culture to link projects to public policies. Tools such as strategic environmental assessments could be used, because they could allow integration of different horizontal issues, such as transportation and agriculture.
3. Review the principle of appointment of decision-makers so that they integrate representation of the regions and expertise, as well as environmental and consumer interests.
4. Apply the principle of "co-construction" by initiating a reflection process upstream, i.e. before the projects are decided and designed.
5. Think about diversity of consultation processes. In addition to public hearings of the judicial-administrative tribunal type, other, more local and diversified consultation mechanisms and spaces should be provided, open to all. The current process is completely outmoded and kills debate.
6. Answer the question of social acceptability, which has been present for 15 years; it is incumbent on the elected representatives to resolve this.

7. Funding the participation of groups in the review process is important to enable civil society to have the means.
8. Explain the decisions and how the public's contribution must be taken into consideration in the decision (traceability principle).
9. Create a multi-level governance space where all the different governments sit down and agree on a common harmonized process for reasons of efficiency and legitimacy.
10. Ensure that the participation and consultation eventually ends. For this purpose, there must be a known schedule; this principle is fundamental and must remain.

### **Indigenous Engagement Session – February 23, 2017**

Participants acknowledged that integrating Indigenous traditional knowledge and contemporary scientific knowledge has so far faced challenges. Some participants shared views that Indigenous forms of knowledge and evidence have been greatly undervalued in the NEB's decision-making processes.

The Panel heard that Indigenous knowledge of ecosystems provides key insights on the risks posed by an oil pipeline spill or other emergency affecting water and wildlife, and that these should be considered by the NEB. The Indigenous understanding of how different natural systems work together is particularly valuable to those assessing the risks of a proposed project.

It was recommended to the panel that the NEB consider an overarching Indigenous principle when coming to a decision. This principle is that of restoring nature to how it was before a human intervention. Another Indigenous value of potential importance for the NEB's modernization is the pursuit of consensus, rather than adopting an adversarial approach to proceedings.

The panel heard of one practical way of integrating traditional knowledge into the NEB's decision-making process: the NEB should involve elders and those who live off the land at various stages of development and place them on equal footing with other experts.

The panel heard that greater harmonization or cooperation between provincial and federal regulatory bodies may help to prevent redundancy and make the NEB's decision-making process faster and easier. It was expressed that these should not contradict one another at the very least. One clear set of rules requiring cross-government dialogue would be best.

Participants offered their views on what should be key decision-making criteria for the NEB. Chief among them were the consideration of constitutional rights under section 35 of the Constitution (regarding the rights of Indigenous peoples) and the aforementioned environmental assessment, a climate impact assessment including an upstream and downstream estimate of carbon emissions and the consideration of impacts on the health of waterways, and ultimately, of those who consume products from affected watersheds.

Additionally, it was suggested that the decision-making criteria used by the NEB be customized to each affected Indigenous community based on factors such as their land use and practices.

Some participants requested that the NEB follow consultation and decision-making procedures, and insert themselves in established Indigenous or treaty processes rather than asking first nations to insert themselves within NEB-specific processes.

Moreover, decision-making timelines were discussed, with a preference expressed for allowing more time for study and consultation within Indigenous nations, prior to providing contributions to the NEB's decision-making process.

The Panel heard from participants in favor of eliminating the seemingly arbitrary classification of who makes the final decision on pipelines based on their length (with 40km being the current threshold for a "Section 58" NEB final decision, or "Section 52" Governor- In-Council final decision). The Panel was invited to consider what other screening mechanisms could be used to determine the decision-making process, such as potential impacts to Indigenous rights.

Finally, the Panel heard a call for integrating community consultation into the application stage of a project rather than simply regarding it as a compliance issue down the road.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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### **Public Session – February 22, 2017**

The panel heard that the NEB's enforcement and monitoring functions should be informed by more than industry data and that the supporting models should be vetted independently of industry interest.

Participants voiced concerns over the conversion of existing pipelines, outlining the need for greater regulation and enforcement surrounding the proof of safety and of adequate response in case of leakage or other incidents. For example, if an existing pipeline's materials would not pass the current test for a new pipeline, it should be required to replace them with compliant materials. It was suggested that the NEB raises its standards for infrastructure specifically to mitigate spill risks, through requiring double-walled pipes for new projects and concrete troughs under existing pipes to better contain spills.

Regarding emergency response, participants asserted that response and repair times by pipeline operators must be shortened. It was suggested that penalizing non-compliance at a rate of 10,000 dollars per barrel spilled, for example, would add incentive for more urgent action in the event of a spill.

The Panel heard grave concern over the proximity of certain pipelines to "high-consequence" sites and a lack of awareness of the attendant risks, on the part of those managing such sites or those tasked with local emergency services. Such sites identified in southern Ontario include seniors' residences, schools, a subway station and highly populated multi-story buildings.

Participants voiced their belief that all those exposed to a risk should be informed. As it stands, there does not appear to be a database or map of pipeline locations. Collecting such information in one place and making it accessible would greatly assist in communicating with affected parties. One idea for doing this is to develop a mobile application that would show all pipelines (both operational and out-of-commission) in the area shown on the screen.

Participants offered the idea of mandatory emergency simulations and dry runs in communities exposed to risk. These would serve a dual purpose of testing emergency response procedures and of raising awareness among residents.

The Panel heard that participants believe that existing legislative and regulatory tools are adequate on paper, but that the greatest challenges lie in how the NEB oversees and enforces compliance. Some participants shared stories of having made a complaint of non-compliance to the NEB and not having received any response.

The Panel heard allegations of proponents making misleading assertions to members of the public, and a request that the NEB consider how best to identify and penalize this behavior. The idea of auditing industry presentations to the public to verify the veracity of claims was raised as part of an overall preference for third party verification of claims and data presented by industry actors.

The Panel heard that the bar for what constitutes “industry best practices” must be raised as the industry’s current safety and compliance measures are inadequate, as exemplified by past incidents.

### **Indigenous Engagement Session – February 23, 2017**

Participants asked the Panel to consider how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) might be enshrined in Canadian legislation – particularly its provisions respecting free, prior, and informed consent.

A question was raised as to the relationship between findings born from monitoring activities and future projects to be considered. Participants cautioned against using baseline data collected as part of monitoring in one community or situation and applying it to others. The distinct ecological knowledge in each territory, and the diversity of views and positions within first nations, complicates this prospect greatly.

The Panel heard that, as part of ensuring compliance and involving Indigenous peoples in monitoring activities on their lands, the NEB must build long-term relationships founded on trust. One participant suggested that demonstrating humility and deferring to first nations as experts on their land would contribute to this trust-building.

The example of the Naskapi people was given by a participant. They want to operate the monitoring functions themselves but will require appropriate capacity development to do so. It was proposed that once the capacity is there, the same people could conduct monitoring activities under multiple government acts, regulating fisheries and transportation among others. It was suggested that other first nations may prefer this model as well.

Other participants spoke more generally of ensuring the involvement of Indigenous peoples throughout the lifecycle of a project. It was suggested that monitoring be done in collaboration with the people who are living on the land and benefitting from it. The agreement between the Cree nation and the province of Québec on the conditions under which projects can operate was raised as an example of good practice, noting that the Canadian government provided input to it.

Participants impressed upon the Panel the importance of building the capacity and resources of First Nations in participating actively in monitoring and emergency response activities.

The panel heard concerns over section 58 of the NEB act allowing companies to minimize their responsibility vis-à-vis public safety and the environment. A review of this legislation as well as of section 52 was recommended to the panel.

Participants noted that the NEB should align its regulations with aboriginal title-related laws that warrant that if a developer moves ahead knowing that there exists a title issue on the lands concerned, large reparations can be sought.

Various concerns relating to safety and compliance were also voiced by participants, including the need to enforce preventative maintenance, the safe decommissioning of infrastructure (including fracking wells) and the extent and application of penalties for violating regulations.

The Panel was invited to consider the possibility of instituting mandatory notification, consultation and accommodation of Indigenous peoples for any operations, maintenance work and spills occurring within their traditional lands.

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*THEME: Engagement With Indigenous Peoples*

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### **Public Session – February 22, 2017**

Participants spoke of the need to marry modern-day scientific knowledge with traditional knowledge. Additionally, participants reminded the panel of the Crown's duty to consult and of Indigenous communities' expectation of dealing directly with the Crown rather than a delegated body. Participants also noted that relationships with indigenous peoples should be in accordance with UNDRIP.

The Panel heard concerns surrounding the capacity of First Nations communities to respond to requests for input in an informed manner within the timelines prescribed by the NEB or the proponent for providing a response. Indigenous voices are not being heard simply because deadlines to provide comment are insufficient; concern was raised that proponents generally equate a lack of response from a community with consent. One participant proposed that First Nations communities be allowed to see what the proponent has written about them to confirm their understanding, before becoming part of the record.

A participant also voiced concern over the fact that when an Indigenous community voices its disapproval of a project, it ceases to be consulted on how this project goes forward. Approval of a project should not be a prerequisite for being consulted about or involved in a project, should it proceed. Meaningful engagement was the term used by participants to denote a deeper participation than being consulted in early stages. Such deeper collaboration may touch on emergency response, effective communication and other local interests.

The Panel heard that further clarification on the status and respective roles of the NEB and regulated proponents and operators regarding the "duty to consult" would be welcome.

### **Indigenous Engagement Session – February 23, 2017**

In line with Indigenous traditions, participants underscored the importance of hearing the voices of people from various age groups, particularly those of elders. The Panel also heard concern over the voices of Indigenous peoples either not being heard, or not being given enough weight in decision-making.

The Panel heard that consultation surrounding issues regulated by the NEB should span multiple governments, ensuring the continuity of dialogue. Under the current government there is a very high

volume of requests for consultation with Indigenous communities. Numerous participants shared concern over limited capacity to handle such a high volume of requests within the timeframe allotted to them and their fear that this be interpreted as an unwillingness or lack of interest to participate. From a practical point of view on substantive issues, community representatives spoke to how a 30 day comment period is almost impossible to meet.

A potential solution offered was to coordinate consultations by different government bodies, which would simplify consultations and enhance solutions by ensuring that a given proposal was handled in one joint consultation. The example of a joint Indigenous and Northern Affairs Canada and Public Safety and Preparedness consultation was presented.

Regarding the establishment of nation-to-nation relationships between Indigenous peoples and Canada, participants expressed faith in the current government's sincerity. However, there were concerns raised about the time it will take them to develop and share their strategy and the exclusion of some bodies representing Indigenous peoples from conversation, such as the Congress of Aboriginal Peoples. Additionally, participants took issue with the Indigenous peoples' nation-to-nation relationship with the government of Canada not being reflected in the NEB act, processes and documentation.

Extensive discussion was held on the topic of the Crown's duty to consult, much of which was previously summarized in this document. It was noted that The duty to consult is triggered when: The Crown has knowledge of a potential aboriginal claim on the lands concerned; The Crown is contemplating a course of conduct or decision; the contemplated conduct or decision have the potential to affect treaty rights.

A presenter proposed the following course of action by the Crown once The Duty to Consult is triggered. While their presentation pertained to the Métis nation, it may serve as a helpful guide for the NEB overall:

- 1) Provide notice to the potentially affected communities
- 2) Provide capacity funding to Indigenous communities concerned to enable consultation.
- 3) Recognize the unique impacts on each region affected and grant them intervenor status
1. (with corresponding cost coverage)
- 4) Exchange information with the Indigenous communities concerned
- 5) Assess the effects on the communities concerned, and
- 6) Provide appropriate accommodation

However, some participants asked the Panel to consider if a shift from consultation to consent of Indigenous peoples is warranted in light of UNDRIP. They specified that such powers would not be used to categorically veto projects, but rather to ensure that enough time is allotted to the careful study of important considerations, some of which are seasonal (eg. wildlife and vegetation).

Discussion also explored the concept of "meaningful consultation". This term is understood as the degree to which aboriginal peoples can influence the process the Crown uses to make its decisions and how well the Crown protects treaty rights. As such, the Panel heard dissatisfaction from some participants who asserted that currently, the only way to have Indigenous voices not only heard, but truly addressed, is by taking cases to the Supreme Court of Canada. It was also noted that of the Supreme Court accepts oral evidence, so should the NEB.

Participants shared the view that if the scope of consultation with Indigenous peoples on NEB-approved projects were to be expanded to the project's entire lifecycle –from application to decommissioning – Indigenous viewpoints and positions would be more likely to be addressed outside of the Supreme Court.

### **Public Session – February 22, 2017**

The Panel heard that it is important to engage with the public throughout a project's lifecycle. Participants advocated for a variety of forums in which to do this, both in-person and digital, and both formal and informal. The Canadian Radio-television and Telecommunications Commission (CRTC) was identified as a best practice for public participation in policy and regulatory processes; it was said that the CRTC holds specific hearings to review policies, which are more idea-based than evidence-based, and include participation from the public. These policy discussion forums do not become part of the record, but are useful for public discussion.

Participants raised the importance of the NEB providing funds to cover the cost of participation by individual intervenors and of civil society organizations in the decision-making process.

The panel heard from many participants that to facilitate active participation by the public, civil society, and concerned stakeholders, the NEB must ensure that complete, easily navigable and easily understood data is made available online in a timely manner. It is also important to be creative in how to better engage youth.

Due to a previously cited concern over the integrity of claims made by proponents, it was suggested that the NEB provide a regulatory framework for public consultation by the private sector. This would ensure that claims are on record and can be cross-examined.

### **Indigenous Engagement Session – February 23, 2017**

Participants voiced what they consider to be important elements of the public's participation in the NEB's work. Firstly, funding should be provided to cover the cost of full participation by Indigenous peoples and other concerned communities, as budget scarcity has been known to get in the way of smaller communities in the past. Full participation is understood to mean research, analysis, consultation and the hiring of subject matter specialists in addition to participation in NEB hearings.

One participant stated that it is important the NEB website be user-friendly and fully accessible to those with disabilities. They also expressed a desire for greater transparency regarding the selection of intervenors in specific processes.

In general, the panel heard a recurring theme that the cultural shift in NEB decision making and across participants is important. To truly respect rights, already well established through numerous court cases, and the stated agreement on the desire and need for reconciliation, the NEB processes, weighting of evidence and ease of participation must modernize.

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*GENERAL COMMENTS*

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In addition, the following general remarks were made:

It is important to acknowledge the very real economic and energy security challenges as energy systems adapt. Those considerations are part of the fabric of public interest in both social and economic considerations.

The procedure of public consultation being used by the NEB modernization panel is laudable and participants are grateful for the opportunity to provide input.

## Fort St. John, BC

### **Expert Panel on National Energy Board Modernization Public Consultation Fort St. John, British Columbia – March 1-2, 2017**

The Expert Panel for the modernization of the National Energy Board met in Fort St. John, March 1st and 2nd 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas. Comments were welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Landowner agreements, compensation and disputes\*
6. Engagement with Indigenous peoples
7. Public participation

\* Landowner issues are included in the “Compliance et al” theme of the Panel's mandate. However, the Fort Saint John session featured such a wealth of quality feedback on this specific subject, that is featured here separately.

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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*THEME: Governance and Structure*

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### **Public Session – March 1, 2017**

The Panel heard suggestions for broader representativeness on the NEB Board itself, include such areas as expertise in agriculture and land issues, Indigenous peoples from treaty and non-treaty lands, and emergency preparedness. It was further suggested that the Board not consist of retired energy executives, as this would threaten the NEB's independence.

Representativeness is a question for the Board in general, but also for hearing panels on specific projects. With respect to project panels, it was suggested that local people from each stakeholder group impacted by a project be part of the project panel.

Participants discussed the issue of accountability for the NEB, as it is appointed and not directly accountable to the electorate. It was suggested that strict record-keeping requirements might bolster accountability, but concern remained among some participants that an independent board isn't subject to democratic accountability in the same way elected officials are. One participant suggested that Board members be appointed based on a vote in parliament.

Participants felt that available technologies and practices have rendered residence requirements obsolete, and that Board members should not be required to live in Calgary. However, the view was also expressed that expecting Board members to live in Calgary is reasonable if that is the centre of where most NEB business is conducted.

The idea of creating an NEB steering committee with regional or national offices to address the rights of landowners was raised, as was the creation of a council of Indigenous representatives.

### **Indigenous Engagement Session – March 2, 2017**

The Panel heard that the NEB and its decision-making Panels must represent the diversity of Indigenous peoples (treaty and non-treaty, Inuit, Métis and First Nations).

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#### *THEME: Mandate and Future Opportunities*

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### **Public Session – March 1, 2017**

Participants discussed the relationship between Government of Canada policies and NEB decision-making. Some felt that it is imperative that the NEB be as politically neutral as possible, and therefore that it should provide independent reports to the government of the day.

The Panel heard that the NEB should determine public interest based on the evidence it receives in hearings rather than a set definition, given that the public interest may depend on the area of the proposed development. Participants suggested that timely and predictable decision-making is critical, and that “public interest” criteria should be explicitly defined for each project in order to limit protracted debate.

To make informed decisions, the NEB's role in data collection and dissemination was underscored as being important. It was also suggested that the energy of the future will be renewable and that if Canada is to be one of the leaders, it must act right away to put renewable energy at the forefront of its strategies, including those implemented by the NEB. One participant suggested that the NEB may focus on different energy sources in different regions according to the natural resources available there.

On the topic of environmental assessments (EAs), the Panel heard that there is a general perception of assessments conducted by industry being inherently biased. They heard support for EAs being either conducted or procured by independent third parties, with the cost charged to the proponents. Today environmental assessments are overwhelmingly procured directly by proponents, and EA service providers may be hesitant to take other business for fear of jeopardizing relationships with industry. In response, it was suggested that the NEB or Canadian Environmental Assessment Agency be the sole authority for procuring all EAs for regulated projects. Project proponents would continue to fund assessments, EA providers would not be seen to be “working for” the proponent. Additionally, the

independent sourcing of EAs could ultimately cost industry members less. One participant worried that this approach, mirroring that of the BC government, would take longer by involving a third party.

Participants asked the Panel to consider how to address the cumulative footprint of various projects (not all NEB-regulated) on landowners. More than one participant illustrated the extent to which their farm land or traditional lands are being industrialized by pipelines, wells and other energy infrastructure, to the detriment of how they sustain themselves. In one example, a farmer had lived through twelve expropriations, resulting in a significant patchwork of energy infrastructure across land. This greatly restricted his ability to work his farm, as machinery as wide as 60 feet cannot be manoeuvred in the space remaining. What's more, in order to drive farm equipment over a right-of-way or other project infrastructure, landowners must ask companies for permission. This is impractical and gets in the way of making a living.

It was shared that involving landowners and Indigenous peoples in setting the strategy and plan for future energy infrastructure would be a good way to better understand cumulative impacts. The Panel heard that looking at macro and micro data can help all parties to get on the same page when planning for the future.

In addition, it was suggested that the NEB could raise awareness about industry best practices, as most people only hear of energy projects in the context of poor practices and conflict. For example, there is a positive work being done to remediate sites.

In acknowledgement of the necessary shift to a low carbon economy, it was suggested that the NEB oversee the shift from fossil fuel-based energy to more sustainable sources.

It was also discussed that the federal government should be the one to grant licenses for the selling of oil companies to foreign entities.

### **Indigenous Engagement Session – March 2, 2017**

The Panel heard that the NEB's mandate should include the timely reporting of projects' effects on the ground to the Governor-In-Council.

It was also said that Indigenous interests should not be considered as a subset of the Canadian public interest as Indigenous peoples deserve much more integrated and extensive engagement beyond the project decision-making process.

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*THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – March 1, 2017**

It was proposed by some participants that the NEB have decision-making authority for all projects, rather than recommending some to Cabinet. The Panel also heard that projects approved with some 200 conditions don't appear to be "approved" in the true sense of the word.

One participant suggested that the NEB needn't be involved if two provinces are in agreement over an interprovincial project. Another underlined the importance of interprovincial and international projects being brought to Cabinet for a decision, in order to ensure better relations with Indigenous peoples on both sides of a border, and contemplate international trade. Overall, the Panel heard that they need to consider the overlap between national and provincial processes in their recommendations, with one participant suggesting it adopt the role of synchronizing provincial processes.

The Panel heard that, from the point of view of landowners with existing or proposed energy infrastructure running through their property, NEB processes are more efficient and provide more satisfactory outcomes than those of its provincial counterpart. In fact, participants believe that the NEB sets the bar for integrity, influencing provincial regulators and industry, despite its lack of jurisdiction over many projects.

One participant suggested the creation of an NEB decision-making matrix to help ensure that all important factors are considered and to keep the process moving. Others doubted whether such a standardized approach would be applicable to the uniqueness of every situation.

Participants warned against the most vocal parties getting the most consideration. To avoid this, a reliance on facts and merits over "interests" was recommended. Additionally, participants raised the responsibility of project opponents to articulate tangible reasons for their objections.

The Panel heard much concern surrounding the timing, meaningfulness and extent of consultation with stakeholders as part of the decision-making process.

What's more, those deemed to not be directly affected by a project have limited opportunity to have their views heard and responded to. Participants suggested that the NEB should consider proximity to one's property and repercussions on air quality and water supply when expanding the scope of who is deemed to be concerned by a project.

Some participants stated that, as provincially regulated energy development and associated infrastructure projects eventually feed into NEB regulated ones, the NEB should have some influence over them. Many more supported the general idea that the NEB study the upstream and downstream effects of a project, whether on communities, the economy or green house gas emissions, when rendering a decision.

Participants discussed so-called "sausage links", the term given to an interprovincial pipeline with the border crossing portion made smaller and/or managed by a separate entity to avoid the main pipeline on either side of the border being subject to NEB jurisdiction. Participants felt this practice is deceptive and that the NEB should be on the look out for such applications. Participants felt similarly about powerlines. In both cases participants preferred to see federal regulation for infrastructure crossing borders.

A participant highlighted the importance of having the NEB consider the international trade implications of energy decisions.

Given differing views on the role of the Governor-In-Council in decision-making, the idea of an established threshold beneath which the NEB could come to a decision independently, was raised. Participants also discussed the time limits placed on decision-making. Some believe the established limits are too short and others too long. Longer timelines, one participant argued, encourages proponents to do some work prematurely and attempt to "divide and conquer" resistant communities. It was concluded that a service standards approach would be preferable to a hard limit as there is a need to balance flexibility and predictability.

## **Indigenous Engagement Session – March 2, 2017**

The Panel heard that the NEB's view of what constitutes a major project and what is assessed needs to be expanded. The EA is just one piece of a larger regional EA and land management plan. Such a regional snapshot should be seen as precursors to EAs as they would allow project specific reviews to measure proposals against a baseline.

It also heard that projects should be decided based on a thorough risk assessment that takes into account the cumulative effects of development. Indigenous peoples in the area have witnessed dwindling numbers of caribou, moose and other sources of food and feel that more of their land must be off-limits.

Participants asked for greater transparency throughout the NEB decision process, including information on which Indigenous groups have or have not given their consent to a project as well as an explanation of its decisions to approve or deny a project.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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## **Public Session – March 1, 2017**

Participants had mixed experiences with NEB representatives, with some finding them to be quite helpful and respectful in discussing and resolving issues and another feeling the need to fight for every bit of help received. It was noted that while new rules are needed, they will only matter in the context of proper enforcement, which has so far been a weak point of the NEB.

Participants shared their opinion that the NEB has a role to play in ensuring that pipelines get removed from the ground at the end of their lifecycle. The Panel heard that as it stands, some right-of-way agreements state that they will be removed, but they have not. The Panel heard that often at the end of a project's lifecycle, companies decommission instead of abandoning a pipe, to avoid triggering their obligation to remove the pipe from the ground.

The Panel heard that there must be a higher minimum safety threshold for lines going through populated areas.

The Panel heard that the NEB cannot expect people to trust in the development of new projects if proponents aren't being proactive in dealing with what they've left behind from past projects. Trust must be built through proper compliance throughout the project lifecycle.

There was a question raised as to the adequacy of emergency management and risk mitigation plans and practices. Specifically, one participant made a call for the NEB to require deeper digging and burial of pipelines, recognizing that the current 1.3m is too shallow if one considers the weight of the heavy farming equipment that will be driving over it.

Further, it was also suggested that proponents need to identify the thickness of pipe at which leaks and ruptures are likely and be mandated to replace pipe before it reaches that point. There were also concerns about the need to improve cathodes on power lines.

While participants acknowledged that pipelines are preferable to other methods of transporting oil and gas, they called on the NEB to develop stricter safety requirements.

The need to protect waterways was raised as being crucial by many participants and the damage to the environment must be strictly monitored and penalized. One participant wondered if mandating the offset of a pipeline's impacts by purchasing and protecting another piece of land would be helpful.

### **Indigenous Engagement Session – March 2, 2017**

The Panel heard that it is advisable that the NEB Act provide some legislative support to the adoption of an approach that considers upstream and downstream effects of all kinds (greenhouse gas emissions, s.35 rights, land and habitat impacts). Participants voiced their dissatisfaction with the NEB recommending rather than requiring that concerned parties following certain guidelines.

Participants recommended that the Panel look beyond Canada's borders for examples of approaches to legislation, compliance, and enforcement.

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*THEME: Landowner agreements, Compensation and Disputes*

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### **Public Session – March 1, 2017**

Participants discussed their dissatisfaction with the land acquisition and compensation process. While many examples pertained to NEB-regulated pipelines, there were also many examples related to upstream development under provincial jurisdiction. The intensity of development in the region was also a concern, in that landowners may have several projects, under different jurisdiction, on their land.

Regarding land acquisition, the Panel heard grave concerns over the knowledge, professionalism, ethics and integrity of proponents' land agents, sometimes referred to as "land men". Participants supported the idea of the NEB creating a training and licensing program for land agents, requiring land agents to provide better information on the rights of landowners, or even the NEB acting as a neutral third party land agent itself. Participants shared stories of disrespect and of intimidation by land agents.

Negotiations between companies and landowners, usually mediated by a land agent, were raised as a big problem area. The Panel heard of intimidation tactics, secrecy, divisive tactics and high staff turnover as getting in the way of the collaborative pursuit of win-win outcomes. They also heard of proponents not following through on their obligations as laid out in their contracts with landowners, leaving landowners feeling betrayed.

To illustrate the practical realities of dealing with proponents, one participant shared the story a land agent calling them at 10 pm wanting to visit the next day. At the visit, they tried to rush the farmer for an immediate signature. When it wasn't instantly provided, they returned in 2-3 days. The landowner got the impression that the visits wouldn't stop until they sign the agreement.

At other times, the company will approach a landowner, then disappear and return unexpectedly in several months. This inconsiderate approach does not treat landowners as

valued partners and does not provide them with the information needed to make decisions and plan. As one participant put it, she feels that the company and herself are sharing joint custody of a pipeline and should therefore be working closely together to ensure a win-win for all.

Specifically, participants felt the modus operandi of many land agents (representing energy companies) was to get a signature from community members or Indigenous communities as quickly as possible “at any cost”. With fewer resources, individuals and communities feel much less respected, unable to make their views heard, and often give in just to make interactions with a proponent stop. One mitigation tactic proposed was to hire land agents among the local population, rather than flying them in from Calgary when they want a signature.

The Panel heard that the NEB could develop a protocol for proponents’ interactions with landowners. Such a protocol would include requiring sufficient notice before showing up on a landowner’s property, requiring that an accurate and comprehensive information package be provided prior to an in-person meeting with enough time to respond and to seek professional advice. Protocols should cover the entire lifecycle of a project. The example of BC’s regulations requiring evidence justifying the compensation offered to landowners was offered. Participants said that compensation should be equitable amongst landowners and transparent.

Agreements are a further area of concern. As is, landowners are asked to sign agreements before learning of the full extent of a project, which compromises their negotiation ability. Some information is routinely shared after-the-fact, or as a result of new regulatory requirements including the extent of safety zones surrounding rights-of-way placed on one’s property, adding several meters to the encumbered land. Many people do not know what is on their land, which poses serious safety risks and prevents them from disclosing such risks to prospective buyers.

One participant proposed a grace period of 24-48 hours in which an individual signatory to an agreement can revoke their consent without penalty. This would be intended to counter the aggressive approach of land agents and proponents to, in the words of one participant “wear them down”.

The Panel heard that the average person does not know who has jurisdiction over a project and who they can turn to if they have questions or need advice. They heard that the NEB is ideally positioned to educate landowners and others on their rights as they pertain to energy projects. Lack of awareness or understanding was raised repeatedly as an impediment to land owners and Indigenous peoples exercising their rights.

The Panel also heard that legislation must protect signatories from agreements signed under false pretenses. Participants shared that this has happened many times and that they have grown frustrated by the fact that proponents do not appear to be penalized for it. It was recommended that provisions exist to render signed documents void if a signatory can prove misrepresentation to the NEB.

Some private property owners suggested that industry seems to be wary of dealing with more organized Indigenous groups, and that pipeline route designs may favour going through private land where possible, as this is perceived as “the path of least resistance”.

With respect to landowner compensation, some participants stated that if the NEB approves a project, it should be accountable to ensure that landowners and other concerned parties are awarded appropriate compensation. They shared a desire to see this reflected in legislation. They also suggested that payment upfront should be mandatory, due to cases of companies being acquired or going bankrupt and not paying. In the same vein, participants suggested that section 86 of the NEB Act, on rent paid to landowners, be made more specific, as it is believed that companies are presently working their way

around the intent of the law. Participants suggested that this section of the Act should be revised to require annual payments to landowners with mandatory reviews every five years.

The pipeline arbitration process managed by Natural Resources Canada (NRCan) for NEB- regulated projects was discussed. Many felt that the process is allowed to continue for too long, with outcomes partially determined by the individual party giving up after exhausting all their time and resources. Contributing to the long duration of arbitration is the fact that current rules require that the process start over whenever one arbitrator leaves a specific case. It was noted that farmers and other aggrieved parties do not get paid for all the time spent in proceedings and that depending on timing, they may be sacrificing future income to be present, as is the case when hearings conflict with seeding season. Participants supported the idea of a set timetable after which disputes should be escalated, and with additional steps for alternative dispute resolution begin explicit prior to binding arbitrations.

The Panel heard that the process of resolving compensation disputes should be more transparent. Participants lamented the fact that the decisions flowing from the pipeline arbitration process managed by NRCan are not made public. Complainants are without the ability to study precedent. The only way to get some idea is if there is an appeal the arbitrator's decision to the Federal Court of Appeal, which *does* make its decisions public.

The Panel heard of the need to create an intermediate appeal process whereby landowners can bring something to an NEB appeal board (quasi-judicial tribunal) prior to getting to the Federal Court of Appeal.

Participants shared their desire to work *with* industry and acknowledged the energy industry's importance to the economy, but would like to see a climate of mutual respect. One farmer summarized his views of how the NEB could contribute to this climate as follows:

1. Take away the power of expropriation from companies, reserving it for the provision of publicly owned utilities like water and sewer lines.
2. Include a study of meaningful social license in the review process.
3. Recognize the free market value of land to compensate for the industrialization of farmland. If the NEB can grant proponents access to someone's land, they too should intervene to ensure appropriate compensation.
4. Recognize the contributions of rural communities to city-states.
5. Sanctify and prioritize stewardship of water over all industrial demands.
6. Emphasize the importance of preserving productive farmland above industrial uses.
7. Create a national farmer's advocate "with teeth" to balance the interests of impacted individuals against those of industry.
8. Take into account the negative cumulative effects of projects on water.

NEB intervenors/negotiators that have been trained by Indigenous peoples were particularly applauded. Alternative dispute resolution (ADR) appears to be promising and the NEB should be willing to listen to what landowners say and concentrate more on trying to understand their interests, impacts and positions.

Many easement agreements are decades old. Participants voiced frustration with the treatment they received when communicating with company headquarters and when seeking to modernize very old agreements. The landowners present shared that they are met with much resistance when wishing to bring outdated agreements into compliance with twenty first century standards. As such, they feel that regulations should be in place preventing the application of outdated agreements without amendment for long periods of time.

An overall desire was shared for greater respect and continuity in companies' and higher management's dealings with private land owners, First Nations communities and municipalities.

The Panel heard of the need to regulate the outcomes of mergers and acquisitions of industry members. Instances of damages caused to private property either due to information withheld at the time of signing an agreement or violations of the provisions of a signed agreement were noted.

Participants repeatedly raised the concern of companies going bankrupt or being bought and their obligations to clean up toxic waste or remove pipelines from the ground are not fulfilled. In instances of unrepaired damage, the stewards of the land suffer from diminished income and income-generation potential.

There were also concerns raised about responsiveness by companies in addressing issues that may arise during operations. However, there was one very positive example shared where an NEB-regulated company immediately took action to right a wrong, pay all costs, and ensure all parties affected were satisfied before considering the problem solved. That was shared as an example of what should be expected by all companies.

The Panel heard that the concept of land stewardship and providing for future generations does not appear to carry enough weight in NEB considerations. For example, fracking carries great risks for current and future generations. Participants told the Panel that they would like to see provisions in the NEB Act that protect farmland from over-industrialization.

In summary, many frustrations and concerns, but also lack of respect, regarding land acquisition and compensation were shared. While many examples pertained to provincially regulated energy developments and associated pipelines, some were certainly under NEB regulation. Furthermore, the general conduct of land agents and processes are of high concern and landowners are looking to the NEB to provide an avenue to advance best practice and improved rules for all.

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*THEME: Engagement With Indigenous Peoples*

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### **Public Session – March 1, 2017**

Landowners shared their perception that there's been increased pressure on private land in recent years, as obtaining access to them is deemed to be quicker and more cost-effective than engaging with Indigenous communities.

One participant asked that the NEB publish what companies are doing to address the toxic waste and land degradation left behind on First Nations reserves to begin rebuilding trust.

It was noted that treaty rights have been violated continuously since Treaty 8 was signed. As such, there is concern that any recommendations will be disregarded and result in more unmet promises. The Panel heard that elders feel disillusioned by past betrayals. It also heard that moving forward, Indigenous peoples should be engaged from the earliest stages of project conception.

The Panel heard that the Indigenous communities affected by a project should be engaged in monitoring it, particularly the effects on wildlife and waterways. The knowledge they have about their lands is unparalleled and they have been sounding the alarm for some time.

One participant shared their annoyance at being segregated from other parties on account of being Indigenous. They feel that everyone should be participating in decision-making together. Yet, their perception is that companies run away from engaging with Indigenous peoples.

The Panel heard that there are Indigenous businesses that specialize in EAs. However companies have their own EA companies, which raises the concern of conflict of interest.

The Panel heard that a timeline of three years to work with Indigenous peoples before coming to a decision on a project would be needed to properly study and consider its impacts and that the knowledge of grassroots groups should hold greater weight.

The use of interpreters in dealing with Indigenous peoples was raised as being crucial, not only as a sign of respect but to ensure that community members fully understand what they are being presented with.

### **Indigenous Engagement Session – March 2, 2017**

It was stated that Indigenous peoples want to work with industry and government, that they are constantly renewing their optimism despite past transgressions. The Panel heard that the land is so important to them that they feel it is their duty to defend it. Land in this context is understood to include land, water, trees, air and wildlife.

Participants stressed the importance of working together to protect the land, not only as First Nations, but as Indigenous peoples and all Canadians, as equals. Everyone's descendants will need water to drink and jobs to sustain their families.

The Panel heard that “participation” and “consultation” are insufficient, and that there must be meaningful engagement with Indigenous peoples throughout the project lifecycle and beyond. Participants have felt used by companies and governments who perceive them as being in the way. The Panel also heard of the need to obtain consent from all tribal councils affected by a project. Proponents should not stop considering which Indigenous peoples may be affected once they get one “yes”.

One participant suggested that the NEB could adopt the model of Synergy Alberta, which has been successful at supporting synergy groups within the province that bring together stakeholders, Indigenous groups and companies on issues that affect their interests. Participants expressed alarm over the provincial regulator's ability to take water from creeks without Indigenous involvement. It recommended that the NEB adopt a system similar to that of the Northwest Territories, in which Indigenous peoples must be directly involved in any interventions concerning water and marshes. Some participants said that this should be expedited faster than the remainder of the NEB modernization process.

One participant shared that the First Nations in the area have formed their own environmental assessment companies, informed by Indigenous knowledge of the land, waters, hunting grounds, and sensitive areas. They believe that companies should engage such Indigenous businesses and avoid the appearance or existence of conflicts of interest inherent in hiring companies of their own.

The Panel was invited to consider the ownership and confidentiality of Indigenous knowledge as it is often sacred and has been improperly exploited in the past. Indigenous knowledge and values should be integrated at the highest levels of regulation. The Panel was also asked to consider whether Indigenous peoples' knowledge should carry a bit more weight than Western science, as the former is informed by the daily experience of what is happening on the land, versus the latter's reliance on theory and limited visits to the sites concerned.

Language was also identified as an issue, with Indigenous peoples and elders not feeling as though their knowledge is adequately translated into the English language.

Participants shared a sense of urgency surrounding NEB modernization, as Indigenous peoples see decisions being made based on legislation created in 1959 rather than the dire situation of the land today. As such, participants felt that the NEB should expedite the creation of a committee representing Indigenous peoples and another representing landowners and that sufficient funding should be put aside to do so. It was also suggested that these bodies share the responsibility of determining the changes that will result from the present expert Panel's recommendations with the Government of Canada.

The Panel also heard that the NEB should mandate companies to share the exact locations of projects with the Indigenous peoples whose lands they are operating on. Part of this requirement should include ample signage, so that community members may keep an eye on how the project is proceeding and ask questions as needed.

The Panel heard of how shale gas exploration and exploitation has affected the Fort Nelson First Nation's rights to their land. This community's perception of the NEB is that it is not designed to be, capable of, or interested in meaningfully assessing, avoiding or mitigating impacts on Indigenous peoples' rights, culture or land. Based on significant experience with resource extraction, a representative shared the following recommendations with the expert Panel:

#### Major Structural Changes Required to Modernize the NEB

1. **Conflicting Mandates:** The NEB should not be tasked with promoting shale gas development alongside the province on one hand, while meaningfully assessing the impacts on the community's rights on the other. The NEB's mandate should remove it from the environmental assessment process altogether (leaving this to CEAA). The NEB is best suited to:
  2. Collect and disseminate energy information
  3. Provide energy advice to federal government
  4. Regulate federal pipelines once EAs are complete
  5. Ensure the enforcement of regulations and conditions
  6. Report on pipeline technology and safety
  7. Assess the fairness of proposed tolling structures
  8. Canada's public interest should be determined by a federal public Minister, not the NEB
  9. The NEB should no longer have a role in assessing the adequacy of a proponent or the crown's consultation with Indigenous nations; instead the NEB could assume the role of expert advice provider to the whichever government body assesses this

- An “Independent Reconciliation Unit” should be created to oversee the crown’s consultations from the pre-EA process forward; this unit should have option of recommending to the Minister that a project EA be referred to an independent Panel for review
10. Should the NEB remain the lead assessment agency, add two new options to the NEB Act for the Ministers to consider when assessing the NEB’s recommendations:
    - 1) Referral to an Independent Panel Review
    - 2) Adoption of the recommendation with additional conditions added by the Ministers following consultation with the Reconciliation Unit
    - 3) Convene expert Panels similar to the CEAA Panel Review process
  11. Establish standing regional aboriginal advisory Panels
  12. Increase community capacity
  13. Increase internal capacity
  14. Conduct regional strategic assessments of shale gas basins in BC (adopt a shale-to- ship assessment approach)

*Incremental Improvements to NEB*

1. Establish Reconciliation Unit that works closely with affected Indigenous communities.
 

Responsibilities:

  - a. Determination of Indigenous groups to be engaged and how;
  - b. Scoping information requirements for Indigenous cultural, socio-economic, land use and rights assessments for EAs;
  - c. Adequacy of Application materials related to these subjects;
  - d. Stopping the EA “clock” if information is not provided by a Proponent;
  - e. Adequacy of Proponent engagement with Indigenous groups;
  - f. Effects (and their significance) on Indigenous culture, Traditional Use, and s.35 rights; and
  - g. Post-EA consultation and accommodation for Aboriginal rights not subject to EA Conditions. Presently, companies may or may not have to talk to community again after their initial consultation. If community members are expected to grapple with a project for its long lifespan there will need to be ongoing dialog from project start to project end.
2. Mandatory conditions for Indigenous engagement in life cycle monitoring and adaptive management
3. Place traditional knowledge on par with Western Science –scientists are paid huge amounts by oil and gas companies making decisions every day that affect Indigenous rights forever
4. Modernize hearing processes to be more respectful of community participants
5. Assess all upstream implications
6. Remove s.58 exemption clause from the NEB Act, so that all physical works and activities are subject to EA;
7. Shift from public interest mandate to “reconciliation”; rights are too often subsumed to public interest
8. NEB Act needs to include explicit reference to UNDRIP – Free, prior and informed consent especially
9. Impact equity – concept of people most likely to bear the brunt of adverse effects also sharing in benefits to offset those effects. Right now, benefits are concentrated down and mid stream and impacts concentrated upstream.
10. Intergenerational equity – responsibility to people coming after us to ensure they enjoy the same opportunities, clean water, clean air, moose and berries

A representative of the Spuzzum First Nation added the following recommendations, many in support of those listed above:

1. To fulfill its constitutional obligation, the Crown must meaningfully consult and accommodate Indigenous peoples about potential effects on aboriginal titles and rights and *attempt to justify any infringement of rights*.
2. To properly assess potential impact on aboriginal rights and title, regulatory review processes must be informed by Indigenous knowledge, laws, perspectives, cultures and traditions
3. A process of consent-based decision-making must be consistent with Canadian case law and the UN Declaration on the Rights of Indigenous Peoples
4. To fully and meaningfully participate Indigenous people must be provided with adequate funding

The Panel heard that a Nation-to-Nation relationship will be imperative in improving the relationship with Indigenous peoples as will adopting a “reconciliation mindset”. Ensuring that Indigenous voices are heard throughout the lifecycle of a process and that s.35 rights are upheld is important. Presently, Indigenous communities have had to resort to invoking the *Species at Risk Act* (SARA) to slow down developments. To ensure that Indigenous voices are heard, funding will be required. It was proposed that the NEB or federal government provide funding to Indigenous communities to help them assess the cumulative effects of energy developments.

Participants told the Panel that *all Canadians are treaty signatories* and that such treaties have allowed the Canada we know today. Treaty rights have been repeatedly upheld by the Supreme Court of Canada and their fulfillment concerns us all.

The Panel heard that training programs preparing youth to work on energy developments are sometimes offered to Indigenous peoples by proponents. Though community members will accept out of concern for their children’s futures, this should not be automatically construed as consent for a project. What’s more, companies only hire the minimum mandated number of Indigenous people to work on their projects, most often in the lowest paid positions.

Métis participants voiced their concern that companies sometimes hide behind legislative minimums to exclude them from such employment, or consideration as a whole. They remarked that since the Daniels decision governments have been recognizing the Métis, but that companies still aren’t.

The Panel heard that the NEB could contribute to educating companies and the Canadian public on the value that Indigenous peoples have brought to their lands. It is believed that this will help to change the attitudes of those who feel they are not entitled to special considerations, including on-the-ground laborers who have been known to make racist remarks. Participants also stressed that disputes are not all about money, as money cannot replace land.

Other participants shared that some racism is likely to stem from differences in communication style, with Indigenous peoples more likely to want to take a step back from a question and carefully consider it before responding, whereas many non-Indigenous people expect to ask a question and receive an answer almost instantly. What’s more, a lot of the information valued in Indigenous communities is passed down orally from generation to generation. Often, information on paper does not carry as much weight as it does in non- Indigenous communities. Understanding such cultural differences and values is key to working together. For example, the current format of NEB hearings is very intimidating and adversarial in the eyes of many Indigenous peoples and needs to be modified to include Indigenous cultural values and oral history as evidence.

A participant shared the lessons learned from their experience consulting with Indigenous communities on behalf of industry. They told the Panel that NEB processes need to be more clearly defined and better explained to Indigenous communities. To do so, the NEB needs to understand the differing worldview and mindset shared by many Indigenous peoples.

The respect of a community must be earned before coming in to discuss a project. Part of demonstrating respect involves starting from a position of acknowledging Indigenous peoples' rights to their land. So far it has been the other way around and elders and community members feel insulted by the repeated requests to prove their ties to the land.

Participants suggested that Indigenous groups should establish a protocol for engaging with them to be followed by government and industry.

The Panel heard that there is a strong baseline of evidence that already exists on Indigenous rights – treaty rights exist, inherent rights exist, titles, SCC decisions, UNDRIP, Duty to Consult. Communities should not have to prove that their rights to the land exist.

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*THEME: Public Participation*

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### **Public Session – March 1, 2017**

The Panel heard that the NEB's current website is difficult to navigate and comprehend, even for someone with deep experience in a directly related field. Participants also expressed their desire to see the NEB make more information public. Participants wished to have access to previous decisions (both in-favor and against projects), compensation rates for landowners, a repertoire of infrastructure and rights of surface and a map of the precise location of active and decommissioned pipelines and wells.

Several participants shared that they have so often voiced concerns in the past with no outcome that they approach public consultations with skepticism – only engaging when their personal livelihood is at direct risk.

The Panel heard from a member of the NEB's Land Matters Group that it is a good forum for dialogue and providing feedback to the NEB. They heard that there used to be a North East Energy and Mines Advisory Committee (NEEMAC) which was also a good forum for bringing issues forward to the NEB.

Lastly, one participant reminded the Panel of the need to consider the voices of young people and labourers who have moved to the area for jobs in the energy sector and whose precarious employment depends on the good conduct of proponents. The question was raised as to how foreign companies taking over projects may be compelled to employ local people versus bringing in foreign workers.

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## *GENERAL COMMENTS*

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In addition, the following general remarks were made:

The procedure of public consultation being used by the Panel in charge of the NEB modernization is laudable and participants are grateful for the opportunity to provide input.

Concerns were raised as to how quickly the expert Panel's recommendations would be acted on, as it was believed that when faced with changing regulations, industry will rush to get projects approved under the 1959 rules.

It was also stated that provisions should be made to revise the NEB Act more frequently than it has been so far.

Additionally some questions remained unanswered but the answers will eventually be posted on the website:

1. What do NEB regulations say about archeological findings on sites in their jurisdiction? Concerns were raised regarding the Site C dam project and participants want to know how the NEB handles it.
2. Does the NEB take into consideration greenhouse gas emissions, including upstream and downstream emissions, during project reviews? Do they take into consideration the Paris agreement?
3. Does the NEB examine macro data analytics to determine where there may be issues in the pipeline system?
4. Does the NEB have the power or jurisdiction to actually set up a rental program, that is, can they require that a company enter into annual rent agreements with landowners with review clauses every few years?

## Edmonton, AB

### **Expert Panel on National Energy Board Modernization Public Consultation Edmonton, Alberta – March 7-8, 2017**

The Expert Panel for the modernization of the National Energy Board met in Edmonton, March 7 and 8th, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas. Comments were welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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*THEME: Governance and Structure*

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### **Public Session – March 7, 2017**

#### **Composition and expertise of the NEB**

The Panel heard that NEB appointments should be merit-based and de-politicized. One idea was to determine which disciplines should be represented (suggestions included engineering, environmental sciences, and skilled trades, among others). It should also include Indigenous Peoples and use an expertise matrix to assess potential appointees.

It was noted that the NEB is lacking in place-based knowledge and board membership is one way to resolve this. A participant proposed the creation of multi-stakeholder committees that could help contribute such knowledge.

Participants suggested that, in light of current technologies that make it possible to work remotely, Board member residency requirements are no longer relevant. Moreover, residency requirements are a barrier to ensuring that people with local knowledge are represented.

## **Location**

Participants shared their differing views on the NEB's location. While acknowledging the potential for perceived conflicts of interest, participants stated that being in Calgary permits the NEB to draw on the rich expertise of post-secondary institutions and the pipeline industry.

One participant stated that the NEB's Calgary location helps to ensure its independence from political influence, while another warned of the time it would take to rebuild expertise, should the board be moved to Ottawa. A participant suggested that more satellite offices could be established, as not all NEB business requires technical knowledge. Conversely, another participant suggested that the NEB move to Ottawa, while keeping its industry relations branch in Calgary.

## **Policy & government**

The Panel heard of the importance of the government setting clear public policy to guide the NEB in its decision-making. As the regulator, the NEB should not be involved in defining policy. In the same vein, the Panel heard that public policy questions should not be debated in the context of project reviews.

Participants acknowledged that the government is in the process of clarifying its policies and that this is a welcome development. In the meantime, the Panel heard that the NEB should proceed in the current policy context and not delay its decision-making because of a public policy gap.

## **Indigenous Engagement Session –March 8, 2017**

Participants suggested that policy development consider the cumulative effects of energy projects on the land as identified by Indigenous peoples, from their earliest recorded data until the present.

The Panel heard that permanent and temporary NEB members need to include direct representation of Indigenous peoples and that all members need to be sensitized to Indigenous rights, governance and perspectives through experience or training. The example of co-management board composition under modern land claims was offered to the Panel as inspiration for the composition of project-specific panels. It was proposed that the communities most likely to be impacted could nominate members.

Participants expressed the opinion that representation is important beyond just the Board itself, and includes NEB staff as well; staff should include Indigenous peoples and all staff need to be prepared to effectively and meaningfully engage with Indigenous individuals and groups. It was specified that being an Indigenous person is not sufficient in and of itself, but that Indigenous representation means having knowledge of both Western and Indigenous ways of knowing. One participant illustrated this by saying that if you are making decisions in Ottawa or Edmonton without ever having set foot on a reserve, you already lack credibility.

The Panel heard that the NEB regulatory regime is likely to have a strong influence on other regulatory regimes at the provincial and territorial levels.

## **Public Session – March 7, 2017**

### **Public Interest**

The Panel heard that the definition and determination of public interest should not be done by the NEB, but rather by the government, prior to a company submitting a detailed, costly application.

A participant remarked that the NEB already uses set criteria to assess the Public Interest, such as social and economic interests, and that enshrining these criteria in the NEB Act itself would help provide more clarity, while ensuring that the definition maintains the flexibility to evolve over time.

One participant asked the Panel to consider that part of the public interest is providing the kind of stable employment that makes rural communities thrive. Another urged the panel to consider how the affordability of energy for the end consumer (individual Canadians as well as businesses and non-profit organizations) might factor into the determination of public interest.

### **Environmental Assessment**

The Panel was exhorted to leave the environmental assessment (EA) responsibilities with the NEB, as they are the pipeline experts. There was concern that moving EA responsibilities elsewhere could result in process duplication. The NEB would still follow the rules set by CEAA, to ensure consistency across jurisdictions and projects. The Panel heard from others that the project needs assessment should continue to be conducted by the NEB but that the EA should be transferred to the Canadian Environmental Assessment Agency (CEAA).

The topic of Strategic Environmental Assessments (SEA) was also raised. As a SEA would identify lands for development, it was suggested that it would provide greater certainty for investors over the longer term. It was noted that some provinces are moving in this direction. However, the SEA process is complex and takes a long time; it would be difficult for the NEB to continue to review projects if a strategic-level assessment one is underway.

### **Energy Information and Analysis**

The Panel heard that, as the NEB fulfills an adjudicative function, it should not be producing the advice it uses in making its decisions and that therefore, the responsibility of energy information should fall elsewhere. It was suggested that doing so would also diminish the appearance of conflict of interest. A needs assessment based on information from a neutral agency would appear to be less biased. In response, a participant cautioned that there are international energy information gathering bodies that are no longer independent, so it would be important that its mandate prohibit advocacy.

Other participants supported the establishment of an independent energy information agency that would equip all parties with the same information. The Metals and Minerals Sector of NRCan collecting data under the *Statistics Act* was offered as an example of a neutral information-gathering body. Participants also said that more information on the benefits of energy projects should be provided for public consumption and that this may make community buy-in for projects more likely. Making information available for public consumption includes translating long technical documents into shorter formats written in plain language.

Regarding what information is captured, participants suggested that data collection should include the amount that the industry is spending, especially on innovation. It was noted that information pertinent to the NEB is currently published by a variety of departments and that participants are not sure that the correct data is being collected.

One participant told the panel that the chemical industry transforms natural gas into petrochemicals and that the NEB can help to reduce the cost of sourcing Canadian natural gas by providing more information on its availability and supply; sourcing from the United States is less expensive, partly because the information required to run a bidding process is available.

### **Expansion of the NEB Mandate**

Participants recommended that the mandate of the NEB be kept to the regulatory oversight over the lifecycle of a pipeline, which is the NEB's current focus and area of expertise. They emphasized the need for a single agency that sees the full lifecycle picture, instead of the regulatory responsibility being fractured between multiple agencies. Participants advised against expanding the NEB's mandate – into regulating the consumption of energy, or downstream greenhouse gas emissions, for example – as this would risk diluting this expertise.

One participant shared that project reviews could use global criteria – e.g. the fact that Canada has by far the safest pipeline infrastructure in the world could factor in to a project's assessment. The same could be said about a project's impact on climate change: i.e. if a project in Canada helps other countries access “cleaner” energy sources such as liquefied natural gas (LNG), this should be taken into account as well. Another participant brought up alternative energy sources and energy efficiency as being important themes for the NEB to consider.

Collaboration with provinces and territories is key to addressing cumulative effects and their regulations should be factored in to the NEB's decisions.

The Panel was reminded that decisions taken by the NEB have impacts on Canada's economy beyond the energy industry. For example, there is an industry that transforms the liquids that are transported in Canada's gathering system into other petrochemical materials, with a value-add. The Panel further heard that the definition of products transported in pipelines should not be limited to the “energy” label, so as to not limit economic development possibilities.

Given the NEB's expertise arising from its current jurisdiction, one participant suggested that the NEB be given authority over all federal mineral lands, including national parks and Indian reserves. The Indian Oil and Gas Commission does not currently regulate oil and gas activities on Indian reserve lands and cannot properly arbitrate among all of the various parties with interests on Indian reserve lands. It was argued that in the past, this incongruity has caused First Nations' interests to suffer and be subordinated to the interests of outsiders. It was further suggested that the federal government clarify the authority of the NEB over all forms of interprovincial energy transmission, including electrical transmission lines, pipelines, railways and truck transport.

### **Regulatory Excellence**

Participants spoke of the need to pursue world-class regulation or “regulatory excellence”. They gave the example of the Alberta Energy Regulator's work with the University of Pennsylvania. Researchers found that an excellent regulator will listen and build relationships. It demonstrates integrity, competence, engagement and efficiency in its dealings.

## **Indigenous Engagement Session – March 8, 2017**

One participant suggested that the Expert Panel recommend changes to the factors listed in s.52(2) of the NEB Act to require consideration of potential impacts on Indigenous rights and interests. This would be reinforced by changes that expand the standing test and participation rules for Indigenous Peoples.

The question was raised as to how Indigenous interests influence the Canadian public interest and vice-versa. The panel heard that the Canadian public interest must not be used to justify negative impacts on traditional territory. It heard that Indigenous interests must be viewed as distinct and equal. In this regard, participants requested that the inherent and substantive rights of Indigenous people be explicitly recognized in the *NEB Act* and the *Canadian Environmental Assessment Act*, to limit discretionary powers as it concerns Indigenous interests.

The Panel also heard that the terms of reference for EAs should be co-developed with Indigenous peoples and include an assessment of cultural impacts, informed by the understanding that Indigenous values are not mathematically quantifiable. Participants also expressed the desire by some Indigenous communities to conduct their own assessments, rather than relying on those by external industry consultants.

The Panel heard that the NEB's mandate should be expanded to consider climate change. A climate test was suggested. The impacts of climate change are real for Indigenous Peoples and threaten their traditional reliance on land, water and wildlife. The Panel heard that upstream and downstream impacts should be taken into consideration.

The Panel heard a call for clarity on how the NEB manages information requests from Indigenous groups and other government departments, such as the Department of Fisheries and Oceans. It was opined by one technical advisor present that the applied and social science capacities of government departments warrant them acting as trusted advisors to the NEB in testing the evidence submitted by a proponent, rather than any other intervenor requesting information.

The Panel was asked to consider the NEB building a long-term vision for the phased development of a resource over time. Rather than studying each project proposal in isolation, this vision would take into account the whole picture, including projects overseen by other regulators to determine how to optimize land bases, treaty rights, ecological renewal and natural resources over time.

The Panel also heard of a need for the NEB to consider the social impacts of constructing a pipeline. The example of one First Nation was offered in which construction sites were built close to the community and temporary workers committed sexual assaults on Indigenous women. It is believed that this is more likely when those working on a project have no connection to the community and leave when the project is over. A participant from this community urges the NEB to include provisions for hiring locally and considering socioeconomic consequences in its filing manual.

## **Public Session – March 7, 2017**

### **Decision Making Roles and Processes**

The Panel heard that the regulatory process should be transparent and efficient, with decisions that are based on science and evidence. Participants said that processes should maintain the principles of natural justice and procedural fairness, and that the NEB must maintain the flexibility to determine its own process.

The Panel heard that the final decision-making function should revert to its pre-2012 status, that is to say that the NEB should have full decision-making (as opposed to recommendation) authority. Other participants believe the federal government should retain final decision-making powers. It was also suggested that the federal government retain not a decision-making authority, but the right to veto a project, though it was noted that political intervention can happen very late in a process, after the investment of considerable time and resources by proponents.

Participants voiced that industry would be supportive of an approach that would entail a two-phase review process for new pipeline projects, that would start with a one-year period for the Government to determine whether a project is in the public interest. This is important as industry estimates that Canada would lose an estimated 16 billion dollars per year due to insufficient market diversity and access. The strategic balance of public interest including indigenous consultation should be weighed politically early and if it is needed, the project could proceed through to detailed permitting.

Should the two-phase review process be the case, the second phase would begin under the purview of the National Energy Board, and would involve reviewing a detailed application that includes emergency planning, engineering plans, and other provisions. Under this model, the EA process would fit within the second phase, when conditions would be put in place to mitigate risks and impacts and address specific concerns.

The Panel also heard that, regardless of who is responsible, providing the reasoning behind decisions would provide the public with assurance that all factors have been considered. It was noted that the confidentiality of Governor-In-Council (Cabinet) decisions does not presently allow for true transparency.

### **Timelines**

Participants agreed that timelines are required, and discussed the possibility of co-developing timelines with Indigenous communities, and even with civil society. Various scenarios and considerations were discussed, but it was mentioned that co-developed timelines would also mean a shared accountability to meet these timelines.

Some participants shared a preference for shorter timelines for smaller projects and longer timelines for larger ones. Others believe that the timeline should depend on project complexity.

One participant stated that the length of time required will depend on who is fulfilling the government's duty to consult. If the NEB is responsible it is likely to result in longer timelines that are co-developed with Indigenous peoples. Indigenous communities are facing major challenges to participation due to the time and capacity needed to assess a project's potential impacts on their rights and gather relevant traditional knowledge.

Participants repeatedly said that regulatory certainty is critical to industry. Industry has a very short window of opportunity to realize projects; it is very important that a company obtain a clear picture of the timelines and conditions to obtain an approval so that it can plan a project, including lining up the investors, procurement, and more. An unclear, complicated regulatory process can mean that investors will choose to go elsewhere. As an illustration of the importance of adhering to timelines the example of the Mackenzie Gas Project was offered, whereby the process took seven years between application and decision.

Participants stated that decision-making timelines should reflect the fact that there are sometimes years of engagement with stakeholders prior to filing an application. This is necessary to provide ample time to get affected communities up to speed.

### **Hearing Process**

While the Panel heard that public participation in the hearing process should be broadened, participants also conveyed the message that participation modalities must make it possible to test the evidence submitted through the NEB's hearing process by oral or written cross-examination. Participants also expressed that larger public participation criteria must not drown the voices of those most impacted by a project.

The Panel heard that there are barriers to participating in hearings, including their intimidating format and formality. The NEB could include less formal participation mechanisms that allow for the presentation of evidence, as is done in British Columbia with the technical committees put in place by the Environmental Assessment Office.

The Panel heard that the complexity, size and impact of a project should determine whether there is a hearing and that therefore hearings should not be required for every application.

### **Indigenous Engagement Session – March 8, 2017**

The Panel heard a suggestion that the hearing process could be changed from its current intimidating court-like setting to one in which traditional evidence is presented in the communities from which it originates. It was recommended that the pre-2012 participatory mechanism that allowed individuals or groups to submit a letter of comment without having to apply to participate should be restored.

One participant suggested inherent standing for Indigenous groups, stating that it is highly inappropriate to ask Indigenous people to prove that they or their group are “directly affected” or have “relevant information and expertise”.

On the topic of public and Indigenous participation in the NEB hearing process, it was suggested that the Expert Panel look at the approaches employed during the Berger Inquiry; northern Indigenous communities point to that process as a relatively open and fair approach.

The Panel heard that the NEB decision-making process does not adequately account for treaty rights or the climate impacts of decisions, and that it should be mandatory that it do so, including consideration for upstream and downstream emissions. It was noted that NEB decision-making is primarily focused on projects in southern Canada, but that climate impacts are disproportionately felt on northern landscapes and communities. The government must first clarify the NEB's role in the broader context of Canadian climate-related assessment and decision-making so that the NEB can include it in project-specific deliberations. It was suggested that the NEB use a detailed quantification of Canada's international emissions reduction commitments as a benchmark against which projects are assessed.

The Panel heard that the NEB needs to be more inclusive of Indigenous peoples and values in its policy development and decision-making. It was suggested that they view open dialogue as ongoing through the project lifecycle and not try to restrict it to a set timeline. It was noted that 18 months is not a long time to consider a project that is likely to have repercussions forever and that current funding does not allow for fulsome consideration and communication of a project's likely impacts. Participants told the Panel that decision-making processes should respect nature's laws, not the other way around.

Participants discussed the challenges of leveraging traditional knowledge while protecting it from public dissemination and misuse. The Panel was told that in the past, this was addressed by leaving names out of final reports, and going *in camera* to share specific details with review panels. One participant proposed the signing of agreements protecting the intellectual property of traditional knowledge holders.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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### **Public Session – March 7, 2017**

Participants spoke of the expertise and high standards of the NEB as a lifecycle regulator. Participants stated their belief that pipelines in Canada are by far the safest. However, there is a need for the NEB to better communicate to the public what it is doing, and to do so in plain language.

Participants indicated that environmental and safety concerns must be prime considerations in all NEB decisions and that there is a need for greater collaboration between all pipeline regulators. The public does not know which pipeline is regulated by whom – a spill hurts the entire industry.

The Panel heard that the NEB should continue to be responsible for compliance oversight as it has the expertise and the powers necessary, such as shutting down a pipeline or issuing penalties. Industry representatives noted that, from their own experience, the NEB does enforce compliance on a daily basis. The website does not adequately communicate this to the public and participants voiced that improved communications overall would go a long way.

Were the compliance element given to NRCan, it would interrupt the whole lifecycle approach previously referenced.

#### **Safety Concerns:**

The Panel heard that the NEB's public safety mandate should be strengthened.

One participant raised concerns about past emergency responses, citing an incident near Edmonton in which one operator hit the pipeline of another and it was found that the necessary response equipment was not on site. The concern is two-fold: firstly, the pipeline operator should have had the appropriate equipment on site and secondly, the operator that hit the pipeline should have known it was there.

The Panel heard that pipeline tampering is a serious concern faced by the industry and that they are having difficulties getting orders enforced. Participants shared an example from 2016, when there was a coordinated effort to manually shutdown the pumps at the pump stations. The company concerned had to apply for an injunction. This is why companies are reluctant to disclose the exact location of shutdown valves in their emergency response plans.

It was stated that the NEB must rely on Best Available Technologies (BAT) to ensure pipeline safety and environmental impacts mitigation.

A participant representing a standards-setting organization working on pipeline safety told the Panel that a set of Pipeline Safety Metrics will be published later in 2017.

They recommended that the NEB do the following:

- 1) Increasingly leverage and champion the development of standards that support its regulatory objectives with respect to enhancing public safety and environmental protection, e.g.
  - a. Land use planning for Pipelines
  - b. Pipeline Safety Metrics
  - c. Emissions for Upstream
  - d. Emergency Preparedness and Response
- 2) Promote transparency of CSA Group standards referenced by the NEB by having the government support making them available on “View Access Basis”.
- 3) Ensure the highest degree of public safety by harmonizing all standards and regulations related to pipelines with the provinces and territories.
- 4) Leverage its unique position to facilitate increased CSA Group collaboration with industry, regulators, local and Indigenous communities, to achieve the development of effective solutions that support policy objective.
- 5) Provide ongoing support for the continued development of pipeline-related standards, including the participation of NEB experts and overall program funding, to continue CSA Group’s decades long support for this sector.

One idea shared was to create a public safety advisory committee that would give a voice to Indigenous people, landowners and environmental advocates. It would Provide ongoing support for the continued development of pipeline-related standards.

### **Landowner concerns**

The Panel heard that landowners are those closest to the risks of a development, but that decisions are made in the broader public interest. Participants acknowledged that there will be trade-offs, but stated that some are difficult to bear for those living closest to the development. There have been instances where a project has been approved for economic reasons despite its impacts on society and private lands.

Participants suggested broadening the criteria for standing in hearings to include adjacent landowners and land occupants. They support a less intimidating process for applying for standing, but say that once standing has been given, the process is very user-friendly. Others said that such an adversarial process hinders effective discussion.

Landowners presented their recurring concerns over weed control and soil quality, as well as their use and enjoyment of their land.

The Panel heard about the imbalance between landowners’ and companies’ negotiation capabilities. They heard that participant funding could go a long way in providing landowners with the capacity to participate in project hearings, and that it should continue throughout the project lifecycle.

Participants shared with the Panel their impression that companies are sometimes negotiating in bad faith and pressuring landowners to sign agreements before they can seek legal advice. One participant suggested that the NEB could provide upfront assistance to landowners in their negotiations.

Participants noted that a notification letter from a proponent is not sufficient notice. The Panel heard that landowners may be involved in multiple projects at one time, requiring paid technical expertise and a significant amount of time to participate. The Panel heard from one company about their guiding principles when engaging with landowners: they engage with landowners very early to allow plenty of time for landowners to think it over; provide financial assistance for landowners to seek a legal opinion; seek mutual agreements, to become partners with landowners, as they have work together for the duration of the project; and have also developed a tool to help landowners know when they should approach the company to get a crossing agreement and what activities are and are not safe.

The Panel heard that Alberta has an accreditation process for land agents with training requirements. Among other rules, landowners must be given time to think and not to have to sign an agreement on the first meeting. Participants shared that the Canadian Energy Pipeline Association (CEPA) has recently gotten involved to launch a similar nation-wide initiative to bring consistency across Canada. It was noted that this should lead to better agreements, which is better for the relationship between the company and the landowners, who have to be partners through the lifecycle of the pipeline.

One participant shared their view that the question of compensation should be separate from the NEB regime. Regarding arbitration of landowner and company disputes, the Panel heard that the arbitration should still be done at NRCan, but that it could be simplified.

## **Indigenous Engagement Session – March 8, 2017**

### **Enforcement**

The Panel heard that the NEB needs more stringent, robust and transparent reporting, enforcement and compliance processes and that Indigenous peoples should be involved in developing them. The Panel heard that proponents sometimes interpret conditions to their advantage and do not always show good faith in their collaboration with First Nations. It was added that the NEB and its project-specific panels need the authority to apply consequences if industry is not engaging appropriately with Indigenous communities and following through on the conditions imposed by the NEB.

### **Land Agreements**

Participants spoke of the challenges of accompanying Elders the length of a proposed pipeline to search for sacred or sensitive sites. The Panel heard of the reticence of many landowners to allow Indigenous peoples to follow a pipeline route onto their property, even when this property is on territorial lands. A story was shared about a farmer exhuming human remains from a burial ground on their property and transferring them to a museum rather than letting Indigenous people come on his land to look for historical sites.

### **Emergency Response**

The Panel heard that Indigenous communities will require funding to assist with emergency response planning and implementation, so that the appropriate equipment is already onsite at the time of a spill, for example. The question was raised as to how to engage multiple Indigenous groups living along a pipeline's route in monitoring and emergency response. The Panel heard that Indigenous groups need to be engaged individually to consider their unique priorities, capacity and interests. For example, some communities have people who are consistently out on the land, whereas others don't.

The Panel also heard that communication among all Indigenous groups along a pipeline is important and that collaboration is possible on such things as training sessions or emergency response drills.

The Panel heard that Indigenous people are often the first to notice accidents and malfunctions as they know their lands better than anyone else. To shore up this monitoring function, it was proposed that the government and industry fund training programs that encourage the continuation of this monitoring and reporting function in a formal capacity, providing opportunities and increasing trust in Indigenous communities, while saving the government and companies a lot of money. It was suggested that if certain Indigenous communities were to specialize in a particular kind of risk mitigation and monitoring, they could share their knowledge in other communities and vice versa.

As things stand today, there is a lack of clarity over who to report incidents to and emergency preparedness documents are hundreds of pages long.

To ensure safety and minimal environmental damages, one participant put forward the idea that whichever party is closest to a spill or accident should be responsible to respond to it, regardless of whether it is their company's pipeline or not.

### **Specific Issues**

The Panel heard participants' concerns over companies going bankrupt and leaving behind waste, abandoned facilities and oil pools. In other cases, as long as companies keep paying the lease, they aren't forced to properly clean up what they've left behind. Indigenous groups have had to litigate to get any compensation in such cases.

Participants expressed concern over orphaned wells, which are under provincial regulation. They also feel that industry is not doing a good enough job at restoring lands after they use them.

Participants voiced concern regarding proponents' impacts on what they call "spiritual safety" stressing the significance of sacred symbols and areas. It was concluded that greater education is needed on cultural practices and spirituality in order to mitigate such risks.

The Panel heard that non-status Indian communities struggle without funding and without recognition of their constitutional rights, including exclusion from s.35 consultation activities. In the *Daniels* decision, they were described as vulnerable and in "a jurisdictional wasteland".

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*THEME: Engagement With Indigenous Peoples*

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### **Public Session – March 7, 2017**

The Panel heard that participants hope that these modernization efforts will instill confidence in the NEB and related legislative regimes among Indigenous peoples—in many cases, for the first time.

Industry representatives stated that they consider all engagement with Indigenous peoples from an environmental, social and economic perspective and that the NEB's own considerations should mirror this. The Panel heard that industry may be able to help government build relationships with Indigenous peoples and show them in their applications how the concerns of Indigenous Peoples are being addressed. The Panel heard that it is difficult to know what to do if 1 or 2 Indigenous groups out of many are in disagreement with a project whereas others want to move ahead.

Industry members expressed their interest in implementing the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), but also spoke to a lack of clarity that must be resolved through dialogue between industry, government and Indigenous peoples. One participant stated that to apply UNDRIP, parties need to have a basic common understanding of the rights of Indigenous peoples to say no to a proposed development project at any point of the project development process. It was concluded that all parties will need a better understanding of UNDRIP and its implications, especially of how Indigenous peoples feel about its implementation, as the goal is to work *with* them. It was remarked that companies often have the same goals as Indigenous groups but that the regulatory process has them sitting on opposite sides of the table.

### **Duty to consult**

The Panel heard a call for greater clarity around the Crown's constitutionally enshrined duty to consult, particularly on how the NEB might play a role in discharging this duty or evaluating whether it has been met. One participant specified that this clarity should complement the forthcoming Supreme Court Clyde River decision, as well as recent case law.

Participants expressed concern over the Crown delegating its duty to consult to proponents which creates added friction and is a missed opportunity for engagement on a nation-to-nation basis. The Crown should engage directly as a sign of respect.

Participants noted that Indigenous communities follow a consensus model and look at the best interest of the collective, which can take a lot of time. The provisions on Free Prior and Informed Consent (FPIC) set out in UNDRIP identifies the way to proceed with consultation.

The Panel heard that Indigenous peoples must each be consulted on an individual nation basis and not as part of a group as they each have agreements with the Crown. Some Indigenous peoples are not represented by national organisations such as the Assembly of First Nations or Inuit Tapiriit Kanatami.

The Panel also heard of the need to ensure that individual band members are consulted and made aware of the decisions affecting them. One participant stated that as the default is to speak with Chief and Council, individual band members are often the last to find out what's going on with a development, whether due to capacity constraints or a breakdown in governance. It was also noted that the duty to consult should extend to Indigenous peoples living in urban areas as they still have ties to their traditional lands, though not residing on them full-time.

### **Engagement Throughout the Project Lifecycle**

The Panel heard that engagement needs to happen at the earliest possible stage, be more culturally sensitive, and continue throughout the project lifecycle. The Panel heard that Indigenous peoples, especially elders, should be able to engage with the review process or continued project engagement in their native language. It was stated that certain things will only carry their full meaning in native languages, which are built on a different worldview. Some participants suggested that a bureau with expertise in Indigenous issues could be created to advise the NEB on appropriate engagement throughout the project lifecycle.

Participants told the Panel that the project consultation process is onerous for Indigenous communities who are expected to work with many players, including various levels of government and proponents, but do not have the resources or capacity to do so. A participant called the Participant Funding Program “minuscule” when compared to the amount of resources that have been taken out of the ground over the years.

The Panel heard that the NEB Act provides too much leeway to the NEB to constrain Indigenous participation and to limit the standing of Indigenous individuals and groups in proceedings, hampering their ability to provide robust, fair, efficient or effective decisions.

The Panel heard the view that current efforts to engage Indigenous Peoples are overwhelmingly focused on the project review stage, without adequate attention paid to the construction, operation, and decommissioning portions of the NEB’s “lifecycle approach” to regulation. As such, participants recommended enhanced involvement of Indigenous Peoples in monitoring and compliance activities under the NEB Act, which would draw on the immense amount of traditional, ancestral and community knowledge they hold. It was proposed that this would greatly improve the NEB’s pipeline oversight work.

Industry participants shared examples of successful collaboration with Indigenous communities and emphasized the importance of building trust through greater transparency.

One participant presented NEB modernization as an opportunity to encourage companies to work better with Indigenous communities, offering economic development opportunities ranging from jobs to equity partnership. They specified that their company has been moving towards more equity partnerships.

The Panel heard of the unique challenge of lengthy linear developments which may involve hundreds of Indigenous groups with different rights to recognize and ways of engaging.

It was specified that youth must participate as well as elders, as they will inherit whatever new reality is born from a development.

## **Timelines**

The Panel heard that industry is generally receptive to the idea of co-developing timelines with concerned Indigenous peoples, though the co-development process itself should be time-bound.

It also heard that in the NWT, the first step of engagement is on the engagement process itself and that it seems to work well.

## **Environmental Assessments and Traditional Knowledge**

There was concern raised as to the timing of EA within the regulatory process. It was stated that for CEAA, proponents are required to make a project description that is very detailed and that requires them to make decisions on a project even before they have engaged with communities. The process needs to be built to allow decisions to be changed based on the feedback proponents receive.

The Panel heard that environmental assessments (EA) are likely to be skewed according to what questions the assessment sets out to answer. They heard that Indigenous peoples would ask different questions than someone only trained in Western science.

Participants also noted that if a true nation-to-nation relationship is sought, it is not a matter of integrating Indigenous knowledge into pre-determined NEB and proponent processes, but rather of working with Indigenous people to shape what the processes will be. Currently, resource constraints hamper Indigenous peoples' ability to meaningfully participate in the EA process and the NEB and proponents are believed to view Indigenous knowledge as carrying less weight than Western science.

The Panel heard that in some communities, the conversation has turned towards Indigenous peoples running the EA process themselves. It was stated that EAs built around Western Science are limited, as they reflect a moment in time, whereas Indigenous ways of knowing are built on daily experiences accrued over generations.

Concern was raised over the risk of duplication of assessments, with an example from the Northwest Territories offered, whereby the Sahtu Land and Water Board had its own EA process, that was partly duplicated by the NEB's process. This resulted in an increased burden on the proponent.

The Panel heard concern over the disappearance of the elders who carry traditional knowledge through oral tradition. In some cases, efforts are underway to document this knowledge, with great difficulty. There is a need to study who carries this knowledge, who has rights to it, and who owns it.

### **Commitments and Compensation**

The Panel heard that certain ecosystems have sustained Indigenous peoples for millennia. Once a project takes place on these lands, it can take decades to rebuild a natural environment, and it will likely never be the same. If Indigenous communities accept that risk, they should expect compensation commensurate with the impacts the project may have.

There was concern raised as to the capacity of Indigenous peoples to negotiate with companies. One participant told the panel that even once negotiated commitment agreements between First Nations and proponents are sometimes left unrealized, with no penalty applied.

## **Indigenous Engagement Session – March 8, 2017**

### **Holistic Worldview**

The Panel was told that Indigenous peoples are speaking on behalf of the land because of their deep connection to the environment, and recognition of the impacts of industrial and human activity on this and future generations. It also heard that the NEB needs to fully recognize their rights to the land, particularly to their livelihood and their heritage sites. It was specified that for some Indigenous groups, traditional territory may exceed the boundaries of official treaty lands and that many Indigenous people are still living off the land.

The Panel heard that Indigenous peoples are working from the premise that, without a healthy environment, human beings are in deep trouble.

The Panel heard that all energy regulators must recognize common interests and common issues, as cumulative effects cross provincial, territorial and federal jurisdictions. The Panel heard that cumulative effects cannot be fully appreciated by the narrow scope of Western science and that the traditional knowledge of Indigenous peoples should be given more weight in deliberations.

## **Legal Rights & Obligations**

Participants expressed frustration over needing to prove standing and defend their rights, when these have been confirmed time after time by various legal mechanisms. There are constitutional protections in section 35 of the *Constitution Act*, there are three decades of court cases, Treaty and inherent and Aboriginal titles and most recently Canada's commitment to UNDRIP under international law. The Panel heard that Indigenous peoples should not have to argue for a place at the table and that, if anything, proponents and government bodies should have to prove that Indigenous rights will be upheld in their project proposals and approvals.

The Panel heard about the distinct and constitutionally protected nature of modern treaty rights, specifying that the rights and protections enshrined in land claim agreements supersede many other interests or legislative authorities. As such, the NEB should go beyond consultation and accommodation and work on a nation-to-nation basis in the broader objective of reconciliation.

The Panel heard that treaty rights protect Indigenous groups' rights to land forever and have a historical component related to identity and culture. Sometimes it is not a single project, but the cumulative effects of many industries under different jurisdictions that impede the fulfillment of treaty rights. The Panel was given a few examples of traditional territories inundated with oil and gas development, clear cuts, hydroelectric dams and other infrastructure.

It was noted by one participant that UNDRIP provisions answer all the questions about Indigenous engagement and consultation in the context of NEB processes.

## **Public and Indigenous Interests**

Participants requested more transparency and clarity around what factors are taken into consideration when deciding on the Public Interest and Indigenous interests. The Panel heard that the NEB currently has too much discretion in regards to considering Indigenous rights and participation and that s.52(2) of the NEB Act could be amended to explicitly require the consideration of impacts on Indigenous rights and interests.

The Panel heard that communicating how the NEB reaches its Public Interest determination would be appreciated. It was suggested that this might involve the NEB acknowledging and providing direct detailed responses to Indigenous submissions and increased detail in the NEB Reasons for Decisions.

## **Engagement Throughout the Lifecycle**

The Panel heard that Indigenous peoples should be involved at every stage of the project lifecycle, including the design stage, and that their cultural practices be valued as best practices, recognizing that they have ensured the sustainability of their practices for countless generations.

The Panel heard that past projects have been doomed from the beginning due to a lack of engagement in setting the process and that Indigenous peoples have felt that many consultations are done as a box-checking exercise that happen too late in the process to be meaningful.

Participants stated that the federal government needs to have a better equipped consultation team as the NEB's consultation mandate is limited. They also said that, given how many legislative acts are being proposed or modernized at this time, the Expert Panel entrusted with the modernization of the NEB should look at the input provided by Indigenous peoples to other government bodies, especially the Environmental Assessment Expert Review Panel.

Beyond involvement, the Panel heard a call for more control by Indigenous peoples over projects and NEB processes, as once industry leaves Indigenous peoples will still be connected to the land for generations to come. The Panel heard that co-management should be considered even in communities where there is little to no experience with oil and gas. It was suggested that these communities might be mentored and supported by more experienced ones.

It was suggested that overall, companies should have more Indigenous peoples at all levels in their ranks, from the president, to the laborer. The idea of providing Indigenous groups with equity stakes in the project was also raised.

The Panel heard that, to make informed decisions, all members of the community, including Elders, must be engaged. They were told that to ensure equal participation, the NEB and proponents should employ interpreters who can translate concepts into native languages and listen to traditional knowledge and translate it into Western concepts.

### **Consent and UNDRIP**

The Panel heard that the NEB and other concerned parties need to acknowledge that each Indigenous group is distinct, with its own self-government and protocols. It heard that to implement UNDRIP, the government will have to address existing policies that force Indigenous rights, knowledge and interests to the margins of decision-making. The Panel was also told that the full implementation of UNDRIP constitutes the minimum standard for human rights and land preservation and that it can form the basis for reconciliation.

The Panel heard that UNDRIP's provision on free, prior and informed consent covers relocation, tradition violations, acquisition of Indigenous cultural, intellectual and spiritual property, the implementation of legislative measures and the storage of hazardous materials on traditional territories, among others. It was reminded of the four tenets of free, prior and informed consent:

- 1) Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- 2) Their consent is sought and freely given prior to start of development activities;
- 3) Indigenous peoples have full information about impact and scope of proposed developments on their lands, resources and wellbeing;
- 4) Choices to give or withhold consent are respected and upheld.

The Panel heard that the Crown and proponents should seek consent prior to project sitting. It was posited that when relationships are such as to share information and collect feedback on an ongoing basis, consent emerges gradually. It heard that Indigenous peoples reserve the right to withdraw their consent should it come to enable violations of their rights.

### **Socioeconomic Concerns**

The Panel heard that while impact-benefit agreements exist between proponents and Indigenous communities, they are not always respected or enforced. One participant told the Panel that proponents have become particularly adept at what he called "cat and mouse games" geared at circumventing policies intended to promote the employment and advancement of Indigenous people.

It was discussed that overall, initiatives geared towards employment should involve training youth and looking for transferable skills that may only need to be tweaked to make someone employable. For example, hunters and trappers could become employed in wilderness safety.

### **Awareness and Education**

The Panel heard that practical issues can be overcome, but the biggest obstacle is the mindset of government and industry, which does not adequately appreciate the Indigenous perspective.

There was concern raised as to the NEB being too far removed from the realities of Indigenous peoples. Participants posited that if NEB and corporate board members were to drink from the same sources as Indigenous peoples, they would make different decisions. As one participant put it, the only way to learn and understand natural law is to experience it firsthand.

The Panel heard from participants that Indigenous peoples are often accused of being “anti-development” but that this is not true. They are simply prioritizing their and future generations’ rights when assessing projects.

The Panel heard that the NEB must acknowledge the regional and cultural diversity among Indigenous peoples and that, as such, it is unlikely to be able to apply the same framework throughout the country.

### **Métis Nation**

The panel heard that the Metis Nation would like to see their relationship with the NEB and federal government changed. They stated that the Metis feel powerless in their dealings with the NEB, and would like to be recognized as a stakeholder on equal footing with other Indigenous peoples. Like other Indigenous peoples, the Metis face capacity constraints that get in the way of advocating for their rights, some of which they feel are being violated (especially harvesting rights.)

Participants said that members of the Metis Nation, including those in leadership positions, must better understand the NEB, and engage with it at the highest level.

The Panel heard that the Metis in Alberta have also felt left out of conversations with industry on project consultation, initiation and operation. They stated that the current practice of placing a notification in a rural newspaper is not sufficient. The Panel heard that this minimal engagement reflects confusion within industry as to where the Metis fit into s.35 rights. The Panel heard that aligning the NEB with UNDRIP would satisfy many of their and the industry’s needs.

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*THEME: Public Participation*

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### **Public Session – March 7, 2017**

Participants acknowledged that public confidence in major pipeline projects has decreased, resulting in delays and uncertainty. More outreach and more transparency about NEB processes are needed to help rebuild this trust.

Some participants recommended that the NEB retain discretionary power over the format of hearings and means of public participation. The Panel heard that the NEB should allow more flexible participation opportunities. For example, the NEB should allow interested parties to submit letters of comment and these should form part of the record. It is believed that this broad-based engagement could help avoid issues arising in the middle of an application review.

Participants stated that public participation should continue throughout the project lifecycle. One participant suggested that the extent of public participation should be commensurate with the size and potential impacts of a project. Another warned that while public participation expectations should be addressed through improved communications, this should not come at the cost of regulatory certainty or of the industry remaining globally competitive.

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### *GENERAL COMMENTS*

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In addition, the following general remarks were made:

- It was noted that provisions should be made for a transition period between the NEB as it is and the modernized version it will become.
- Some participants believe that the NEB process is a good one and that modernization efforts should merely involve some tweaking.
- The procedure of public consultation being used by the Panel in charge of the NEB modernization is laudable and participants are grateful for the opportunity to provide input.

## Yellowknife, NT

### **Expert Panel on National Energy Board Modernization Public Consultation Yellowknife, Northwest Territories – March 10, 2017**

The Expert Panel for the modernization of the National Energy Board (NEB) met in Yellowknife on March 10, 2017, to listen to presentations and engage in a public dialogue session.

The following summary presents the comments and input received throughout this in-person engagement session. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at this session.

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#### *THEME: Governance and Structure*

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The Panel heard that board members should be selected based on their skills, knowledge and decision-making abilities, rather than their political ties.

The Panel heard that, for the sake of credibility, the NEB should be representative of the people it affects, including Indigenous peoples. It was specified that having a board member who happens to be Indigenous is not sufficient and that the important thing is that someone be on the board to represent the interests of Indigenous groups – ideally someone selected by the people they are meant to represent. The importance of appointing temporary members with regional knowledge was discussed, noting that it is not fair to expect one Indigenous person to represent all Indigenous peoples from all regions to the NEB.

Participants suggested that the NEB establish regional NEB-Indigenous co-management boards to ensure that relevant voices are heard from coast-to-coast. People from each region could elect or appoint members to their local board for a set term during which they would be “on-call” for service on NEB-regulated projects is proposed in their regions. The Panel heard that regional co-management board members would have to be independent, with no ties to industry. One participant expressed a preference for an Indigenous advisory committee without decision-making powers. This committee could help compensate for capacity gaps in Indigenous communities as a water specialist from one community could work alongside a wildlife expert from another. It was agreed that whatever its form, it is important that the NEB reflect regional views on matters such as community development and traditional knowledge.

The Panel heard that the members of project-specific hearing panels should understand the related land claim agreements and s.35 of the Constitution, so that these are given the weight they deserve. Additionally, project hearing panel members should have some regional knowledge, especially in places where special technical considerations and traditional knowledge exist, such as the Arctic.

The Panel heard that policy issues like greenhouse gas emissions should be decided on by federal and provincial governments rather than the NEB in debates surrounding specific project reviews. It was also suggested that someone with expertise on the environment sit on the NEB Board.

The Panel heard that an increase in the number of NEB staff members on the ground would be appreciated. Participants referred to the current practice by the NEB of providing support from NEB staff in navigating technical and administrative processes. It was shared that this has been very helpful, especially to organizations with limited capacity. Participants supported the continued supply of information on, and management of, frontier lands and off-shore locations. It was suggested that the NEB's administrative functions could be improved through greater awareness of Indigenous peoples' land claim agreements and treaties and through increased coordination with other regulators.

The Panel heard that the composition of the board is more important than its location and that where someone lives is less important than where someone comes from.

The Panel was left with an open question as to where the NEB should be headquartered. It was suggested that the NEB be located close to where projects are happening. They heard that being in Calgary gives them the image of a regulator captured by industry, but that moving it to Ottawa may give the idea that it is captured by political interests.

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*THEME: Mandate and Future Opportunities*

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The Panel heard that the NEB's 2015 annual report provides a definition of the Canadian Public Interest and that any definition used in deliberations should be put into the NEB Act itself. A participant suggested that the NEB Act should also define regional interests, in recognition of the different treaties in place and various risks and rewards in places where projects are proposed. The Panel also heard that Indigenous interests are not the same as the Canadian Public Interest and that they deserve special consideration, as mandated by the Constitution.

The Panel heard that it would be best for industry to have the NEB act as their single point of contact with all government departments or agencies with jurisdiction over a project.

Participants told the Panel that the duplication of environmental assessment (EA) processes challenges the integrity of land claim agreements, slows things down, and creates confusion as to how to weight differing conclusions. It was suggested that the EA approach with the most stringent environmental standards be the one applied, regardless of which agency is conducting the EA, and that this be agreed upon before it is conducted.

The Panel heard that if there are multiple agencies deciding if a project goes ahead, it's more difficult from an industry perspective. One participant raised the Mackenzie Gas Project as an example of the regulatory process getting so complex and taking so long that the economics behind the process died.

The Panel heard a desire to see all pipelines approved by Cabinet, as it is considered to be accountable and because Indigenous and Northern Affairs Canada, Natural Resources Canada and Environment and Climate Change Canada play a vital role in all the ancillary issues that revolve around pipelines. There was concern that under the current system, the NEB can be used by Cabinet as a scapegoat for decisions.

The Panel heard that a balanced approach might entrust the NEB with providing the best information possible and entrust the government with making the decision. Another approach suggested was to have the NEB issue permits, but require the federal government to confirm or deny these permitting decisions based on its assessment of whether the process met the Crown's duty to consult, as enshrined in the Constitution. It was shared that Alberta's Energy Regulator has an office responsible for determining whether or not the Crown's consultation was adequate given the circumstances, which is factored into its decisions.

The Panel heard concern over companies investing years and hundreds of millions of dollars in an application only to be told 'no' by Cabinet without explanation.

The Panel heard that decision-making currently defaults to Common Law but that aboriginal principles of law need to be recognized to a greater degree.

The Panel heard from a member of industry that it must focus on regulatory efficiency and effectiveness. It was suggested that there should be a better way to come to decisions than to expose companies to the risk of spending 500 million dollars and multiple years before getting to the point of a yes or no answer.

As one participant put it, industry is not so adamant about what criteria are used to make decisions, as much as it is interested in having a clear and consistent set of criteria that can inform whether they should embark on the pursuit of a project approval from the start. The Panel heard unclear processes, uncertain timelines, high costs, and political involvement described as "job killers" by one participant.

The Panel heard a suggestion of a two step process, with the first phase consisting of the NEB conducting a needs assessment and deciding on public interest, subject to Cabinet's approval. The second phase would be to focus on the NEB assessing and deciding on the details under which a project would be developed. The Panel was also told that no one party should effectively or formally have a veto right over a project, as pipelines may span numerous communities that wish to see a project go through.

The Panel heard that the review process is uncomfortable and unwelcoming for Indigenous peoples and that, coupled with the diffusion of accountability and overlapping jurisdictions, it erodes trust among all parties, leaving environmental concerns and socioeconomic opportunities unaddressed.

Participants told the Panel that, where available, Regional Strategic Environmental Assessments (RSEA) should be considered in the NEB and Government in Council's decisions and recommendations, as they provide land use and socio-economic considerations.

The Panel heard that for many present, the regulatory regimes of Northern Canada are exemplary. It was recommended that in modernizing the NEB, the regimes of the North be studied.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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The Panel heard that the NEB should strengthen its regulatory process and increase its oversight. This would involve increasing the accountability of proponents and provincial and territorial regulators to affected communities. It was suggested that the NEB could keep a register of all commitments made to communities throughout a project's lifecycle and periodically report back on how well they are being met.

The Panel was offered the example of the Northwest Territories, where there are lifecycle committees, co-management, and a level of transparency that encourages the engagement of local and Indigenous peoples to the highest possible level in the areas of compliance and enforcement.

The Panel heard that safety provisions can be viewed as opportunities to employ local and Indigenous peoples. One participant said that if companies were to inform Indigenous governments of what skills they foresee needing, they could equip potential workers with the most relevant training.

There were specific concerns voiced over the age of pipelines and slope erosion. There was concern that some may wait until there is a leak or burst and that older pipelines often need more of an overhaul than a small repair. The Panel heard that the public must be more knowledgeable, especially in regions where there are pipelines, before a pipe bursts. It was said that raising the bar on safety standards and creating a plan for the country could help improve this. This plan should include an early warning system to protect the land, rivers and wildlife.

A participant shared the practice of her First Nation, which requires that a proponent have various plans covering waste management, contingency, groundwater monitoring, closure and reclamation. It also requests an engagement plan that explains how various stakeholders will be engaged throughout the lifecycle. The Panel heard that most of these plans have standard conditions that spell out the proponent's obligation to revisit them annually and update them appropriately, subject to the approval of their land and water board.

The Panel heard that communities must be consulted on reclamation projects, as in some cases, past consultations have lead to minimal input into the final outcome.

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*THEME: Engagement With Indigenous Peoples*

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Participants discussed the Crown's constitutional duty to consult and, where appropriate, accommodate. The Panel heard that the Crown fulfilling land claim obligations and treaty rights should not be debatable. Another participant asked that the NEB Act clearly explain any delegation on the part of the Crown to the NEB in such a way as to be clear that the Crown retains ultimate responsibility, though sometimes the NEB or the proponent are better placed to conduct certain parts of a consultation. The existing NEB reliance on proponents for aspects of consultation was noted.

The Panel heard that consultation should scale with the activity proposed. It also heard that while many companies have made a good effort to consult extensively, reports and documents are in technical language, requiring increased capacity of Indigenous communities. Participants stated that it is important

that these technical documents be available publicly but also that plain language summaries be available to permit the engagement of non-specialists.

The Panel was asked to consider if one can truly provide consent if one does not understand what to which one is consenting. An analogy was offered: everyone is entitled to a fair trial, but is it truly fair if the defendant cannot procure themselves a lawyer? Seeking consent requires the development of a deeper understanding and capacity, it is not transactional.

The Panel was told that the solution to this is to provide more and steadier funding to communities as opposed to sporadic project-specific funding. This would allow communities to develop capacity internally, thereby preserving knowledge and preparing them to respond to any future requests that may arise. The Panel was told that funding needs to be provided in good faith, without dictating exactly what it is to be spent on. It was proposed that rather than set hard rules, funders could establish expenditure criteria in conversation with recipients.

With such internal capacity, Indigenous communities would be more likely to respond meaningfully and within a shorter time frame. Investments could be made in Indigenous participation in Regional Strategic Environmental Assessments during less active periods. While funding would not be tied to a real-time project, it would allow Indigenous communities to more fully participate in booming times.

Participants discussed the challenges of documenting traditional knowledge for use in NEB processes, stating that a crucial element involves the ability to speak and understand the native languages spoken by elders. It was acknowledged that traditional knowledge is fundamentally a different way of knowing. The example of the concept of sustainability was raised. It was offered that what is taught in universities is one thing, but a gathering of Indigenous people once defined it as “looking back ten generations and see what ancestors did to make sure we benefit”.

The Panel heard that traditional knowledge cannot be taught in the traditional sense of the word but rather has to be lived. To keep traditional knowledge from dying, visits by Indigenous youth to the land will need to be funded.

One participant brought up the guide to traditional knowledge developed by the Inuvialuit Regional Corporation (IRC), supported by environmental studies and a research fund. The Panel heard that this guide addresses who ought to be engaged, how to invite community members to participate, and how traditional knowledge can work with Western science. The IRC also has a traditional knowledge coordinator position. It was stated that this guide is exemplary but that it may not apply to other Indigenous groups. As such, it was concluded that the NEB cannot legislate a one-size-fits-all approach to traditional knowledge.

Participants warned against perpetuating the false dichotomy between proponents and governments representing science and Indigenous groups representing traditional knowledge. Many Indigenous people are equipped to participate in scientific discussion, among other issues, as well. The Panel heard that there is a perception that when studies are conducted by or on behalf of Indigenous groups they are not sufficiently considered. It was noted that with better Indigenous representation on the NEB itself, this is likely to improve.

The Panel heard that even in cases where a First Nation government is mandated to conduct its own approval process, the NEB retains jurisdiction over what happens underground, having resulted in the NEB approving fracking operations before a First Nation can conduct its assessments. It was noted that such Indigenous-led assessments tend to go further in their consideration of the environment.

However, the resources and capacity are not always there to conduct assessments themselves, so the NEB should be prepared to do a thorough environmental assessment for all projects. Indigenous governments may then use these assessments in their weighing the impacts of a project.

One participant stated that currently, no one body feels completely accountable to ensure that commitments made to Indigenous communities don't slip through the cracks. One-day consultations are held in their community by companies and the issues raised don't appear to get addressed. There is a perception among Indigenous peoples that the NEB is a servant of the industry.

The issue is not only gathering, interpreting and understanding traditional knowledge, but also of acting on it. An example was offered of a community having used traditional knowledge to support their request that a proponent not build an airport on a fishing lake. The claimant built it anyways, and the community made them remove it. While the company readily did, the action eroded trust and illustrated the poor appreciation of how Indigenous people feel about certain sites.

Additionally, it was stated that the NEB should not seek to integrate traditional knowledge into Western science, but that it is best used on its own.

A participant brought up a challenge their company faces in leveraging traditional knowledge. While it is understandable that community members are hesitant to make such knowledge public, if a company is made aware of it once and must return years later, they must seek out the same information again, beginning from scratch. They wonder whether a confidential database of traditional knowledge could be created.

It was stated that changes in the climate and ecosystems of the North are particularly alarming to the Indigenous peoples living there. Examples were given of species declining and invasive species arriving, erosion of the land occurring. The Panel heard that this is the context in which Indigenous peoples are seeking sustainable economic development, with locally retained benefits. The Panel heard that Indigenous peoples are seeking a balance between traditional use of natural resources and modern opportunities to improve the health and well-being of their communities.

The Panel heard that people in the North face contradictory messages. On the one hand, they welcome the initiative to modernize the NEB to better reflect regional and traditional knowledge, environmental science and community development priorities. On the other, one in-person engagement session on NEB modernization was held in the North, while nine were held in Southern Canada. Meanwhile, the Prime Minister announced in December 2016 that Arctic Canadian Waters are designated as off-limits to future oil and gas licensing. All this leads northern communities to believe that the North is not a priority for the government.

Participants discussed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The Panel heard that UNDRIP mandates the pursuit of reasonable consent, rather than the accordance of veto rights.

One participant shared the following proposed implementation of UNDRIP (quoted here from the presentation provided), where treaty rights are concerned:

- 1. Freedom from force and manipulation:** There must not be any threat of withholding benefits or rights in exchange for consent, nor requests to simply “rubber stamp” requests.

2. **Mutual agreement on process:** This is essential to having a smooth and efficient process.
3. **Robust and satisfactory engagement:** Enough time and resources must be put towards engagement for it to be meaningful.
4. **Sufficient and timely multilateral information exchange:** There must be a demonstrated understanding of the information shared with and received from rights holders.
5. **Proper resourcing – technical and financial:** Indigenous communities must be equipped with the capacity to assess projects. In places with a boom and bust economy, it is hard and possibly impractical to maintain constant capacity. In these places, co-management might not work.
6. **Shared goal of obtaining consent:** Reasonable consent should be pursued as a discussion between two equals, rather than the “parent-child” style negotiations of the past. If a party can prove that consent is being withheld unreasonably, the ultimate decision-maker would have to go through an analysis, as set out in the *Sparrow* decision. Nobody has a final veto.

The Panel heard that a nation-to-nation relationship is not something that can be quantified in a matrix but is a paradigm shift whereby the NEB and Crown would regard Indigenous governments as truly equal, and would begin to think seven generations down the line.

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*THEME: Public Participation*

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The Panel heard that industry supports rigorous public involvement but that this participation should not extend the timeline for arriving at a go or no-go decision. It heard that while informal forms of consultation should be allowed, the assertion of facts must be subject to formal testing. It was also noted that in testing evidence through cross-examination there is a practical limit to the numbers of individuals involved, and some grouping of interests may be necessary.

It was suggested that prior to making an application, the applicant would file a project description on which the NEB would facilitate public consultation. The results of consultation would then be summarized in a report to be included with the proponent’s application. This report would augment the existing NEB Filing Guidelines to further define what questions the NEB should pursue in their discovery and consideration of the project.

It was stated that NEB consultations should take place along the length of a pipeline and online *before* a recommendation or decision is made. It was also specified that intervenors at a hearing should not be limited by a narrow definition of “directly affected”. It was noted that in the past the NEB has rightfully deemed Indigenous peoples to be “directly affected”, automatically granting them intervenor status in hearings.

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*GENERAL COMMENT*

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- Some participants feel that the NEB is currently one of the best if not *the* best regulatory process in the world. They believe we should not throw the process away and restart but rather make small changes, if any.
- Other participants welcome the government's commitment to modernize the NEB.
- One participant said that in consultations such as the one in Yellowknife, the government should provide translators capable of translating from traditional languages so that they can capture the nuances of what community members are saying.
- The Panel heard a participant expressing frustration that the legislation that guides the NEB's exploration and production work in the North is not part of the NEB Modernization review.

## Saint John, NB

### **Expert Panel on National Energy Board Modernization Public Consultation Saint John, New Brunswick – March 21-22, 2017**

The Expert Panel for the modernization of the National Energy Board (NEB) met in Saint John New Brunswick, March 21-22, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas area as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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### **Public Session – March 21, 2017**

The Panel heard concerns that the NEB as it is presently constituted either is, or appears to be, structured and staffed in a way that favours the perspective of the energy industry and limits consideration of the full range of issues involved in pipeline approval decisions. Specifically, participants spoke about the representativeness of both the Board and staff, the knowledge and experience that Board and staff bring to bear and structural questions around where the NEB is located and who may serve on the NEB Board.

With respect to Board and staff composition, the Panel heard that Canadians expect to see a broader range of people sitting as Board members. There exists a perception today that the Board as presently constituted (particularly the permanent members), over-represents the energy industry. Participants discussed provisions for strong regional representation, representation of Indigenous peoples, and for stronger mechanisms – like exclusion periods – to limit the relationships and flow through of both Board members and staff between industry and the NEB. In addition, participants noted that a representative Board should include a greater diversity of expertise, such as knowledge of Indigenous traditional knowledge, climate science, upstream and downstream cumulative effects, governance, and other areas.

Participants acknowledged, however, that in a country as broad and diverse as Canada no group of 10 or 20 people can directly represent every single experience or interest. The Panel heard discussion of ensuring that training is in place to bridge any skills or competency gaps for Board members and staff. For example, Board members could be given specific training on Indigenous worldviews and how to understand and incorporate traditional knowledge into decision-making processes.

Structurally, many participants pointed to two concerns with the current NEB: its location in Calgary and the requirement that Board members reside in Calgary. With respect to the Board's location, the Panel heard differing views. On the one hand a majority of participants expressed that being headquartered in Calgary creates at the very least a strong appearance of a too-cozy relationship with the regulated industry and allows the sort of incidental closeness that can compromise a regulator's independence without any malice on the part of any party. This view suggests that the NEB headquarters should be moved to Ottawa. However, the Panel also heard the view that if the NEB is to be a truly independent decision-maker – which entails independence not just from industry, but also from political interference – that being located outside of Ottawa makes sense. Moreover, the volume of transactions that the NEB must deal with is such that proximity to industry is efficient for all parties.

Participants discussed the residency requirement for Board members and suggested that this stipulation is out-dated and does not reflect the world of modern work. Moreover, such a requirement limits who may accept an appointment and may further entrench an industry orientation. The Panel heard that regardless of where the NEB is located, if Board members are able to fulfill their duties, their place of residence should not be a limiting factor.

The Panel also heard discussion of the Board Chair as CEO. Participants suggested that this dual role was unusual as a governance model and could create conflicts for the Chair/CEO. A participant noted that municipal governments have a similar dynamic where a mayor chairs Council, but also plays a *de facto* CEO role for the city; this dual role can work if well- designed. For example, the Panel heard that a mayor might be permitted only to cast a tie- breaking vote on an issue.

### **Indigenous Engagement Session – March 22, 2017**

The Panel heard that Indigenous knowledge and experiences are crucial for understanding the Indigenous worldview that underlies so many of the issues that create difficulties between Canadian and Indigenous governments. The Indigenous worldview is based on a view of humanity as part of a natural and spiritual equilibrium. In this view, man's role is to live in balance and to ensure bountiful resources for the next generations. This contrasts with a traditional Western worldview, that sees humanity at the centre of the world. In this view, nature exists to be used by man. These fundamental differences inform very different ways of looking at and solving issues.

Regarding the NEB, the Panel heard that Indigenous people and knowledge must be represented on the Board and within NEB staff to ensure that these views are adequately considered.

A participant shared a photograph which served as a simple and powerful example of how differing worldviews can affect decision-making outcomes. The photograph was of an area cleared for a transmission line (this specific example was not an NEB-regulated project, but the story is illustrative of the issues in question). The local Indigenous community had specified that they trapped marten in the area, and that this practice was very important. As a means of accommodation, the project proponent had left a marten trap intact on a tree stump in an otherwise barren area, an area where no game could reasonably be trapped.

This story was used to illustrate how a failure to truly understand another point of view could lead to unintended consequences, in this case a preserved trap, where the actual activity of trapping is impossible.

Participants considered the logistical challenge of representing all of Canada's regions, provinces, Indigenous groups, languages, and perspectives. The Panel heard that no Board could perfectly represent all of the many groups and interests involved in NEB decisions, but that some effort toward representation is very important. In addition, it was suggested that the NEB create regional advisory committees, consisting of Indigenous peoples and others, to guide NEB decision-making and ensure that local interests are brought to the table. It was further suggested that these committees could constitute a roster of potential NEB hearing panel members, and NEB Board members. Sitting on the regional groups would allow non-industry specialists to learn about the industry and processes related to regulation and standards. It would also enable non-industry specialists to build a larger base of knowledge that would allow them to step into governance roles as needed.

In addition, it was suggested that the principles of the UN Declaration on the Rights of Indigenous Peoples, and the Prime Minister's commitment to establishing nation-to-nation relationships with Indigenous peoples should be formally incorporated into the preamble of the NEB Act, if not in specific sections. While a preamble is not binding, it was suggested that this change would further signal and entrench the importance of establishing new relationships with Indigenous peoples in Canada and support reconciliation.

Participants suggested that, regardless of where the NEB is headquartered, regional offices across Canada are important for enabling engagement in NEB processes and for answering inquiries.

The Panel also heard a suggestion that when appointments to the Board are made, they should be explained or justified to make clear why a particular person was chosen and to describe what skills, expertise, or knowledge they bring to the organization.

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*THEME: Mandate and Future Opportunities*

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**Public Session – March 21, 2017**

Participants suggested to the Panel that a broad rethinking of the NEB's mandate is essential, and this is the building block upon which governance, decision-making, and other modernization efforts must be based. In this regard, the Panel heard about a need to bridge the gap between broad public policy and regulatory decisions and the importance of considering energy from a holistic perspective, in spite of existing jurisdictional questions.

Participants expressed the view that the National Energy Board only looks at a small sliver of the overall energy picture in Canada: the transmission of certain types of energy, and then only under certain conditions (crossing jurisdictional boundaries). The Panel heard that participants understand that the current system is the product of incremental adaptation and growth, and that provinces and various government departments have discrete responsibilities. However, there was expressed an overall desire to see some type of pan-Canadian leadership on energy writ large, in spite of the jurisdictional silos. The Panel heard suggestions for a formal national energy strategy of some type, or a new National Energy Act or agency that would organize the various players and unite them in the service of a coordinated approach to energy in Canada. Such a strategy would deal with the big questions like "how will Canada choose to transition to an energy future that is much less reliant on fossil fuels?" Or "should we have a strategic petroleum reserve, and if so how big should it be?" Today, these questions play out in reviews of individual pipeline project applications, which are ill-equipped to consider whether and how Canada will adopt new *sources* of energy for the future.

Similarly, the Panel heard that connecting broad public policy to regulatory decisions is critical. Participants expressed views that the NEB needs either clearer direction, from a policy perspective in rendering its decisions, or that it should clearly limit its role to exclusively that of a licensing body, and guarantor of safe and secure infrastructure. In this view, a modernized NEB would limit its role to a narrower set of criteria relating to the construction, operation, and decommissioning of a pipeline, rather than the upstream and downstream socio-environmental effects of the products transmitted in that pipeline. For example, it was suggested that the NEB, as a regulator, should not be involved in the production of energy information to inform regulatory decisions.

Participants discussed the concept of “public interest” and suggested that a clearer definition be enshrined formally in the NEB Act. Such a definition might include specific reference to the primacy of Indigenous rights, which are not balanced against the general public interest, and for which infringement must be justified separately. In defining public interest, participants suggested that sustainability be at the core of any definition as an over goal, and also that health be noted as a consideration. One participant suggested that the NEB’s overall mandate should be to deliver affordable, available, sustainable, and secure energy transmission infrastructure.

The Panel heard support for an NEB that consolidates information and plays a strong educational role in explaining to Canadians what the issues are, and how to interpret the information available to them.

### **Indigenous Engagement Session – March 22, 2017**

The Panel heard that the Crown, and the Crown alone, bears the duty and authority to consult with and accommodate Indigenous peoples. Today, the *de facto* responsibility for consultation is often delegated to project proponents, and it is proponents who then present Indigenous views to the NEB. This creates clear problems and conflicts, in that proponents are in no way authorized to conduct consultation on behalf of the Crown (though certain procedural elements may be delegated, responsibility cannot). Beyond this, though, the Panel further heard that the NEB itself does not have the authority to conduct consultation and make accommodation decisions. This responsibility is exclusively that of the Crown. In this regard, a proponent offered a definition of the Crown as the government representative with the knowledge and authority to enact appropriate accommodation measures resulting from consultation.

As noted above, participants expressed concerns with the limited mandate of the NEB as it stands today. The Panel heard that the Board’s name, “National Energy Board,” is a misnomer, because it is not truly national in scope (with so many energy production generation and use under provincial jurisdiction), and it does not deal with “energy” as a whole, but only a small part of the energy system. It was offered that in its current incarnation, the NEB can do little to affect the kind of broad energy policy that many citizens see as an implicit requirement in any energy debate.

In this regard, the Panel heard a vision of the NEB as a convener of a coordinated national approach to energy, and managing the move to more sustainable sources of energy. In this vision the NEB, or whatever government body takes the lead, would provide leadership and guidance, even in the absence of formal control over things which are clearly not within federal jurisdiction.

A participant gave a personal example of talking to the Chair of the NEB about the Board’s responsibility for the overall impacts of the oil sands. This discussion revolved around the NEB’s limited jurisdiction over the transmission of energy, and not how it is produced. The participant acknowledged that jurisdiction for the many issues involved is split up, and suggested that this arrangement allows all parties to dodge their responsibility for the overall system. For example, if there were a large spill into the Bay of Fundy, all of the parties upstream from the spill would deny responsibility for the overall problem. In this vein, it was suggested that Canada take bolder action to rethink its whole energy system, and look to innovate in adopting new, cleaner technologies.

In addition, with reduced dependence on fossil fuels, participants advised the Panel that transmission lines will be ever more important in the future. Today, transmission lines may attract less attention – even to the point of having sections in the *NEB Act* on transmission lines simply refer to sections on pipelines – but we can expect greater challenges around coordinated national approaches to the transmission and storage of electricity, particularly in light of Canada’s vast potential to tap renewable energy sources.

On the subject of public interest, participants noted that the Canadian public interest, which is an evolving balance of social, economic, and environmental concerns, does not include Indigenous interests in terms of rights. Indigenous peoples are rights holders under the Constitution, and those rights are not the same as changing social or economic conditions that can be weighed and traded against.

Participants suggested that there is a balance between bringing in new Board members with new approaches, and maintaining an institutional memory for the NEB. It was suggested that NEB staff could bridge institutional knowledge gaps where Board knowledge is lost to succession.

A participant noted that the 2015 NEB Annual Report offered a definition of “public interest” that could guide the Panel.

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*THEME: Decision-making Roles, Including on Major Projects*

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### **Public Session – March 21, 2017**

The Panel heard differing views on the role of environmental assessments, and who should have responsibility for their conduct. The Panel heard views that environmental assessments – which are critical for establishing the impact of a project – should be overseen by the Canadian Environmental Assessment Agency (CEAA). Participants suggested that CEAA is better placed to perform this role because it is a centre of expertise for environmental assessments, and because, as a body distinct from the NEB, it does not face any real or apparent conflict in assessing the effects of a given project. In addition, the Panel heard that the CEAA process of environmental assessments is more open and inclusive, and allows intervenors to feel as though their concerns can be heard.

A participant articulated a distinction to guide where and how environmental assessments are done: EAs are about planning, not regulating – and it is in this context that participants expect to see broad assessments that include social factors as well. The NEB is a regulator, and, as such, is not responsible for overall plans affecting the environment or a specific ecosystem. Therefore, it should not conduct environmental assessments which, at their core, are planning exercises, not regulatory exercises.

However, the Panel also heard views, that environmental assessments of NEB-regulated projects should be overseen by the NEB. It was suggested that the NEB is a unique centre of knowledge and expertise on pipeline and transmission line issues, and most critically, that its experience allows it to best understand the full lifecycle effects and implications of a project and to oversee the follow through on issues that have arisen.

Overall, there is an expectation that the NEB make science-based regulatory decisions. In order to do so, credibly changes will be required.

The Panel heard discussion of the NEB's role as a quasi-judicial body. Here again, views were mixed, looking at questions of who makes decisions, but also how those decisions are made. Participants expressed the view that the NEB should be independent of political interference, and that, therefore, it should wield full decision-making powers for all matters before the Board. Countering this perspective, it was also suggested that Cabinet should retain a role in overseeing decisions, so that accountability is maintained at the political level. Going even further, it was suggested that in Norway major projects are voted on in parliament directly, and that Canada could look to this as a model. Another participant mentioned that Canada could hold a national plebiscite on major projects to ensure full public debate and accountability.

Related to the question of who makes ultimate decisions is the process by which those decisions are made. The Panel heard that participants expect a clear, predictable, and accessible process, as well as transparency around why a decision is made. NEB hearings of today may be difficult to navigate for some parties, partially due to how the quasi-judicial role is carried out, as compared to the more accessible (but less decisive) administrative proceedings used by other organizations. With respect to transparency, participants acknowledged that Cabinet confidence represents a significant challenge; even those who believe that Cabinet should be the ultimate decision-maker suggest that the opacity of Cabinet decisions is a barrier for all parties in understanding why and how a decision was made, which serves to erode confidence in the decision-making process. Similarly, it was noted that cross examination of proponents should be allowed in all hearings.

The Panel heard suggestions that the government adopt a two-phased approach to decision-making. The first phase would look at the big picture, and whether or not a particular project should proceed, in principle, based on a consideration of broad public policy and weighing of the Canadian public interest. Mechanically, this might include a strategic-level environmental assessment, or other type of higher level review. It was suggested that the NEB not be responsible for the conduct of this phase of a review, and that the strategic level assessment be the responsibility of Cabinet, or the Major Projects Management Office, or another such body.

Assuming a positive outcome to phase I ("Yes"), the NEB would focus its efforts on the second phase of decision-making: how an approved-in-principle project should proceed, to ensure that is conducted safely, securely, in partnership with affected communities, and with as minimal as possible effect on the environment. A modernized NEB's role in such a two-phased process would relate directly to its mandate (above). It was further suggested that, even if the NEB were to have sole decision-making authority over projects, its decisions should be appealable (likely to Cabinet).

The Panel heard a concern that projects might be "approved" but with dozens of associated conditions. Participants expressed views that this can feel like a project is approved with many of the crucial details left to be figured out later, which raises questions about the monitoring of compliance with conditions on an ongoing basis.

Participants suggested the creation of technical panels to help interested parties understand technical or engineering issues, and also to help manage the logistical challenges inherent in processes with potentially hundreds of parties looking to be involved to some extent. There was also a suggestion that there be an NEB ombudsman to oversee the Board's conduct and report to the public on a regular basis.

### **Indigenous Engagement Session – March 22, 2017**

The Panel heard suggestions that the NEB should not conduct environmental assessments, but that this task should be assigned to the Canadian Environmental Assessment Agency or some other body. Participants explained that the CEAA process is more open, that CEAA is a natural centre of expertise for environmental assessments. Moreover, participants cited the current lack of trust between many

communities and the NEB is serious enough to warrant a change in order to restore credibility to the process.

In addition, it was suggested that traditional knowledge must be incorporated into any future environmental assessments to provide a complete picture of the risks and effects of a project. It was noted that proponent studies often do not include traditional knowledge, and this can leave the impression that Western and traditional approaches are not on an even playing field.

As noted in the “Governance” section, participants suggested a range of advisory-type boards with varying degrees of decision-making authority. The Panel heard suggestions for creating an Indigenous advisory committee to better represent and incorporate Indigenous concerns to the NEB. It was also suggested that each region could maintain such a committee, or a committee with a broad group of stakeholders (nationally or regionally) that would review both projects and ongoing management issues. It was further imagined that future hearing panels might contain both NEB Board members and regional or local representatives. In general, participants urged Panel members not to feel obliged to “colour within the lines” and to be creative in recommending new ways of doing things, including how to make NEB decisions.

The Panel heard that future decision-making models must account for the UNDRIP affirmation – which Canada has endorsed without qualification – of the obligation of governments to seek in good faith the free, prior, and informed consent of Indigenous people in any decision affecting their rights. There remains debate about what free, prior, and informed consent really means. Most crucially, some participants suggested that this amounts to a veto – i.e., that without the express consent of affected Indigenous peoples, a project cannot be approved.

In this regard, the Panel heard that the NEB should include in its decision-making processes an assessment of whether adequate consultation and accommodation with Indigenous peoples have taken place. However, these participants emphasized that it remains the responsibility of the Crown to actually conduct consultation and authorize accommodation measures.

The Panel heard that the current decision-making model is hierarchical, flowing from the Crown, to the NEB, to proponents, and lastly to Indigenous groups and civil society. It was suggested that in the future this model would not be a hierarchy, but rather a network of parties with relationships with each other, working together to resolve issues and make decisions.

Participants suggested that no further evaluation of a project should occur until the environmental assessment is complete.

With respect to timelines, the Panel heard that the NEB Act today allows the NEB some discretion in extending timelines of a project review where warranted, and that this is a good practice which should be employed more frequently.

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*THEME: Compliance, Enforcement, and Ongoing Monitoring*

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### **Public Session – March 21, 2017**

The Panel heard about the importance of safety and preparedness, which is especially pertinent in Saint John, as it is a very industrialized city, with numerous overlapping industrial activities and risks.

Participants suggested that many of the tools necessary to ensure safety, security, and compliance are in place and available to government, however, how they are used and coordinated are major concerns.

For example, Saint John is a port, which means that jurisdiction for many activities is shared between agencies, divided by where the sea begins. Practically speaking, this means that the NEB, for example, might regulate pipeline safety measures and emergency plans on land, but would not be responsible for a spill into the harbour from a tanker. For this reason, it is imperative that regulators and emergency responders collaborate openly and in advance to ensure that emergency measures are in place and adequate. The Panel heard that preparation is critical, and learning from best practices, including clear protocols on who is responsible for what, what infrastructure is required, lines of communication in the event of emergency, and so forth.

The Panel heard concerns that measures are not planned or publicized to guarantee the safety of local populations in the event of a catastrophic emergency. Participants expressed a desire to see and input into emergency response plans, both in the early stages of project approvals, but also throughout the lifecycle of a project.

Participants suggested that projects should not be permitted to proceed until emergency response plans are approved. To achieve approved emergency response plans, it was suggested that consultation and collaboration on these plans be made mandatory under the *NEB Act*. This would include better defining what constitutes adequate emergency planning, which should include clear lines of accountability for who will do what in an emergency.

Participants expressed a desire for clearer information channels, like hotlines, to report incidents and ensure that action is taken.

In addition, participants expressed concerns that enforcement is not sufficient to ensure compliance on the part of industry. This includes both the scope and volume of compliance monitoring activity, and penalties for non-compliance, which must be large enough to change behaviour. Participants also suggested that the bond required of proponents is not large enough to cover the enormous cost of a major incident.

The Panel heard concerns about how land acquisition is conducted in the context of NEB- regulated projects. Participants described how land agents will pressure land owners, and attempt to get agreements as quickly as possible, without necessarily informing land owners of all of their rights. In addition, it was suggested that current practice heavily favours one- time payments (instead of ongoing leases), and landowners may not understand the liability they have assumed in making such agreements. Also, landowners have been subject to confidentiality clauses that bar them from disclosing conditions of sale agreements, which depresses prices and creates difficulty as they feel barred from discussing financial details with family, or even accountants or realtors.

It was suggested that landowner rights should be better and formally protected, and that agreements should not be signed before compensation is determined. There may be tax implications of which landowners are unaware at the time of signing. The Panel also heard that landowners bear all liability for damage to pipelines on their land, even if said damage was caused by hunters or others trespassing on the land. It was further suggested that land agents should be in the employ of the NEB, not proponents, in order to eliminate some of the incentives for the conduct that landowners experience today. Moreover, the dispute resolution process is too long, and should be clearer. In general, participants described a system that feels stacked against small players.

The Panel heard a desire for better science on new products within existing pipelines, as new substances may exceed the limits for which existing infrastructure were designed. It was also suggested that all transmission infrastructure have an “expiry date” beyond which it must be retired or overhauled.

### **Indigenous Engagement Session – March 22, 2017**

The Panel heard discussion around the land expropriation powers of the NEB. A participant suggested that criteria for expropriation of land where Indigenous rights and title are infringed may be difficult, if not prohibited by the most recent jurisprudence.

Moreover, participants expressed skepticism regarding the current state of readiness to respond to spills or other incidents. The Panel heard concerns that some ecosystems or other areas may simply be too fragile to bear any risk of a spill, and that projects in such areas belie a mistaken belief that we have the capacity to remediate potential damage.

The Panel heard a desire on the part of Indigenous communities to be much more involved in monitoring activities. This includes seeking better arrangements with proponents for funding for meaningful employment and capacity building in order to play a greater role in ensuring the safety and security of both new and existing pipelines.

A participant mentioned an example of having convened an Indigenous monitoring committee for a project, but with the stipulation that monitors could not hinder or obstruct the project proponent, and that monitors were advisors only, with no authority to take any action to ensure greater safety.

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### *THEME: Engagement With Indigenous Peoples*

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### **Indigenous Engagement Session – March 22, 2017**

The Panel heard that the NEB and the Crown need clearer protocols for early engagement, consultation, and accommodation. This includes both formal legal obligations and better enshrining best practices to guide activities.

Participants expressed the view that engagement with Indigenous peoples must occur under the auspices of nation-to-nation relationships, and that early engagement is critical. The courts have stated that Indigenous peoples must be engaged and consulted as soon as the Crown believes their rights may be affected, and not after many of the details of a project have already been worked out. Indigenous people may feel that their input is not sought in good faith, if the dialogue begins after major decisions appear to have already been made.

Also, the NEB and the Crown need to define clearer guidelines for how engagement and consultation unfold in practice. Without such guidelines, individuals are left to start from the beginning and may make the same mistakes repeatedly without benefiting from the experiences of the past.

Overall, the Panel heard that the government must understand that Indigenous peoples are rights holders, not just stakeholders. This distinction entails a different relationship, and different processes, because Indigenous rights are fundamentally different in law than the interests of other parties. Moreover, it was suggested that Indigenous peoples should automatically be deemed to have standing in any project affecting their rights, and not have to justify this standing repeatedly.

Funding and funding sources were raised as issues. First, funding must be adequate and commensurate with the depth and complexity of the issue at hand. It was suggested that funding under CEAA processes is more adequate than those of the NEB. In addition, the Panel heard that communities who oppose a project but accept proponent funding to support their intervention in a project review may feel inherently conflicted. This points to a larger issue that one participant described as “damned if you do, and damned if you don’t” with respect to Indigenous engagement. On the one hand, Indigenous engagement may be perceived as tacit approval for a project, even if a community engages in an effort to alter or oppose a project. Conversely, a dissenting community which chooses not to join engagement processes may be seen to have approved of a plan by virtue of its silence.

Participants also mentioned that the NEB website is difficult to navigate for computer savvy people, much less average citizens who wish to access information. Specifically, the Panel heard that full text searching is difficult to do efficiently, and large document files should be available as one single file, but also with the major sections broken down separately. As it stands today, some large files are only available broken down into their constituent parts, so accessing fifty pages of a report might require one to open dozens of separate files.

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*THEME: Public Participation*

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### **Public Session – March 21, 2017**

Participants raised the 2012 legislative changes, which affected NEB decision-making and public participation processes. These changes have, for many, eroded confidence in the NEB, and in the ability of the public to meaningfully input into NEB decision-making.

The Panel heard that standing is a major barrier to meaningful public participation. Many individuals and groups have been deemed not to be “directly affected” by a project, and therefore feel as though they have little opportunity to input into NEB decision-making. At the very least, participants found it difficult to accept that they were barred from submitting letters of comment if they did not have standing.

Participants feel as though they are at a significant disadvantage during hearings as compared to the vast resources available to project proponents. It was suggested that the NEB could create a committee or some form of public intervenor, which would allow stakeholders to identify concerns and have their interests represented during formal proceedings. Such a body could also prioritize and fund scientific or legal research that would benefit a larger class of stakeholders. Today, in contrast, intervening parties may receive funding individually, but lack the ability to commission large scale studies, or even the capacity to navigate the many legal, engineering, scientific, and other issues at play. The solution to this issue is not just allotting more and more money to intervenors, but establishing processes that ensure that the voices of intervenors are effectively represented and heard by the NEB.

The Panel heard that NEB hearings are intimidating to participants, with confusing procedures, and often revert to a formal “people vs. suits” dynamic, that does not promote discussion and mutual understanding, and where the greater resources of proponents can make processes feel imbalanced.

Also, participants talked about proponents hosting open houses to share information. While these practices are useful, the Panel heard that citizens would also like open houses or informal public meetings with the NEB itself along with proponents available to publicly answer questions in a public forum. Similarly, there was an interest in seeking more option discussion rather than presentations that push certain information without genuine engagement on the issues.

Project timelines were also raised as problematic. It was suggested that project timelines be scaled to the complexity of the project in question, so as to allow adequate preparation time for intervenors. For complex projects, it may take considerable time to marshal resources and commission relevant studies. Broadly speaking, participants expressed a desire to be more involved in project scoping, so that all parties could work together to agree on what is in and out of scope during a particular review, in an iterative process.

The Panel heard that the information provided by proponents can limit the depth and quality of public participation. For example, if a map of a proposed pipeline route is developed, but at a level so abstract that its specific effect on the area cannot be determined, then the public is at a loss for how to contribute meaningfully and assess the risks of a project.

Participants expressed a strong desire to see greater engagement with Atlantic Canada in NEB business. It was noted that the Expert Panel itself made only one stop in Atlantic Canada, and that more generally people expect better access to the NEB in the future. To this point, it was suggested that the NEB establish more regional offices, which would be responsible for ongoing engagement with citizens, and could help interested parties understand and navigate the processes by which they could input into decision-making, help landowners understand their rights, and other functions.

One participant provided the example of the New Brunswick Clean Air Act, and the public participation regulations under that act, as examples of best practices to be looked to. Under this act, the Minister announces projects for review, takes questions, and answers those questions publicly. The same act also features a regulation creating an independent panel which works on issues in the public interest and acts as a sort of public intervenor.

Finally, a participant asked about the NEB's funding model. Specifically, how fees from proponents are handled, and what percentage of the NEB's overall budget is sourced from the recovery of costs from proponents. It was suggested that this scheme could create an inherent conflict, if the regulator is dependent on industry for funding.

The participants' questions, which are described below, will be sent to the NEB to prepare a response.

*Could you please provide an overview of the NEB's funding model? In particular,*

- a) What are the sources of NEB funding?*
- b) What percentage of the NEB's budget is derived from industry? How is this funding used?*

Once it is ready, the response will be posted on the Panel's website and sent to the participant who posed the questions.

## Montreal, QC

### **Expert Panel on National Energy Board Modernization Public Consultation Montréal, Québec – March 28-29, 2017**

The Expert Panel for the Modernization of the National Energy Board met in Montréal March 28-29, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

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#### *THEME: Governance and Structure*

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### **Public Session – March 28, 2017**

The Panel heard from many participants that a major overhaul of the NEB's governing legislation and structure is needed, whereas others felt the existing rules and structure are adequate, needing only to be implemented more effectively and consistently.

Several participants urged the Panel to recommend that the Energy East project review be suspended until the laws and regulations governing the NEB have been transformed, as per this modernization process, to handle the review more effectively and with greater integrity.

The Panel heard that the NEB's perceived credibility and impartiality are key to earning citizens' trust. It heard that the public currently views the NEB's integrity as compromised by its proximity to industry, calling it a "captured regulator". Public opinion polls and quotes from within and outside Québec were offered to support this claim.

The Panel also heard that the revelations surrounding former Québec Premier Jean Charest's private meeting with the NEB chairman and NEB's members to discuss the Energy East review process have been especially damaging to the public trust, partly because they have been brought to light by investigatory journalists rather than formal mechanisms. Mr. Charest was purportedly under contract

with Energy East proponent TransCanada. In the opinion of many present, this ethics breach warrants an investigation prior to creating a modernized NEB or its successor.

The Panel heard that the problem seems to lie in the non-application of existing rules on independence and impartiality. It was suggested that mechanisms be put in place to ensure that the NEB is exercising its responsibilities in a neutral, independent and transparent way. One specific suggestion offered was for Canada's Auditor General to conduct random audits on the NEB to catch and rectify potential ethical lapses.

#### Board and Project panel Composition

The Panel heard concern over industry affiliated appointments to the NEB, and a call for board members representing a broader range of experiences, interests and knowledge.

It was specified that participants wish to see civil society (ordinary citizen), Indigenous and local representation.

The Panel heard that the Metis Nation wants members who understand their rights and priorities. The Panel also heard of the need for members to have an understanding of how agricultural lands and forests are likely to be affected by projects, as most private landowners are agriculture and forestry producers.

Given the NEB's current quasi-judicial nature, one participant questioned whether people without a legal background should be making legally binding decisions.

Participants acknowledged the need to draw on the expertise of those with industry experience, but wondered how to ensure the NEB's independence in light of this. Some participants felt that, when in conflict, the independence of the NEB should be favored over acquiring talent with oil and gas industry knowledge.

Some participants suggested that people with industry expertise and ties should only be technical advisors and consultants rather than permanent or temporary members. One participant suggested setting a policy whereby a minimum number of years must pass before an NEB board member or employee may go work for the industry. Some participants acknowledged that such limits would need to be accompanied by a level of job security and compensation commensurate with the sacrifice they demand.

One participant pointed out the need to specify what is meant by "industry", assuming that most are referring to oil and gas. They noted that moving forward, "industry" should be understood to refer to renewable energy sources as well.

#### Bilingualism Requirement

The Panel heard that NEB board members and staff must have functional bilingualism, as per the definition applied to the Supreme Court of Canada, so they can read and understand evidence as filed.

Participants expressed their conviction that proponents should also be subject to bilingualism rules, with all documentation offered in both French and English. One participant proposed that this rule apply whenever a project takes place in Quebec.

#### Location of NEB Headquarters

Most participants were concerned with the NEB's proximity to industry and therefore preferred to see it moved to Ottawa. In addition to decreasing the risk of industry bias, a move to Ottawa is believed to facilitate collaboration between ministries, which will be especially important in coordinating a transition away from fossil fuels.

Some participants cautioned that a move to Ottawa may result in undue political influence over the NEB, though they felt that it would be worth it if it removes the appearance of conflict of interest.

Some participants saw no problem with the NEB headquarters remaining in Calgary if decentralized satellite offices are maintained. The latter reduce the appearance of bias and are more accessible to citizens around the country. A participant with public safety expertise felt that regional offices are crucial from an emergency preparedness perspective, as they help to ensure that local culture and emergency procedures are integrated into any incident response.

#### Role of NEB Chair and CEO

The Panel heard that the roles of CEO and Chair should not be occupied by the same person to better reflect their different orientations.

#### Policy Direction

The Panel heard that the NEB's regulatory process must not be treated as a substitute for consultation on policy issues. Participants agreed that the government should be responsible for creating the policy framework in which the NEB operates. Participants said that the creation of a clearly communicated energy policy for Canada would provide a framework in which the NEB and project proponents could work more efficiently.

The Panel was told that currently, many issues arising in the hearing process are policy issues that the NEB has no authority to address. Participants supported the idea of creating a forum in which such a policy framework could be discussed, in consultation with Indigenous Peoples and the public.

One participant suggested that in determining policy, political leaders should re-examine the sustainability of Canada's production and consumption habits, considering the benefits of a more circular economy.

### **Indigenous Engagement Session – March 29, 2017**

#### Board and Staff Composition and Expertise

The Panel heard that to gain the trust of Indigenous Peoples, they must be better represented in the NEB's membership and staff. One participant suggested that Indigenous Peoples form 50% of permanent board members. It was also specified that the board should have representation from Indigenous People who live on the land, rather than only Indigenous People from urban centres.

The Panel heard that the NEB selection and appointment process should be transparent and that it should involve Indigenous Peoples, ensuring that Indigenous women (represented by civil society groups) have a say. It also heard that Indigenous Peoples should have an equal role in appointing individuals to project review boards.

It was also discussed that the NEB should represent Canada's regional diversity and contain members with expertise in community development, sociology, economics, traditional knowledge, renewable energy, energy efficiency, fisheries and aquatic ecology, land ecology, climate change mitigation and adaptation and archeology.

It was stated that all parties involved in the NEB's decision-making and operations should receive comprehensive training on the history of Indigenous Peoples, treaty rights, the issues facing Indigenous women, intercultural communication, human rights and the fight against racism and discrimination.

The Panel was told that the roles of CEO and Chair of the NEB should be held by different people.

### NEB Location and Residency Requirements

One participant called for all impediments to Indigenous participation in NEB governance to be removed from the NEB Act. The Panel heard that the residency requirement for board members should be eliminated, and that the NEB should not be located or funded in a way to bias its conclusions. It heard that participants feel it is much too close to the oil and gas industry, calling into question its impartiality. Some participants wished to see the NEB headquarters moved to Ottawa, though they warned against replacing industry influence with political influence.

The Panel heard from some participants that the NEB's current Calgary location is fine as long as there are changes made to its mandate and governing legislation.

### Policy and Legislation

The Panel was told that participants wish to see a major overhaul of the NEB Act in order to translate the government of Canada's commitments and goals into action. It heard that the NEB Act should include requirements for the informed consideration of Treaty rights and the application of Indigenous knowledge.

It heard that the NEB should be tasked with implementing a National Energy Framework, developed jointly by the federal government, provincial and territorial governments, and Indigenous Nations. Such a framework would be responsible for assessing what energy resource potential is available, the national demand for energy, the potential for export opportunities, energy diversification targets (including those needed to meet international climate commitments and societal expectations) and the infrastructure requirements needed to meet current and future needs.

The Panel also heard that, in setting energy policy, political representatives must consider the growing inequality among Canadians and the cost of energy to the end user.

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### *THEME: Mandate and Future Opportunities*

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## **Public Session – March 28, 2017**

### Scope of Mandate

Some participants proposed to divide the NEB's current role among different government agencies. One participant specified that the NEB's role should be reduced as society shifts further away from oil and gas-related energy to focus on decommissioning pipelines.

Some participants expressed their desire to keep the NEB as a single point of contact through which proponents can fulfill all regulatory requirements throughout the project lifecycle.

They believe the NEB's mandate is adequate and that dividing the review process between the NEB and another agency would make the process more cumbersome for proponents.

The Panel heard that the NEB's current project by project focus must be expanded to consider the cumulative impacts of various forms of infrastructure, and long-term national strategies based on forecasted needs, risks and opportunities. Such forecasts may span several decades as the ramifications of energy projects and climate change are too long lasting to be credibly assessed over a short time. As such,

the NEB's mandate must no longer hinge on the assumption of a continuously increasing demand for fossil fuels.

The Panel heard that the NEB's mandate should fall within the context of Canada's greenhouse gas (GHG) emission targets and global commitment to the Paris Climate Agreement. The NEB should operate on the understanding that such targets were established to remedy an urgent situation. The Panel was offered the example of the United Kingdom's integration of a carbon budget into legislation. One participant expressed their desire to see the NEB mandate include the transition away from fossil fuels.

The Panel heard from one participant that her organization sees no need to expand the NEB's mandate, but rather prefers to improve its ability to fulfil its existing mandate more effectively. Another participant wishes to see the NEB Act amended to include decision-making and monitoring authority over energy transportation by rail, road and waterways, in addition to pipelines.

The Panel heard suggestions to withdraw the NEB's project assessment mandate and give it to a new national entity akin to Québec's *Bureau d'audiences publiques sur l'environnement* (BAPE). This new office would examine projects and provide recommendations to the Governor in Council (GIC) on the basis of the information it gathers and its consultations with the public, with an emphasis placed on transitioning to greener energy sources.

The Panel heard from other participants who envision reducing the scope of the NEB's mandate in favor of sharing more power with provinces, territories, municipalities and Indigenous governments, in the spirit of cooperative federalism.

The Panel further heard that the NEB must scale and grow its capacity in proportion to any new or expanded mandate. Expanding the overall NEB mandate and increasing compliance and monitoring activities will require that the NEB maintain the organizational capacity commensurate with these expectations.

#### Government Institutions

The Panel heard from some participants that Canada should create a national institution with the mandate of coordinating the transition away from fossil fuel-based energy. It was noted that the province of Québec is in the process of creating such an institution and that one already exists in France. Some participants stated that the NEB does not appear to have the capacity to fulfill such a function.

It was proposed by one participant that the NEB mandate should be split between two distinct organizations, one studying fossil fuel-based projects and another studying projects based on alternative forms of energy. It was suggested that this could help reduce public cynicism.

#### Electrical Transmission Lines

The Panel heard that international power lines are a vital component of the Canadian and North American power grid, with net exports to the United States exceeding 50 terawatts a year.

Regarding electricity, the Panel heard a desire for a more efficient, streamlined and predictable process of regulating electricity exports and international powerlines. It was noted that regulatory requirements have not changed for many years despite changes in the electricity industry. Specifically, it heard support for the modernization and streamlining of the export permitting process.

One participant voiced their organization's support for procedural reforms that improve the efficiency of applying for international power line permits. Procedural form and governance are interrelated, given the NEB's quasi-judicial role.

A participant suggested that the NEB play a role in bilateral provincial negotiations over electrical transmission lines. What's more, one participant expressed her concern about the increased risk of corrosion caused by electrical lines crossing pipelines, adding that since there are many more kilometres of pipeline than electrical lines, when these two cross, the rules governing pipelines should take precedence. There is a risk of confusion in such situations and the NEB should be responsible for providing citizens with the appropriate information on which regulatory framework is being applied. One participant said that she had to pay to find out which standard applies to a nearby area where an electrical line and pipeline cross and called for more transparency in sharing information with the public.

#### Determination of Public Interest

Participants agreed that determining the Public Interest involves considering the various complex intersections of social, economic and environmental factors and that these have evolved since the NEB's creation. The Panel heard that the definition of Public Interest to be applied by the NEB should be made very explicit, so as to limit discretion in its interpretation and application.

Concern was expressed vis-à-vis the perception that so far, economic factors have outweighed all others in the NEB's deliberations. The Panel heard that in considering the Public Interest, decision-makers should consider climate change and protecting water sources higher priorities than economic factors, as life itself depends on a healthy environment. It heard that in considering socioeconomic issues, the social cost of GHG emissions from production to combustion should be included in the analysis.

In light of this, some participants voiced their belief that the approval of any further fossil fuel infrastructure would contravene the Canadian Public Interest.

The Panel heard of a tool called the Social Cost of Carbon which was developed in the United States and has been adopted by Environment and Climate Change Canada. It allows damages to be estimated based on tonnes of carbon emissions in each year.

A participant asked if, given the global shift away from fossil fuels, investing a fifth of the Canada's economy in this industry would be wise from a economic perspective.

One participant provided the following list of minimum criteria to be applied in the determination of Public Interest:

- Ecological integrity;
- Respect for ancestral and acquired rights to the land and resources;
- Respect for existing environmental and public health policies; and
- Relevance to social context and relative return on investment (comparing costs and benefits to alternative projects).

The Panel heard that such considerations reflect the government of Canada's international commitments, public statements and policy orientations.

A participant voiced their concern that this may push the imbalance the other way, neglecting important economic impacts. It was proposed that imbalances be avoided by applying a sustainable development lens to determining the Public Interest. This means considering the various interdependencies of social, environmental and economic factors. For example, many industries may be directly or indirectly affected by pipeline infrastructure or its upstream and downstream effects – fishing, tourism and construction, among others. The Panel heard that the Indigenous notion of weighing the impacts of a decision on seven generations to come could be a good guideline to adopt.

The importance of adopting a sustainable development lens was further illustrated by the cost to mental health and wellbeing of upheavals to people's living spaces, agricultural lands, jobs and risks to water and food security.

The Panel heard that the NEB's consideration of economic interests should take into account regional and local consequences, and not just the national GDP, which may hide significant financial losses at a municipal level. Pipeline owners and users benefit from inequitable tax advantages, with citizens assuming losses in the form of decreased land use, safety risks and mitigation measures, reduced tax revenues and, in some cases, social cohesion. One municipality with 25 hectares occupied by pipelines estimates losses in the order of several millions of dollars.

In considering the social component of Public Interest, a participant offered the example of Norway, which invested the royalties from energy development in solid social systems that can now support working families transitioning out of their jobs in the oil and gas industry. In contrast, working families in Alberta are finding themselves in a difficult position.

The Panel heard that the Public Interest should include consideration of provincial, territorial, municipal and Indigenous laws, as currently, when a project crosses interprovincial or international borders, federal laws eclipse them.

It was stated that broadening and specifying the definition of Public Interest in legislation would fortify the NEB's impartiality by providing less leeway to NEB board members with ties to specific interests.

#### Energy Information

The Panel heard that the NEB's energy information mandate should be separated from its regulatory one, as in the United States. The Panel heard that it is a conflict of interest to have the NEB responsible for forecasting energy needs and informing the public about matters of energy and climate while acting as regulator.

The Panel heard that the Energy Futures report is used not only by political decision-makers but also by civil society and scientists. Participants said that in the last Energy Futures report (2016), the published demand for oil and gas was incongruent with Canada's greenhouse gas emission targets and climate change commitments. It was further noted that it appeared to underemphasize the significant advances made in renewable energy technologies.

The Panel heard that Canada's energy information system is incomplete, incoherent and full of large gaps. Coherent, comprehensive and impartial energy information is a crucial element of sound policy making and public understanding of energy's interactions with the economy and environment. It is also needed to perform broader sustainability assessments.

The Panel heard that every project application produces copious amounts of data but, as it is considered proprietary information, it is not available to the public. A participant asked that baselines studies, impact assessments and other information be put in a database that could be accessed by researchers.

A participant shared that there are approximately five energy systems models for Canada and that most are either held by institutions and inaccessible to the public, or unintelligible for the average interested citizen. The model on which the NEB bases itself should be available to the public and should go further into the future than the NEB's current 2030 outlook. Models were cited as being important as they bring together fragments of data to increase the capacity of humans to perceive and understand the systemic consequences of a proposed course of action, allowing for more informed decisions.

The Panel heard that it is a conflict of interest to have the NEB responsible for forecasting energy needs and informing the public about matters of energy and climate while acting as regulator.

### Environmental Assessment

While one participant expressed a desire to see the environmental assessment (EA) function remain with the NEB, most participants requested that it be given to a separate government body, such as the Canadian Environmental Assessment Agency (CEAA) which is more inclusive and better equipped to study biodiversity, climate change and social issues. One participant proposed that a NEB-led project review should only move forward once CEAA has given it its approval. It was noted that, unlike the NEB, CEAA's prime focus is on community impact. The Panel heard that whoever does the EA, it should encompass an assessment of long term sustainability, which would integrate upstream and downstream effects, and intergenerational and environmental justice.

Some participants favored a new agency, akin to Québec's BAPE, conducting EAs in a highly consultative manner that takes social and economic factors into account. The Panel heard that, even with the EA conducted by another agency, the NEB should still have to consider climate change and other environmental issues in its decisions. It also heard that the NEB could remain responsible for the issuance of Certificates of Public Convenience and Necessity (CPCN), with Cabinet holding veto power.

Some participants spoke of turning the EA into a sustainability assessment that would consider upstream and downstream impacts, as well as intergenerational and environmental justice.

One participant voiced her organization's position that the NEB should keep the mandate to conduct EAs; given the organization's quasi-judicial nature, the procedural role and the adjudicative functions are interrelated.

### Cumulative Effects

The Panel heard that the NEB should assess projects proposals in the context of the cumulative impacts of various forms of infrastructure, rather than the current process of evaluating each project individually. Projects should be assessed on the basis of how they fit in with long term national strategies based on forecasted needs, risks and opportunities; such forecasts may span several decades as the ramifications of energy projects and climate change are too long lasting to be credibly assessed over a short time.

Some participants believe that there should be triggers built into the NEB Act determining when a strategic environmental assessment (SEA) or class assessment is needed, as more of these types of assessment should take place. It was suggested that a body other than the NEB should be charged with conducting long term planning, involving SEA, regional assessments, engaging with Indigenous Peoples and land use planning, among others.

## **Indigenous Engagement Session – March 29, 2017**

### Scope of Mandate

Participants shared differing views on the scope of the NEB's mandate. Some wished to see it expanded to include a focus on renewable energy sources and related storage and transportation technologies, or to see it empowered to map out future energy scenarios and trends.

Others voiced that they have lost faith in the NEB's ability to conduct broad and thorough enough EAs and that such EAs should be entrusted to the CEAA. It is believed that this will allow a larger picture to be taken into consideration, including upstream and downstream GHG emissions. It was added that Indigenous Peoples should help define what is studied in EAs.

A clearer understanding of each party's role and one centralized agency responsible for all EAs would save time and money for all. Additionally, participants believe that environmental assessments should adopt a sustainable development lens, understanding that social, cultural, economic and environmental factors are interdependent.

Some participants envision a modernized NEB acting as a center of excellence and technical expertise contributing to the implementation of a National Energy Framework, rather than acting as regulator. With its role limited to technical aspects, it could provide expert counsel to other government bodies tasked with conducting EAs and safety and emergency preparedness work.

### Public Interest

The Panel heard that the NEB Act should include a clear definition of Public Interest developed jointly with Indigenous Peoples. However, it also heard that the constitutionally protected interests, rights and titles of Indigenous peoples should be evaluated outside the scope of a Public Interest determination and take precedence over it. Among the considerations that the NEB must take into account when evaluating impacts on Indigenous Peoples, one participant listed the following:

- Credibly identifying impacts to Section 35 rights
- Considering the impacts of upstream developments
- Regulating a broader range of projects: no more project splitting between various jurisdictions
- Honour of the Crown has been upheld
- Advancing reconciliation in all decisions

The Panel heard that were a National Energy Framework to be developed, as outlined above, the NEB could apply it to help determine whether a project is in the Public Interest or not. Assuming that CEAA is entrusted with the task of conducting EAs, it could assist the NEB in making its Public Interest determination.

The Panel heard that the NEB has overemphasized short term economic gains thus far. Participants cited the need to prioritize climate change and long term economic prosperity in the determination of Public Interest. They cited decisions by foreign courts and governments as examples of aligning energy decisions and climate considerations. In one case, a judge in the Netherlands ruled that the government had a legal obligation to act in the best interest of current and future generations by lowering CO2 emissions. Participants were supportive of legislating a duty of care that would consider the rights of future generations in determining if a project is in the Public Interest. It was noted that this is reflective of a long-standing Indigenous principle of considering an action's impact on the next seven generations.

### Cumulative Effects

The Panel heard that while the cumulative effects of various infrastructure projects have dire consequences on the ability of Indigenous Peoples to uphold their traditional practices and way of life, it falls outside the narrow scope of the NEB's current mandate. It was noted that even if another organization like CEAA assumes responsibility for EAs, changes will have to be made to governing legislation to ensure that cumulative effects are considered and reliably tracked. This was raised by many participants as an urgent concern and pertains not only to current uses of Indigenous territory but also future land use plans made by communities.

## **Public Session – March 28, 2017**

### Decision-Making Context

The Panel heard that it is important that prospective proponents know the decision-making criteria and policy framework in which they fit before embarking on a project.

It was stated that as Canada has signed the Paris Climate Agreement and acknowledges the grave risks and consequences of climate change already being felt, a new decision-making framework must be drawn from the NEB in which all decisions are viewed from the standpoint of a transition to cleaner energy sources.

Examples were provided of other countries having made decisions on the basis of climate change consequences. Austria cancelled a runway at one of its airports, a court in South Africa cancelled a coal station and US courts determined that the costs associated with carbon emissions must be taken into account alongside the gains that may result from activities generating them.

The Panel heard of a tool called the Social Cost of Carbon which was developed in the United States and has been adopted by Environment and Climate Change Canada. It allows damages to be estimated based on tonnes of carbon emissions in each year.

### Decision-Making Criteria

The Panel heard that the rules governing the NEB's decision-making must be clearly enunciated as the largest hurdle for industry is regulatory uncertainty. When governments do not clearly indicate their criteria for project approval, companies invest millions of dollars upfront without the chance to predict the likely outcome of their applications.

The Panel heard a call for publicly accessible, free decision-making standards available in both official languages.

It was noted that a determination of social license currently lies outside the scope of NEB responsibility. One participant stressed the need for caution in considering a social acceptability requirement, as it is a subjective, ill-defined term. Their fear is that the decision to grant or withhold social license by a community would result in more unpredictable decisions, thereby creating a more unstable and therefore unattractive business climate. As one participant put it, the NEB should make decisions based on the rule of law and not who shouts the loudest.

Participants acknowledged the challenge faced by the NEB in bringing together many diverse worldviews before coming to a decision. One suggestion offered was to require that proponents explain their understanding of the worldview of each community directly affected by their project in the application itself. This may help in confirming that adequate consultation has taken place.

Many participants supported the inclusion of a climate test in the NEB's decision-making criteria. Most of them believed that upstream and downstream greenhouse gas emissions should be evaluated in the context of Canada's climate change targets. One participant felt it is unfair to expect proponents to be responsible for any emissions outside the scope of their project activities; the example raised was of a construction company building a road and being held responsible to ensure that only electrical cars will ever drive on it.

Participants told the Panel that the NEB's decision-making criteria should mandate the consideration of alternative energy developments, based on impartial data provided by neutral parties. It heard that there has so far been an overreliance on industry data in justifying the need for, or opportunity presented by, a project.

The Panel heard that the NEB should ensure that proponents respect provincial and territorial laws and regulations as well as their own. A specific request was made that the NEB consider the decisions of Quebec's *Commission de protection du territoire agricole* (CPTAQ).

#### Decision-Making Roles

The Panel heard from one participant that all big projects should be subject to provincial and national government approval as determined by free and secret voting. It was clarified that the element of discretion is important as some politicians will surely wish to transition to the private sector following their term, and may otherwise feel pressure to approve a project to avoid dampening their employment prospects.

One participant suggested that, to help restore the balance of power between proponents and citizens, the NEB's decision-making function should take the form of an Inquiry Commission, as in civil law tradition in France, presided over by an inquisitor. He recommended to move from a quasi-judicial process to an inquisition process.

The Panel heard that the Canadian Parliament should be deciding on large projects rather than the Cabinet deciding behind closed doors.

One participant suggested that assent by local governments be a prerequisite to project approval.

#### Pipeline Routes

The Panel heard that there is a need for set protocols governing and limiting pipeline routes. Presently the proponent determines a corridor on time for the hearing, but they may determine the exact route later on, after a Certificate of Public Convenience and Necessity (CPCN) has already been issued.

One participant requested that "no-go zones" be established through a concerted protocol between different levels of government. Such zones have been instituted in Australia and the United States to protect zones where spills may have particularly serious consequences, such as densely populated zones, navigable waters, sensitive environments and drinking water sources. The identification of such zones would inform pipeline integrity and security programs throughout the infrastructure's lifespan.

Participants requested that specific pipeline routes and proposed risk mitigation tactics be identified before the hearing process so that they may be scrutinized and precautionary principles may be applied to decision-making.

#### Access to Information

The Panel heard that access to information on proposed projects should be a priority for the NEB. Its website should include all proponent documents in English and in French. By consulting communities at the onset, proponents can ensure that they are given access to the information of greatest concern to them.

#### Section 58 of the NEB Act

Participants stated that s.58 of the NEB Act should be eliminated and that the NEB should have jurisdiction on cross-border pipelines regardless of their length. This is believed to help with the problem of "sausage-links" whereby the cross-border portion of a larger pipeline is presented as a small project of

its own to avoid going through the NEB's review process that is required for a longer project regulated under s.52. Therefore, there should no longer be a difference between small pipelines under 40 kilometers and large pipelines of 40 kilometers and above. Both would be subjected to the review process under s.52.

### Decision-Making Process

The Panel heard that industry would benefit from the predictability of having the “go/no-go” determination, based on a public interest determination, made earlier in the application process. It heard that the investment climate would be favored by a more transparent, inclusive, and time bound decision-making process.

Some participants impressed upon the Panel that hearings and public consultations must be time bound and restricted in scope, lest proponents invest money in developing a project application and be left in limbo. Other participants expressed concern that such limits are undemocratic.

It was noted that the Panel has heard from some that there could be two stages to decision-making. The first would consist of a determination of public interest by the government. If the determination is a positive one, the project would proceed to a second step in which the NEB would establish project conditions. Some participants supported this idea, while others took issue with such a process on the grounds that it would restrict public, local and Indigenous government consultations to the earliest stages of an application review and that, as presented, it would not allow for parties to change their mind if more information comes to light following a stage one determination of Public Interest.

Another participant added that there should be a third, preliminary step: that of strategic regional and national environmental assessments that would predetermine whether or not projects of a certain kind or in a certain place are desirable.

One participant stated that the notion of Public Interest cannot be excised from the NEB's task of setting project conditions and therefore, the decision-making process could not be separated in such a way. To illustrate this, an example was given of a company wanting to go back on a statement it made to community members that only a certain substance would be transported by a given pipeline and of community members having to fight to have the NEB to mandate the respect of their initial claims in its project conditions.

One participant questioned if energy infrastructure should be privately owned, citing a private company's responsibility for the Lac Mégantic tragedy of 2013.

A participant suggested that while awaiting clear policy direction, prospective proponents can find predictability in the Paris Climate Agreement which indicates that it is time to transition away from oil and gas projects. The Panel heard that the NEB Act should make this explicit so that industry members know that it is the time to adapt to a new reality.

### Hearings

The Panel heard that public accountability is a key component of the review process. Some participants voiced concern over the lack of oral cross-examination opportunities in the project review process. The Panel heard that written responses from proponents often lack detail and accountability.

Participants voiced a desire to see the in-person hearing process become more welcoming and inclusive, suggesting it be inspired by the BAPE in Quebec. One participant posited that the fact that the NEB has approved nearly all projects placed before it is indicative of a need for more debate to be built into the process.

The Panel heard from participants in favor of a return to pre-2012 joint review processes. They were also in favor of expanding standing rules from allowing only those “directly affected” to the pre-2012 standard of all interested persons.

A participant further suggested that the Panel consider alternatives to the intimidating quasi-judicial hearing format such as World Café, community cartography and round tables. The Panel heard that hearings should also allow for written submissions, as well as audio and video submissions, which would make the process more inclusive of those with difficulties reading or writing.

The Panel heard a call from some participants for the right to obtain a judicial review of NEB decisions at no unnecessary cost to the party seeking it.

### **Indigenous Engagement Session – March 29, 2017**

#### Decision Making Roles

The Panel heard from participants who were pleased with the idea of the NEB providing recommendations to the federal government in regard to large projects, rather than making decisions itself. Some participants requested that all of the NEB’s decision-making mandate be transferred to the Crown, as they perceive that the NEB has demonstrated insufficient deference to Indigenous Peoples’ assertions of territorial rights, traditional knowledge and constitutional rights. The Panel heard that if the NEB makes the final decision, it should be responsible to assess any impacts to the rights of Indigenous Peoples and the adequacy of consultation with them. If the NEB recommends a decision, it must be very clear about what assessments have or have not been conducted to arrive at this conclusion.

The Panel heard that the NEB Act should spell out a clear division of labour between the Crown and NEB as it relates to decision-making. It also heard that Canada should share decision-making jurisdiction with Indigenous communities, reflecting s.35 of the Canadian Constitution and the principle of Free, Prior and Informed Consent (FPIC) outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Participants stated that providing Indigenous Peoples with a more active and authoritative role in decision-making would result in outcomes that are safer and healthier for the Canadian population at large.

The Panel heard that the NEB should continue to be responsible for the oversight of conditions set as part of the project review process.

#### Decision Making Criteria

The Panel heard that project-specific decisions should be coherent with broader regional and national policies, laws and values, including the Indigenous principle of ensuring the sustainability of natural systems for the next seven generations. The Panel also heard that decisions should be made by looking at the full array of project options available, rather than looking to approve or deny each project in isolation.

One participant impressed upon the Panel the importance of facilitating the participation of Indigenous women in decision-making processes, as well as the importance of weighing a project’s potential impacts on them. The Panel heard that the Government of Canada and some provinces are currently using a comparative gender analysis model to study the impacts of their projects and policies on men and women, and that the NEB Act should make such an analysis a mandatory component of the project assessment process.

The Panel heard that the NEB should require proponents to provide clear, complete and specific information before a project can be approved. Participants said that when information is left unclear or unspecified, decision-makers have been known to decide in favor of proponents, or rely too much on their

word. Complaints were heard about the NEB's past failures to fact-check the information or claims put forward by proponents in their applications, leaving this role and associated costs to concerned communities.

The Panel heard that EAs must address strategic, regional and project level plans and must be led and reviewed by different levels of government and private sector actors as relevant.

The Panel heard from one participant that an archeological evaluation should form part of a project's EA. The Panel heard that a project's impacts on food security and agricultural lands should also be taken into consideration.

### Decision Making Process

Participants discussed the proposal made by some to split the decision-making process into two stages. In the first, the Government of Canada would determine if the project is in the Public Interest and allowed to move ahead. In the second, the NEB would establish the project-specific technical requirements for proceeding.

Some participants agreed with establishing the Public Interest first, to provide proponents with enough predictability to justify further investment. One participant specified that the first stage could also include a determination by the government as to whether Indigenous Peoples have been adequately consulted.

However, the idea of setting time limits on when public and Indigenous interests would be considered was rejected by others. The Panel heard that each project timeline should be established by concerned parties upfront, rather than applying a universal time limit. It was stated that Indigenous Peoples require enough time to gather information, discuss it with their community members and come to a position. The Panel heard that the NEB's own processes should be more culturally sensitive and inclusive of Indigenous Peoples. Specifically, the Panel heard the current 30-day norm being woefully insufficient given the complexity of project documentation and resources available to Indigenous communities.

Pursuant to the UNDRIP and the principle of free, prior and informed consent, some participants expressed that any community whose land a project finds itself on should retain veto power and the right to bring further concerns to light at any stage of the application process. This is believed to be an embodiment of the nation-to-nation relationship the federal government has expressed interest in pursuing.

The Panel heard that within this pursuit of a nation-to-nation relationship, decision-making authorities should value and respect the decisions and findings of Indigenous Peoples' own governance bodies and project assessment processes. Some participants called for a parallel EA to be conducted by Indigenous Peoples to ensure their views, concerns and forms of knowledge are considered appropriately. Some participants support joint decision making on proposed projects between the Government of Canada and Indigenous governments.

Participants stated that if Indigenous People are excluded from the NEB's decision-making process, there will continue to be conflicts, causing delays and unnecessary resource expenditures for all.

## **Public Session – March 28, 2017**

### Collaboration with Municipalities

The Panel heard that municipalities are tasked with responding to an emergency or spill in the first six hours after it takes place and that as such, companies should work with municipalities first to determine emergency plans. The local emergency authorities concerned should be able to appraise the risks to their local environment and add to a project's emergency response criteria before a project moves forward. Currently, the NEB reviews and approves the company's emergency plan only once the project is approved and built, and the municipality is almost on its own in implementing the plan.

The Panel heard that proponents should be held to providing municipalities with the emergency mitigation and response plans. It heard that regulations exist to this effect but that the NEB has not been enforcing them. One participant told them that as the regulator, it is incumbent on the NEB to ensure that municipalities have the correct and up-to-date emergency preparedness plans for infrastructure on their land. An example was shared in which a municipality had to resort to an official access to information request to obtain from the NEB the emergency response plan for a project in their community.

The Panel heard that pipeline companies should have to give provincial and local authorities information on the composition and volume of what is being transported by a pipeline crossing their territory. Roles and responsibilities should be more clearly defined, and all parties should know the time it would take for a municipality to respond, what alternate sources of drinking water are available, what should be done with submerged petroleum and how to manage undetected flow variations.

It was remarked that current NEB regulations stipulate that companies must ensure ongoing training for firefighters, police and other organizations. However, in one example that was cited by a municipality, the proponent had not conducted a single emergency preparedness exercise in ten years.

Similarly, it is important for companies to have information on municipal resources. One illustration given was of a company headquarters in Alberta being alerted to a spill in Quebec. Rather than call 911, this company should immediately be able to retrieve the ten-digit Quebec phone number of local emergency services.

One suggested improvement was for the NEB to convene local risk management committees comprised of industry and government representatives as well as safety experts. Such committees would specialize in hydrocarbon spills and be funded by proponents, but supervised by the government. The Panel was told that one company has begun working more closely with the *Ministère de la sécurité publique* of Québec as well as municipal authorities, which is a good practice that has improved communications between them and with citizens.

### Specific Safety Concerns

The Panel heard from many of their concerns over the contamination of potable water by NEB regulated projects. Participants expressed a strong desire for more robust regulations protecting water sources. These would extend to emergency preparedness plans and ensuring that local communities are equipped with the knowledge and equipment needed to prevent the loss of drinking water as quickly as possible. A proponent possessing the equipment is not sufficient if it is half way across the country at the time of a

spill. In cases where traversing water sources cannot be avoided, one participant suggested that pipelines be encased in a protective tunnel.

The example of Energy East was offered in which citizens questioned why the pipeline would go so close to the drinking water source for the city of Montreal's 3 million residents. The company told them that it was because this was not one of the NEB's criteria.

Participants requested that specific pipeline routes and proposed risk mitigation tactics be identified before the hearing process so that they may be scrutinized and precautionary principles may be applied to decision-making. The Panel heard participants question how the NEB could have assessed the level of risk posed by an application and deemed the documentation complete when modelling had not been done on potential spill outcomes for 25 of the main rivers crossed by a proposed pipeline.

#### Monitoring, Incident Reporting and Accountability

One participant expressed concern over his understanding that companies are not required to report leaks of under 1,500 liters to the NEB. They believe that all leaks must be reported. With regard to restoring public confidence in the NEB's enforcement of project conditions, it was suggested that reported leaks and an account of the response to them be published by another organization, along with NEB-generated reports on how well companies are complying with project conditions.

The Panel heard that in the past, when oil and gas industry employees have put their jobs on the line by notifying the NEB of spills, the regulator has not responded, waiting until the incident is revealed in the media, forcing them to act. The Panel also heard of the need to listen to ordinary citizens who have been known to report technical problems, and of the need for an efficient and timely reporting mechanism.

Further suggestions for improved monitoring included engaging Indigenous peoples as co-governors of monitoring and the creation of local monitoring committees that would ensure a link to on-the-ground conditions and interests.

The Panel heard that its recommendations should address pipeline tampering, which has grown in prevalence over the decades. This poses significant risks to perpetrators, local populations and the environment.

#### Enforcement

While the Panel heard from some participants that the NEB's rules and tools to ensure compliance, safety and environmental protection are sufficient, it also heard from many that the NEB is not rigorously upholding the economic, social, environmental, and safety conditions it sets on projects, expending little resources to monitor and follow-up on them.

The Panel was told that the NEB should have and use a variety of tools to establish compliance and prevent future shortcomings, both of a corrective and punitive nature, not excluding legal sanctions. Some participants suggested that an investigation be launched in to proponent transgressions and the overall culture of non-compliance. Some participants believe that oversight and security responsibilities should not be entrusted to anybody with an economic mandate, such as the NEB. It was suggested that the Auditor General should monitor compliance much more closely than it currently is. Participants said that the NEB's reliance on self-monitoring by proponents must stop.

### Performance Criteria for Emergency Response and Preparedness

The Panel heard of the need to establish and enforce performance criteria for emergency preparedness and response. Such criteria must take into account that many different types of substances go through pipelines, and that the human and other resource needs in case of an incident differ and must be on standby to respond quickly when the need arises. A municipality representative present quoted an expert in saying that they do not have the equipment needed to respond quickly enough in case of emergency.

The Panel heard that as part of these performance criteria, proponents should be obliged to integrate their response plans with provincial and local procedures and not the other way around.

### Public Participation in Risk Assessment and Mitigation

The Panel heard that citizens must be made aware of the energy infrastructure near them. An example was given of residents of Terrebonne believing they had a waterman in their backyard, which turned out to be a pipeline. Only once the public is fully aware of the inherent risks and proposed mitigation strategies can they be expected to pronounce themselves on a project.

### Land acquisition

The Panel heard concerns about company-landowner relations. As one participant put it while citing an example of dishonest dealings, “it’s like the Wild West”. It was stated that the NEB should stop taking the proponent’s word that they have obtained permission from landowners. It was proposed that the NEB inform landowners of their rights before proponents first speak to them or submit their application. Also, to compensate for the power and resource imbalance between parties, it was suggested that landowners form collective agreements with the proponent on any given project.

Participants expressed a desire to see the norms of company conduct improve. The Panel heard that when landowners have made complaints of harassment using the NEB’s online landowner complaint form there has been no response. Participants believe that the NEB should have the power to issue punitive and corrective measures for company misconduct toward landowners as such conduct can have dire consequences on individuals and their communities.

The Panel heard that the NEB should not issue temporary access permits allowing proponents to begin work before project approval and that article 104.1 of the NEB Act is akin to expropriation and puts companies on a much stronger footing than landowners.

The Panel heard that the NEB Act should explicitly require that companies remove decommissioned pipelines from private lands. Additionally, the Panel heard that landowners should be paid yearly rent for as long as there is a pipeline affecting their lands.

### Arbitration of Land Disputes

The Panel heard that Natural Resources Canada, which is currently responsible for the arbitration of land disputes between landowners and proponents, does not share enough information on past decisions with the public. As such, these decisions cannot be cited as proof of precedent.

The Panel heard that, given the abovementioned difficulty accessing information, an independent appeals tribunal could be created. The NEB would not be a suitable arbiter as it is not impartial enough in its role as regulator.

## **Indigenous Engagement Session – March 29, 2017**

### Emergency Preparedness and Risk Mitigation

The Panel heard that pipeline leaks and spills have devastating effects on current and future generations of Indigenous Peoples. Current threats and consequences include declining water levels, loss of wildlife and contamination of traditional food sources.

The Panel heard that the NEB should adopt a precautionary principle when assessing projects, based on Indigenous Traditional Knowledge. Participants were particularly concerned with protecting waterways. It was suggested that such water protection efforts may be inspired by environmental stewardship and watershed protection measures already being implemented by Indigenous Peoples in the regions affected.

It was stated that communities must be prepared to react to spills. The Panel heard that communities should be made aware of the composition of substances being transported by pipeline through their territory and of the related safety and emergency response measures that are required to mitigate damage.

The Panel heard a call to reform the NEB Act, the *Canadian Environmental Assessment Act* as well as the *Pipeline Safety Act* to better reflect the needs and priorities of Indigenous peoples. It is believed that Indigenous communities would be better informed if the government of Canada itself had an official role in pipeline monitoring and safety, as this would trigger the Crown's duty to consult, which mandates that Indigenous Peoples be consulted and accommodated as needed when a contemplated action may impact their rights.

The Panel heard that communities should be provided with more information on the potential risks of a project at the onset and that the regulatory process must leave room to suspend or cancel a project if a need for further studies exists.

The Panel heard that Indigenous communities must receive adequate emergency preparedness training and response tools. Participants suggested that with investments in post-secondary education and job training, Indigenous peoples could play a key role in risk mitigation, emergency preparedness, and emergency response efforts, leveraging their wealth of traditional knowledge to create safer, more responsible and more profitable projects.

### Enforcement and Monitoring

Participants expressed concern over the degree to which the NEB enforces the laws, regulations and conditions placed upon proponents and their projects. It was proposed that conditions be worded less vaguely, to clarify what is expected of the proponent.

Participants expressed their hope that a modernized NEB will not only have more stringent rules, but also the means to enforce them. It was suggested that there is a need for more on the ground surprise audits and that these should only be conducted by organizations at arm's length of industry.

Another idea offered to increase transparency and accountability was to track a proponent's compliance with project conditions on a public online forum. Another suggestion was to create a Compliance and Enforcement branch of the NEB that partners with Indigenous watchmen on the ground.

One participant stated that the liability limit of 1 billion dollars for spills and other incidents should be increased to better account for the damage being done to Indigenous rights for current and future generations.

Some participants shared their belief that pipelines are leaking all over the country and that Indigenous Peoples are not being engaged enough in monitoring and mitigating these risks. The Panel heard that Indigenous Peoples were not consulted on the *Pipeline Safety Act* which is now being used to prevent them from accessing the site of a pipeline to monitor its effects, and allows proponents to access Indigenous traditional territories to conduct integrity digs without triggering consultation obligations. Participants are against proponents being left to monitor themselves.

The Panel heard that participants feel that the NEB places economic interests above compliance with its own rules, citing instances in which Indigenous peoples have had to urge them to ensure that conditions and regulations are being respected. The Panel also heard that proponents are being allowed to begin digging for a project before it has been approved, already changing the landscape.

Participants would like to see plans to restore the land, air, water and other natural resources to their original state mandated by the NEB Act once a project is complete. One participant shared the importance of the continuous monitoring of impacts to treaty rights. They also proposed that proponents seek the approval of Indigenous communities before finalizing their emergency and restoration plans.

The Panel heard that the NEB should continue to be responsible for the oversight of conditions set as part of the project review process.

It was mentioned by participants that existing pipeline infrastructure should be reassessed in light of whatever changes result from the NEB modernization process and that any issues that arise should be addressed as they would be in a new project application.

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*THEME: Engagement With Indigenous Peoples*

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### **Public Session – March 28, 2017**

The Panel heard that the NEB and proponents must behave honourably and in accordance with laws governing their relationship to Indigenous Peoples. It heard that these laws, including the NEB Act, will have to be amended in accordance with the UNDRIP, which establishes the minimum criteria for interacting respectfully with Indigenous Peoples.

Participants discussed the Crown's duty to consult Indigenous Peoples on any contemplated action that may impact their rights, as per section 35 of the Constitution. It was stated that the NEB cannot currently consult on behalf of the Crown.

The Panel heard that consultations having to do with a specific project could form part of the NEB process itself and even be conducted by the proponent. In this case, larger policy questions would still need to be consulted on by the Crown. An alternative interpretation would allow the NEB to consult with Indigenous Peoples but would have the Crown set standards by which it could evaluate and issue a decree as to whether the duty to consult has been adequately carried out.

The Panel heard that consultations are quite onerous for many Indigenous communities and that the timelines associated to them (often 30 days) are unrealistic given their culture and the time and resources available to them.

Some participants proposed the creation of a new permanent commissioner in the Office of the Auditor General responsible for all consultations with Indigenous Peoples, and for the implementation of UNDRIP and of Truth and Reconciliation Commission recommendations. Alberta's Aboriginal Consultation Office was offered as an example.

The Panel heard that it would be helpful if the government could identify which Indigenous political bodies should be consulted by proponents. A participant then reminded the Panel that, as in other societies, Indigenous political leaders do not represent all of their community's ideas or opinions, so Indigenous individuals should also have the chance to be heard.

#### Indigenous Traditional Knowledge

The Panel heard that project approval and lifecycle management should integrate a wider range of approaches, especially those integrating Indigenous Traditional Knowledge, throughout NEB processes. Additionally, NEB processes could draw inspiration from Indigenous cultural and legal tools to better account for principles such as intergenerational justice and the fight against climate change.

The Panel heard that consultation will sometimes have to take place in native languages to be meaningful and complete and to fully convey the traditional knowledge and Indigenous worldviews.

#### Early and Continuous Engagement

The expert Panel heard that Indigenous Peoples must be engaged from the earliest stages of a project. They must be represented among those designing and implementing projects, as well as in decision-making bodies. The Panel heard that in instances where a project spans many Indigenous jurisdictions, shared decision-making could be negotiated, though it may take a long time.

The Panel heard that the NEB might include in its project conditions the need to respect local laws, including those of Indigenous Peoples. The Panel heard that everything the NEB does should contribute to relationship building, including with the Métis Nation which has historically been neglected. The Panel was asked to recommend that the NEB's governing legislation advance the protection and fulfillment of Métis rights.

### **Indigenous Engagement Session – March 29, 2017**

#### Legislation and Reconciliation

The Panel was told that currently, a deep distrust reigns over Indigenous Peoples' relations with the Crown and the NEB given their past undermining of constitutional and treaty rights. It heard that the NEB Act and operations should be modified to better support reconciliation. It was noted by one participant that reconciliation is about sharing the land, benefits and power.

The NEB Act should also reflect Canada's signing of the UNDRIP and integrate its key principle of FPIC. The Panel heard that treaty rights should be recognized and respected at every turn.

A specific legislative change requested was to eliminate section 78 of the NEB Act whereby proponents are given the means to expropriate reserve lands.

The Panel heard that the NEB and proponents' dealings with Indigenous Peoples should take place within the context of a nation-to-nation relationship, respecting Indigenous modes of governance, ways of knowing and decision-making schemes.

It was noted that some Indigenous nations have, or are elaborating, formal constitutional documents and that, where these are available, the Crown, the NEB and proponents should be conducting themselves within the norms that they dictate.

Participants said that, rather than requesting that Indigenous Peoples continually identify and justify their rights, they hope that conversely, under a modernized regulatory process, proponents will be tasked with proving how their projects will *not* infringe on Indigenous rights. One participant said that reconciliation cannot take place until Indigenous Peoples are included as equal parties in decision-making circles.

### Meaningful Consultation

Participants asserted that Indigenous Peoples have the right, to be consulted in a truthful, honest, open and collaborative way that influences decisions and processes.

The Panel heard that the constitutionally mandated duty to consult cannot be delegated to the NEB, the provinces, the proponent, or any other party. It heard that this has been confirmed by the Supreme Court of Canada, but that parties are acting as though it can be. When delegated to the NEB, the potential scope of consultation and accommodation are greatly reduced, resulting in unsatisfactory outcomes. It was also noted that risk mitigation is not necessarily sufficient accommodation.

The Panel heard that the confusion surrounding the duty to consult prevents it from being carried out adequately. At times, the NEB does some of the consultation or relies on proponents to do so. It heard that this should not be the case and that the Crown itself should be involved. Conversely, the Panel heard that the NEB Act should be modified to clarify whether the Crown's duty to consult can be delegated or not.

Participants shared that proponent consultations often place them in a difficult position. They fear that the fact that they participate in a consultation may be misused as proof of community assent to a project. On the other hand, if they cannot stop a project from moving forward, they would still like a say in how it is implemented. It was suggested that the NEB provide proponents with clear and specific guidance on each party's responsibility to consult with Indigenous Peoples and accommodate them. The Panel heard that the Indigenous Peoples affected should be the ones to decide on the appropriate accommodation.

The Panel heard that, to build credibility, guidelines should specify the need to consult with the correct representatives, such as chiefs and in some cases, associations. The Panel heard that, as the impacts of a project are different and at times graver for Indigenous women, they should be consulted in particular. It was specified that consultations should be face-to-face, without relying on letter-writing campaigns.

Participants believe that the NEB should be equipped with set criteria to test whether all consultation obligations were adequately carried out before approving a project. To those concerned about the extensiveness of consultation requirements, participants said that early and comprehensive consultation is likely to reduce the scope and length of future consultations.

### Consultation Funding

The Panel heard that many Indigenous communities, such as the Metis Nation, lack the significant financial resources and in-house capacity to adequately respond to consultation requests. As such, the current average timeline of 30 days to respond is unrealistic.

Participants stated that such communities should receive funding to enable their meaningful participation. One participant specified that the need to provide funding is supported by case law as forming part of the Crown's duty to consult. Some participants put forward the idea of providing communities with multi-year funding, to build internal capacity to respond to all forthcoming requests for consultations.

The Panel heard that proponents should be prepared to assume the costs associated with the activities needed to meet their consultation threshold and maintain positive relationships with the community. However, one participant said it is not fair to expect the proponent to make up for a lack of consultation by the NEB or the Crown.

#### Indigenous Worldview and Traditional Knowledge

The Panel heard that the NEB, proponents and the Canadian public must understand that opposition to projects stems from an Indigenous worldview that highly values the protection of Mother Earth and of future generations. This is a unifying belief among various Indigenous Peoples who have lived on their lands for millennia in an ecosystem they have come to know intimately.

Participants said that the NEB's current decision-making criteria do not mesh well with Indigenous knowledge and priorities, passed on by elders who are viewed by outsiders as less qualified than scientists with formal credentials. However, traditional knowledge is often very detailed and technical and provides key insights on sensitive environments, emergency mitigation and economic opportunities. As such, some participants said that it would be beneficial to integrate it to all facets of the NEB's role and responsibilities.

Others suggested that rather than striving to integrate traditional knowledge to NEB proceedings, it could form the basis of a parallel process which better reflects its particularities. An example was given of how traditional knowledge, in the form of observing black bear behaviors, had alerted Indigenous peoples to climate change before it was broadly recognized in the scientific community.

The Panel heard that, as part of the decision-making process, the Crown should continue to provide Indigenous communities with funding to collect and document traditional knowledge and to conduct research on the issues of greatest concern to them.

The Panel heard that collecting and assessing traditional knowledge cannot be done the same way as conventional knowledge. It was told that traditional knowledge keepers should not be asked to share their knowledge in a quasi-judicial setting in front of an intimidating panel, or to condense it in a short, written answer to a pointed question.

Traditional knowledge sometimes cannot be translated to English or French without losing its meaning, therefore, it is believed to be in the interest of all parties to conduct certain proceedings and meetings in native languages, with interpretation as needed.

#### Early and Continuous Engagement

Some participants believe that the Crown, the NEB and proponents should be pursuing consent and shared decision making, rather than consultation in a strict sense. Others said that the NEB needs to demonstrate how Indigenous rights, interests and perspectives were taken into account when coming to a decision.

The Panel heard that unless there are truly extenuating circumstances, federal processes should defer to Indigenous processes as per land claim agreements and agreements in principle.

Consultation should take place as soon as development is contemplated on Indigenous territory. Access to NEB processes and government consultations should be facilitated. The example of accessibility issues offered was of an Inuit Nation with fourteen communities accessible only by air, in which Inuktitut is the primary language spoken by all age categories. When processes are only in the official languages, or involve consulting web pages, this forms an entry barrier.

The Panel heard that Indigenous Peoples want to be involved throughout the project lifecycle, not only when a new project on their territory is being considered. Participants proposed that the NEB Act mandate the creation of lifecycle agreements between proponents and Indigenous communities. Such agreements could mandate early engagement, joint decision-making and post-construction monitoring.

A participant proposed that a government sustainability council could be created in Ottawa, with input received from all different regions of the country and consultative neighbourhood councils. Indigenous Peoples could map zones of serious consequence and share them with the council so that it could inform further pipeline routes.

A participant offered the Panel the following six hallmarks of improved Indigenous engagement:

1. Capacity funding provided corresponds to a community's needs
2. Arbitrary timelines are removed
3. Indigenous peoples are involved in scoping impact assessments and determining information sufficiency
4. What matters to Indigenous peoples is assessed: go beyond current use and biophysical impacts
5. Indigenous knowledge is respected and incorporated in project planning and NEB decision-making
6. The decisions and perspectives of Indigenous Peoples are respected

#### Economic Development

Participants stated that, despite what is shown in the media, Indigenous Peoples are not necessarily against economic development, nor the exploitation of resources. They said that communities are often open to talking to companies, but will simply not negotiate the loss of access to ancestral territory, or the degradation of flora and fauna.

The Panel heard that Indigenous People should receive a fair share of benefits from the projects crossing their territories in the form of shared profits, community improvement projects and procurement partnerships, among others. Participants discussed the possibility that certain Indigenous communities give their assent to a project out of desperation to resolve poor living conditions. It was posited that many would not approve projects, many of which contradict the rules imparted on them by their ancestors, were there other means of subsistence available to them.

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#### *THEME: Public Participation*

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#### **Public Session – March 28, 2017**

The Panel heard of the need for fair, transparent and balanced participation. The unfair turn of events of past consultations was decried, when the loudest or most violent participants seemed to hijack proceedings at the cost of others being heard.

Criticisms were raised as to the inability of the NEB to lead and coordinate effective and meaningful citizen engagement. The expert Panel heard of the need to scale public participation opportunities overall: participants believe that the degree of public participation should be commensurate with the importance of a project. It was noted that a variety of online tools can be leveraged to collect diverse Canadian perspectives.

Concerns were raised over open houses being an insufficient means of public consultation. With no written record, it is easier for proponents to make misleading statements and not be held to account for them.

The Panel was also told that while a hearing likely wouldn't be needed, small replacement and modification projects (i.e. a valve or pump replacement) should still require some form of public consultation.

The Panel heard that there should be public participation in the EA process. In addition, beyond project-specific review processes, there needs to be a forum for public deliberations on larger energy policy issues, as well as strategic and regional environmental assessments.

The Panel heard a call from some participants for the right to obtain a judicial review of NEB decisions at no unnecessary cost to the party seeking it.

### Early Engagement

The Panel heard that before submitting a project application to the NEB, companies should already have begun engaging communities and modifying their project accordingly. The Panel also heard that the NEB itself could engage the public in early informal consultations, prior to beginning the project review process, in order to identify what information the public would like to be collected and presented to them. It was put forward that online tools may be particularly helpful in the early and continuing collection of diverse Canadian perspectives.

### Project Hearings

The Panel heard that the EA and all official positions on a project, including those of the federal, provincial, territorial, municipal and Indigenous governments, the proponent and civil society groups, should be published on the NEB website, to provide hearing participants the opportunity to familiarize themselves with these views and cross-examine them, as necessary.

A participant further suggested that the Panel consider alternatives to the quasi-judicial hearing format such as “world café”, community cartography and round tables. The Panel heard that hearings should also allow for written submissions, as well as audio and video submissions, which would make the process more inclusive of those with difficulties reading or writing.

Participants voiced a desire to see the in-person hearing process become more welcoming and inclusive, suggesting it be inspired by the BAPE in Quebec. The BAPE implements a two-step consultation process whereby proponents present their project and answer questions from the public as a first step, following which the public can submit comments.

The quality of participation was also stressed, noting that it must be inclusive, transparent, and culturally sensitive. One participant emphasized the importance of letting communities determine which forms of participation are best suited to them –while some may appreciate hearings, others may not. Including communities earlier on in the project review process would result in more meaningful participation.

The Panel heard that the NEB should facilitate the participation of smaller entities in hearings, to encourage more decentralized decision making, including providing more time to register and simplifying the registration form. The Panel also heard that technologies such as video or audio calls can be leveraged to enable remote participation in NEB proceedings.

The Panel heard that the NEB should allow participants interested but not deemed to be “directly affected” to submit a letter without having to pass a standing test. This was allowed prior to the 2012 legislative changes that introduced the standing test. Some participants voiced their position that only those directly affected by a project should have standing. The Panel heard that there should be no standing test and that if thousands of people truly are interested in having standing, as some parties fear, it signals the importance of a project, and that they must be heard. One participant said that all Canadians are affected by energy projects as they ultimately impact the value of our dollar and the stability of our climate.

#### Participant Funding

Participants told the Panel that citizen groups require sufficient participant funding to offer their variety of opinions and expertise as part of the project review process. They said that unrestricted funding would enable the study of alternative scenarios, to ensure that the NEB and federal government are making informed decisions.

#### **Indigenous Engagement Session – March 29, 2017**

n/a

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#### *ADDITIONAL COMMENTS*

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- One participant expressed disappointment that there was not a specific working document produced on the issues facing land owners.
- Some participants expressed their hope that the time they invested in this consultation process will have influence over the Panel’s recommendations, and ultimately the government’s actions.

# Annex VII: What We Heard: Your Voice on NEB Modernization

## What We Heard: Your Voice on NEB Modernization

This annex provides an overview of the primary themes that emerged during the NEB Modernization review showcased through a collection of quotes that speak to these key issues in the language of the author. The Panel would like to thank everyone who took the time to engage in this review and notes that this annex is not meant to be an exhaustive compilation of all comments provided during the review period.

## Governance

### Location of NEB Headquarters

***Concerns were raised that the location of the NEB head office in Calgary contributes to a perception of bias towards industry viewpoints, and participants noted that it is typical to locate a federal head office in Ottawa. Others pointed out that there is practical value in the regulator being located near industry headquarters, and that being located in Ottawa would make the NEB appear politically biased because of proximity to Government.***

*“The NEB’s headquarters are located in Calgary and, rightly or wrongly, many Canadians will perceive that the staff are ‘close’ to the energy industry. It is important that Canadians have confidence in the neutrality of the energy market studies and GHG information that will be published and it would be preferable if it were clear to all that the agency was independent of the Government and the energy industry.”*

*“We propose that Board members be based out of each of the NEB’s regional offices (Montreal, Vancouver, Calgary), as well as in Ottawa. Having members from across the country will ensure that they are aware of regional priorities and concerns. That said, given the volume of day-to-day interactions between the NEB employees and industry, it is essential that the NEB maintain a technical/professional presence in the area. It is thus logical that the operations-side of the NEB be geographically proximate to industry.”*

*« Affirmer la neutralité des instances de réglementation, de surveillance, de consultation et d’information en matière d’énergie en établissant leurs centres de décision à Ottawa et en éliminant toute obligation, pour les membres de ces instances, de résider à Calgary ou à proximité de cette ville.»*

*“For cost and efficiency reasons, it is important for the NEB to be located near the companies it regulates due to the ongoing, long-term nature of the lifecycle regulation. As such, the NEB headquarters should remain in Calgary given the concentration of pipeline companies and other energy-related firms.”*

## **Inadequate Board Representation**

***There is a perception that there is a lack of diversity of perspectives and knowledge represented on the Board and amongst its staff.***

*“The majority of Board Members and the Chair should have expertise in fields related to the broader energy sector (including renewable energy), but also at least half of the members should have expertise outside the bounds of the private sector, such as in environmental science, risk assessment and management, public health and safety, community development, Indigenous traditional knowledge, local government, climate policy and the low-carbon economy.”*

*“The composition of the NEB needs to reflect the fact that the Board now regularly deals with issues relating to Aboriginal and treaty rights, and impacts on Indigenous communities and people.”*

*“Modernizing the NEB so that it can effectively work with and fulfill its responsibilities to Aboriginal peoples necessarily entails that the Board itself have Aboriginal members.”*

*“Permanent and temporary members of the NEB need to include direct representation of Indigenous peoples and need to be sensitized to Indigenous rights, governance and perspectives.”*

*“There should be Aboriginal Women on the Board, Aboriginal Women selected based on their knowledge, education, and understanding of the roles, functions and responsibilities of the NEB. We do not want to see ‘token aboriginal women selected.’”*

*“Provide financial resources for universities and research centres in Canada to develop pools of independent experts who can be called upon to provide independent third-party information.”*

## **Residency Requirement**

***The NEB Act requires that permanent Board Members reside in Calgary. Concerns were raised that this contributes to a perception that the NEB is “captured” by industry, and that it could limit diversity of skills and knowledge of Members (including regional perspectives, technical skills, and French language skills).***

*“Recommendation #12: The NEB should remove the Calgary residence requirement for permanent board members.”*

*“The current requirement that permanent NEB Board members reside in the Calgary area has resulted in a lack of balance on the Board, given that many people in the Calgary area have been involved in the oil and gas sector and have certain biases toward that industry. A broader perspective could be brought to bear on NEB applications if permanent Board members could reside throughout Canada.”*

*“[Our organization] recommends that Hearing Commissioners be located anywhere in Canada and not be restricted to the region where the NEB is located (in this case Calgary). This would both increase the pool of potential Hearing Commissioners and assist in getting an appropriate geographic balance.”*

## Dual Role of the Chair and CEO

***The NEB’s Governance model, which requires a Chair who is also a Chief Executive Officer, has been called problematic because of the different roles necessary for adjudication and administration.***

*“The role of Chair of the NEB should be separated from that of CEO. The Chair provides strategic leadership to the Board, while the CEO is the administrator responsible for the efficient operation of the Board.”*

*“The Chair of the Board should not also be the NEB’s CEO. Dividing this dual role will ensure that true ‘arms-length’ criteria are met.”*

*“One must be appointed as Chair and one must be appointed as C.E.O.; one member must not wear 2 [sic] hats.”*

## Role of Government and NEB in Providing and Determining Policy Direction

***Participants expressed their views that the Government does not have a clear method for providing policy direction to the NEB and that, subsequently, the Board’s decisions on projects do not necessarily reflect the broader policy context in which it operates. In contrast, some participants have suggested government policy direction should not be involved in the regulatory review and decision process. This has led to calls for a two-step review process (discussed in section 3: Decision-Making).***

*“The government must provide the required policy direction for the regulator to deliver its mandate. It is not efficient or effective to have a regulator operating in a policy vacuum.”*

*“Individual NEB project reviews are not the place to debate, develop or discuss larger policy issues. Policy development needs to be undertaken by the appropriate government ministries and then applied transparently by the NEB.”*

*“The government should establish a national, public forum on energy policy. Such a forum would allow for public input around energy policy, and would help build consensus about energy goals and coordination with environmental objectives.”*

## Risk of Bias or ‘Capture’

***There is a perception that the NEB has been ‘captured’ by industry interests and is not as independent as it should be. Some suggested that steps should be taken to mitigate real or perceived bias.***

*“A regulator is not a partner of industry. A regulator must be arms-length and independent from industry.”*

*“There is unfortunately, a perception on the part of the public, that the NEB regulators are more inclined to make rulings in favour the energy sector than to regulate it in the best interests of the public. I would hope that is not done deliberately, but it can only be avoided through elimination of conflict of interest.”*

“Whether the public perception of bias is factual or perceived is not the question; it exists, and will continue to exist for as long as the authorizing agency has such close ties to industry.”

«Le financement de l’ONÉ doit être public, avec une obligation pour l’industrie de contribuer, mais sans que ce dernier n’ait la moindre influence.»

“In order to be designated with the power to perform National Energy Board (NEB) functions...the designatee cannot be engaged in or have investments in the hydrocarbon or electricity business.”

“The way regulators should function is a big question. They should be open, engaged, informal, working in partnership with others, effective real-time communicators and yet somehow judicial, objective and guardians of the integrity of regulatory processes. No one should underestimate the complexities in reconciling that set of requirements.”

«Qu’il s’agisse des nombreux déversements qui continuent à se produire chaque année, du laxisme de l’ONÉ envers des vieux pipelines comme Trans-Nord ou la canalisation 9b d’Enbridge, du passe-droit qu’il a accordé à TransCanada en déclarant « complet » un projet dont des éléments fondamentaux étaient absents, ou des fautes d’éthique commises lors de l’affaire Charest, l’ONÉ a perdu sa crédibilité.»

## Mandate

### Need for an Updated NEB Mandate

**The NEB was initially created to address issues that arose regarding the conditions for constructing new pipelines and approving long-term energy exports, among others. However, concerns have been raised that this mandate is out-of-date and does not reflect contemporary priorities, such as the need to address climate change and indigenous rights, aboriginal treaty rights, and title. Participants have expressed their view that the current NEB mandate needs to be updated to reflect the current needs of Canadians in the energy regulatory context.**

“The Board has unilaterally declared that climate change emissions, both upstream and downstream, from proposed projects placed before it for approval, are somehow beyond its mandate. This is inexplicable in the context of what we know about the global effects of many of these projects.”

«Dans l’examen des Projets, l’Office ne respecte pas son mandat de tenir compte de l’intérêt public, puisqu’elle exclut systématiquement de son champ d’analyse les préoccupations qui sont DÉJÀ considérées par le gouvernement du Canada comme faisant partie de l’intérêt public (l’effort mondial de réduction des émissions de gaz à effet de serre, la volonté de réduire les autres polluants atmosphériques, le passage à une économie post-hydrocarbures, la prise en compte des impacts durant le cycle de vie des hydrocarbures, etc.).»

“The Agency should have an innovation, development, and science program mandate; and a regulatory function.”

“The NEB must become more active as a public educator on all forms of energy. The NEB is an energy regulator, not just a fossil fuels regulator. The NEB Act does not currently outline a specific mandate for public education on energy.”

“A modernized NEB must have a role in decarbonization, as a regulator of both interprovincial and international pipelines and transmission lines.”

“The regulator in charge of regulating the energy industry must have a strong and credible science-based emphasis on protecting the environment and communities.”

*“The future role of the NEB should be limited to the licensing and regulation of Energy Infrastructure, with the main emphasis being safety, reliability and insuring [sic] that the conditions of licensing and operation of the infrastructure are strictly enforced.”*

*“The entity responsible for considering project impacts must have a specific mandate to consider upstream and downstream effects and impacts. This includes consideration of impacts on upstream production and resulting greenhouse gas emissions and impacts from maritime shipping.”*

*“Modernization of the NEB’s mandate should reflect and respect related provincial and Territorial responsibilities and jurisdiction, such as the roles of the Ontario Energy Board and Independent Electricity System Operator.”*

## **Public Interest Determination is Vague and Incomplete**

***Some participants are of the view that the description in the NEB Act of ‘public interest’ is too vague, and that the NEB’s and the Government of Canada’s rationale for determining whether a project is in the public interest lacks transparency. Also, concerns have been raised that the NEB’s public interest determination for projects does not sufficiently consider environmental and socioeconomic issues, including Indigenous perspectives.***

*“We agree that the public interest determination is ultimately the correct test. However, it must be clarified... This public interest determination is reflected in s. 52(2) of the NEB Act which states generally that the Board may have regard to ‘any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.’ Factors for the public interest determination need to be clearly defined in the legislation in order to provide more clarity as to how this determination is made in relation to NEB-regulated projects.”*

*“‘Public interest’ is inclusive of all Canadians and should refer to a balance of environmental sustainability (including climate security), indigenous governance, long-term community prosperity, economic stability (or something similar) that change as society’s values and preferences evolve over time.”*

*“If the NEB is going to continue to make the public interest determination on projects, it must be required to provide comprehensive reasons for its assessment of the elements required. It must also provide reasons which are specific to individual Aboriginal Nations which may be affected and how their specific concerns have been addressed.”*

*“When the NEB determines that a project is in the public interest under the current framework, it does so based on all relevant factors except impacts on Aboriginal and treaty rights and the adequacy of Crown consultation.”*

*“When making a determination as to whether a proposed project is in the public interest, the responsible authority conducting the environmental assessment of NEB projects should be required to consider sustainability criteria, whether the project will result in a net reduction of GHG emissions and whether the project infringes on any indigenous rights.”*

*“If the NEB is going to regulate in the public interest, it must regulate not only to meet the needs of the transport of energy, but also the needs of the communities that host the means of transport.”*

*“We support that the public interest must be inclusive of all Canadians, however, we believe the NEB hearing process should give precedence to those who will be directly affected by a project. This requires a balance between accommodating broader participation and ensuring an efficient and effective process that leads to a timely decision.”*

*“The NEB should solicit and incorporate the public interest at all stages of an energy project’s life-cycle, including the sharing of detailed information and analysis, and greater Indigenous and local community involvement. Increasing Indigenous and public participation in the NEB hearing process is a vital element in expanding the public’s knowledge and creating greater credibility and support of NEB decisions.”*

## Scope of Environmental Assessments and the NEB's Role

**Concerns have been raised regarding the NEB's ability to adequately conduct environmental assessments for projects within its jurisdiction. Furthermore, some participants have suggested decisions are being made on projects out of context of broader issues such as cumulative effects and highlighted the need for government support to develop regional land use plans and/or strategic impact assessments in advance of the NEB approving specific projects. However, others shared the view that the NEB has extensive expertise in EA, resulting from their lifecycle regulatory role and systems knowledge.**

*"The current regime is not working for anyone – neither proponents nor participants, including First Nations. The NEB must be modernized in concert with broader environmental law reviews, and in particular the EA review process. It should also be informed by a National Energy Policy, which will guide Canada's transition away from fossil fuels."*

*"Shifting this responsibility from the NEB to CEAA... would in fact represent continuation of efforts to make the EA process consistent – and predictable – across sectors. It would allow for us to focus on building the required expertise and process into one body."*

*"It is our view that CEAA, as an agency totally independent from NEB, is to be preferred as the provider of environmental assessments required for pipeline applications."*

*"When making a determination as to whether a proposed project is in the public interest, the responsible authority conducting the environmental assessment of NEB projects should be required to consider sustainability criteria, whether the project will result in a net reduction of GHG emissions and whether the project infringes on any indigenous rights."*

*"We recommend that a tiered approach to EA be implemented by the Government of Canada. Such an approach would allow Government to measure issues such as social-acceptability before a proponent is required to make significant investments towards the elaboration of a detailed environmental and socio-economic assessment. Making use of Strategic Environmental Assessment and Regional Environmental Assessment will allow the integration of a multitude of issues that may be relevant, but not directly related to the construction of new energy infrastructure; it is unreasonable to ask this of project-specific EA."*

*"Regional and strategic planning is a major function that is lacking in Canadian energy policy and decision making."*

*"Because of its expertise, experience and lifecycle oversight, there is no federal agency that better understands environmental impacts and mitigation measures for pipelines, from the planning stage through construction, operations and eventual abandonment."*

## Energy Data and Information

**At present, the responsibility for collecting and disseminating energy and climate data and information is conducted by multiple entities, including the NEB, Statistics Canada, Natural Resources Canada, and Environmental and Climate Change Canada. Provincial and territorial regulators (e.g., Alberta Energy Regulator, BC Oil and Gas Commission, and Ontario Energy Board) are also key sources of energy data in their respective jurisdictions. As a result, concerns have been raised that there is no single authority for energy and climate data and information in Canada. Concerns were also raised about whether NEB forecasts reflect a wide range of planned or possible outcomes, or reflect existing government policy such as decarbonisation efforts.**

*“Coordinate and harmonize data currently produced by the NEB with those produced by NRCan, StatsCan, ECCC, Transport Canada and the Transportation Safety Board. Further, provincial, and even international data is essential for a complete picture of the energy sector, and the NEB should work to find ways to integrate additional information. There should be one government centre for energy information and the NEB seems best positioned to fill that role, which would carry with it a requirement for increased resources.”*

*“Modelling of Canada’s energy industry and reporting of the modelling results should be coordinated by one entity because of the complex and high cost nature of the modelling. Scenarios and all other assumptions used in modelling should reflect the best available information from all levels of government and the private sector and this will necessitate central coordination. A federal government entity should be responsible for coordinating energy data but Natural Resources Canada and Environment and Climate Change Canada may be better suited to this role [than the NEB].”*

*“Because of the technical nature of producing energy information, it can be beneficial to have expertise from the industries being studied. However, the perception of a ‘revolving door’ with industry has contributed to further entrench the view that the NEB is industry captured. Energy information and decision-making functions do not need to be housed in the same organization; it is arguably more effective to keep these functions separate.”*

*“To protect the NEB’s role as a quasi-judicial administrative agency, and to remove the potential for a conflict of interest between the NEB’s regulatory role and its energy information and advisory role, the energy information and advisory mandate of the NEB should be removed. As this energy information is currently used quite widely in Canada as the basis of much further analysis, such a change will also prevent any NEB’s biases from calcifying a particular view throughout the energy system.”*

*“The NEB’s Energy Forecasting must envision scenarios where we meet our national and international climate commitments and explain how we achieve reduced greenhouse gas emissions in the energy sector. The NEB of today appears to operate as if the policy context around climate change does not exist.”*

*“The NEB’s energy information function is not a core role of an independent, quasi-judicial regulator. It would be more appropriate that the energy information function be placed with a government Department or an outside agency similar to the US Energy Information Administration, which collects this kind of data in the United States.”*

*“Energy data, information and analysis may distract from the NEB’s core mandate and therefore should be managed by the respective government departments (not the NEB), including NRCan and Environment and Climate Change Canada. Especially in the case of producing information and data related to climate change, it would be more appropriate to house this function with an outside agency. The energy information function might be better placed with a government Department(s) or a separate agency similar to the US Energy Information Administration, which collects this kind of data in the United States.”*

## Decision-Making

### Legislated Timelines

**Concerns have been raised that the 15-month legislated timelines for NEB reviews of major projects is both inflexible and too brief because it does not allow sufficient time for interested parties to review information and develop positions on major projects. Further, Indigenous groups have noted that it can be challenging to consult and make decisions through community governance structures within the formal time allotted.**

*“Statutory timelines should be proportionate to the complexity and potential environmental impacts of a proposed project. They must be sufficient to allow for full review of project descriptions, environmental impact statements and technical reports by interveners and their consultants, and, in the case of certain projects, to allow for oral cross-examination of expert witnesses. That should include when the technical data is complex, or where public interest is high.”*

*“The review of different projects will take different amounts of time. The NEB Act should not provide a ‘one-size-fits-all’ time limit on NEB reviews, especially one that is so short.”*

*“The NEB approval process needs to account for the time it can take Indigenous communities to make decisions, prepare evidence and respond to the proponent’s materials, whether or not a permit is subject to a hearing. Accelerated processes do not take account of this and effectively exclude Indigenous participation in the decision-making process.”*

### Issues Scoping in Hearings is too Limited

**Groups have expressed concerns that the NEB’s list of issues, which defines the scope of a hearing, is too limited. For example, concerns have been raised that upstream and downstream environmental impacts related to a project are not considered. As a result, there is a perception that project-related concerns that are identified after the list is finalized are not considered.**

*“Currently, the NEB acts inconsistently in scoping the impacts of marine shipping into environmental assessments of energy infrastructure projects – sometimes they are included, other times not – despite the fact that the Canadian Environmental Assessment Act, 2012 definition of ‘designated project’ includes ‘incidental activities.’ To avoid improper scoping that excludes marine shipping impacts from assessment, the NEB Act should be amended to include a non-exhaustive list of “incidental activities” that must be considered when assessing certain types of projects. This list must include marine shipping for pipelines to marine export terminals.”*

*“The NEB must not be allowed to limit the scope of what is considered in projects, without input from the public. This includes upstream, lifecycle, and downstream effects as well as transmission lines required to power pipeline infrastructure. NEB reviews should consider all impacts of a project including the facilities required for the project (e.g. transmission lines, power generation, etc.) and the impact at the end of the pipe (e.g. tanker traffic, impact on fisheries, emissions from refineries, human health, potential impact on tourism, etc.)”*

*“[A Province] encourages the NEB to incorporate a broader system perspective when evaluating energy projects of national importance. This approach may help to identify which energy projects maximize the benefits to Canada’s energy system as a whole.”*

*“The NEB process does not assess impacts on a spatial or temporal scale that is relevant to First Nations’ way of life. The project area and scope of the review are often determined without First Nation input, and without regard for how First Nations use their territory. A First Nation may view its territory in a more holistic way and potential impacts may occur to the practice of rights that are beyond the arbitrarily designated project area boundary.”*

## **Climate Test During Pipeline Hearings**

***Some participants expressed that view that the upstream and downstream impacts of greenhouse gas emissions on climate change were not considered as part of a pipeline project review.***

*“We suggest that upstream and downstream impacts of any project be assessed and that impacts be measured against standards set by governments, including Canada’s Nationally Determined Contribution under the Paris Agreement.”*

*“Regional planning initiatives that consider cumulative effects, upstream and downstream effects need to be included in any project assessment.”*

*“We also see a flaw in the List of Issues in that the NEB will consider “cumulative environmental effects that are likely to result from the proposed project” and that is NEB does not look at Upstream and Downstream effects of a project..”*

## **Prior Determination on Participation**

***Concerns were raised that there are unacceptable limits to public participation in hearings due to the way that standing is defined in the NEB Act and the manner in which the NEB applies these criteria. Others noted that standing can be helpful to focus participation on those who have the most relevant information to share.***

*“More formal opportunities for participation such as Intervenor status (allowing for the submission of evidence and cross-examination of other parties) should be reserved for those that are either directly affected by a proposed project or have relevant expertise. However, all parties, whether they have formal standing or not, should have an opportunity to provide comments through flexible and appropriate processes.”*

*“The public should be afforded the opportunity and means to meaningfully participate throughout all stages of NEB regulatory processes, from the early stages of applications through to follow-up, monitoring and enforcement. Meaningful participation means, among other things, that dialogues are deliberative; there is a toolbox containing different means of engagement; and the public has the ability to influence decisions, adequate funding to do so, and is engaged in the design of participation opportunities.”*

*“We recommend eliminating the requirement that participants be either “directly affected” by a project or possess “relevant information or expertise”. In our increasingly interconnected world, all members of the public have a stake in projects that can affect our environment.”*

*“All who want to participate should be allowed to participate.”*

*“To obtain intervenor status, any person wishing to participate in a hearing must demonstrate to the Board’s satisfaction that they are ‘directly affected by the granting or refusing of the application’ or have ‘relevant information or expertise.’ First Nations should not have to demonstrate the value they will add as an intervenor to an NEB hearing where a project has potential to impact their Indigenous and Treaty rights and interests.”*

## Written vs. Oral Cross-Examination

**Concerns have been raised that NEB hearings that relying solely on written evidence and written cross-examination, without the inclusion of oral cross-examination of the proponent and participants, does not adequately test the evidence necessary to make a recommendation on a project.**

*“All hearing of applications for NEB-regulated projects must allow for oral cross-examination of expert witnesses. Oral cross-examination is the most effective way to test evidence.”*

*“The right to oral cross-examination ought to be guaranteed under the Act where the Board has determined that applications are to be dealt with by oral hearings.”*

*“We recommend that while the current procedure may be justifiable to ensure timely processing of applications, there should be no objection to a more expanded procedure for written submissions. Thus, oral submissions could be subject to the “directly affected” test, but there should be no such barrier to written submissions. These would require review by panel members, but would not take up hearing time.”*

*“An inclusive approach to public involvement that allows for timely decisions can be accomplished where scalable and flexible levels of involvement, including written submissions, and live statements are accommodated. It can improve the quality of the decision and ultimately help legitimize the process and build public trust.”*

### **Hearing Process is Adversarial and Unnecessarily Complex**

**Concerns were raised that the quasi-judicial hearing process is needlessly complex, inflexible and difficult to navigate. Participants further noted that the adversarial nature of the process made it difficult to collaborate and find win-win solutions.**

*“Our members are not comfortable presenting in the NEB’s highly formal and adversarial process, with several refusing to engage entirely due to the legalistic nature of the process.”*

*“Another issue to be addressed in NEB processes is the western-centric and quasi-judicial nature of NEB hearings. This can be a huge impediment to meaningful involvement of Indigenous groups and proper consideration of TEK. The NEB needs to have the flexibility to design project-specific processes that are culturally appropriate.”*

*« La structure des audiences sous forme de tribunal administratif est problématique selon [un groupe] et peu propice à notre participation dans de manière culturellement appropriée. D’abord, elle retarde le moment où nos préoccupations et commentaires seront entendus à la tenue des audiences, ce qui peut faire en sorte qu’ils arrivent trop tard dans le processus d’analyse. De plus, elle est difficilement compatible, voire incompatible, avec nos processus internes d’évaluation et d’analyse. »*

### **Decision-Making Process for Major Projects is Politicized**

**All participants indicated that decision-making should rely on best available science and evidence. Some participants felt that allowing the GIC to make the final decision on projects would encourage decisions made on the basis of politics. This perception has been exacerbated by the 2012 legislative changes in the decision-making process that provide the Governor in Council final go/no-go decision on all major projects (including those that the NEB did not find to be in the public interest) and the authority to send a recommendation or conditions back to the NEB for reconsideration.**

*“Leaving the final decision to the government rather than the NEB yields a decision that may be tainted by political expediencies rather than based on science and facts.”*

*“For many years the primary roles of the NEB were to advise the federal government and to act as a quasi-judicial regulator of oil and gas activities in specified jurisdictional areas. In recent years, however, the federal government has attempted to foist upon the NEB the responsibility for making decisions that are essentially value judgements which are political in nature. This has been very unfair to the NEB.”*

*“The closer the NEB is to the government, the higher the risk that the decision-making process will remain politicized. It will be challenging for the NEB to maintain credibility if it does not have decision-making independence from the federal government.”*

*“Policy development does not and should not reside in a regulatory review process.”*

*“Define timely and transparent processes that accent, not duplicate, other reviews. Co-ordinate and collaborate with other federal departments and provincial regulators in project assessments – utilize their strengths, skills and expertise.”*

*“We recommend de-politicizing pipeline application decision-making. The pre-2012 power of the Board to decide, rather than advise on, whether pipeline applications should be approved, should be restored.”*

*“Both NEB Board members and staff possess multi-disciplinary expertise, built over decades. There is simply no other federal regulator that is more knowledgeable about the construction and operation of pipelines throughout their lifecycle than the NEB, and it brings this expertise to bear in its decision making.”*

*“The NEB Act should be revised so that all pipeline projects that the Board conditionally approves are put before GIC for final approval. This includes pipelines that are 40 kilometres or less in length (which currently do not require GIC approval) since even projects of smaller size can have significant environmental and health impacts.”*

*“It is not in the interests of any parties, peoples or organizations in Canada to afford governments with the power to undermine fair and just processes of determining the public interest. It is unfair to proponents and interveners that their contributions and investments in the review process may be undermined by late-stage politicking.”*

## **Lack of Transparency in the Decision-Making Process**

***Concerns have been raised regarding the lack of transparency in the decision-making process, both in how the NEB undertakes its public interest determination leading to a decision, and as the Governor in Council make a final decision, as the deliberations of the latter body are subject to Cabinet confidence.***

*“Decisions must be transparent and open, and all documents and information considered by the decision-maker must be publicly available online and searchable. The decision-maker must give full reasons that provide justification, transparency and intelligibility.”*

*“The NEB must be responsible for making decisions. We are concerned that Cabinet currently has the decision-making authority and can claim Cabinet privilege. This undermines the ability of the courts to hold the government accountable.”*

*“Decisions must be evidence-based, and decision-making rationale must be transparent, disclosed to the public, and include reference to evidence (including intervenor evidence) used to reach the decision. Decision-makers must be accountable for their decisions and decisions made by Governor-in-Council must also be open to appeal through the courts.”*

## Two-Phase Review Process

***Arising from concerns about political decision-making, review timelines and process certainty, some participants have recommended the regulatory review process be separated into two phases: one to determine whether a project is in the national interest, and the second would comprise a technical review of feasibility. This would allow discussion of broader policy issues and solicit a decision from Government on whether or not the project should proceed to a full evaluation earlier in the process.***

*“[We] encourage the Expert Panel to consider a two-phase regulatory approach in the case of major energy infrastructure. Phase One would address the question of ‘national interest from a high level’: would Canada benefit from the proposed project, and is the proposed project in the national interest? The Phase One process would be adjudicated by the NEB, culminating in a recommendation to Cabinet based on a submission that would conform to the current guidelines for Pre-Application Project Descriptions and an evidentiary process that would gain input from relevant parties on the major public interest issues in play with respect to the proposed project. ...Phase Two would not be initiated until the Phase One national interest decision has been released by the Government of Canada. If conditions imposed by Phase One are not acceptable to the proponent the project would not proceed to Phase Two. ...Phase Two would consider the project in detail, through a process similar to that followed by the NEB today. Proponents would need to satisfy the NEB with respect to technical design, construction, environmental compliance, safe operations, toll design, economic viability, contractual underpinning, landowner compensation and a host of other requirements that are part of the NEB process today. Satisfaction of all conditions attached to Phase One approval would be required prior to Phase Two approval.”*

*“...the first part would consider the project in the context of broad public policy issues... such as climate change and transition to a low carbon economy, Indigenous matters and consultation... and any other potential project specific ‘showstoppers’... Part two would enable a timely decision by the NEB that would be final and NOT require an additional GIC approval.”*

*“...to the extent that the GIC retains a decision-making role, it should relate to broad policy issues and take place early in the process rather than at the end. Major Pipeline Projects are experiencing significant delays and uncertainty, in part due to broad policy issues that extend beyond the reach of a particular project.”*

*“This two-part review essentially reverses the order of the current NEB/GIC determinations for major projects... As proposed, the first phase of the review would reduce uncertainty and investor risk by signaling whether a project should proceed to a detailed technical assessment before proponents invest significant resources, years of time and hundreds of millions of dollars developing technical proposals and participating in multi-year regulatory reviews.”*

*“Public confidence is important, but so too is the confidence of investors. Other countries and regions also have energy development opportunities and capital is mobile. In the absence of greater clarity on Canada's energy policy framework and regulatory processes we risk losing those investments - and the associated jobs, government revenue and technology development - to other countries.”*

*“The principles of regulatory excellence provide the framework for sound decision making by the NEB. The NEB must operate independently from government, industry, and private interests. Decisions must be based on clear policy, science, facts and evidence.”*

*«Pour rétablir la crédibilité du processus d'approbation des projets de pipelines, l'Office doit réintroduire le principe de précaution dans sa prise de décision et ne concéder le certificat d'utilité publique que sur la base d'une conception de projet détaillée.»*

## Compliance, Enforcement, and Ongoing Monitoring

### Adequacy of Lifecycle Oversight

**Groups are concerned about the NEB’s lifecycle regulator activities for pipelines. A number of issues have been raised: the number of inspections is thought to be inadequate; the extent to which the NEB follows-up on conditions, recommendations from incident reports, and monitoring is unclear; the NEB may lack the legislative tools to respond where it deems necessary to protect people and the environment; and there is a perception that the NEB places too much trust in proponents’ efforts to prevent and respond to incidents.**

*“For a regulator to be held accountable, it must have the responsibility for the full life cycle of the sector it regulates. It has been my experience that when segments of a sector are divided between different regulatory authorities and/or government departments, it leads to a lack of accountability, jurisdictional confusion and sub-optimal regulation.”*

*“...the NEB should look to strengthen its role as a full lifecycle regulator by expanding its role to encompass regulatory oversight and community reporting responsibilities with regard to environmental and socioeconomic commitments made by proponents. This oversight and reporting function would be carried out at the project application, construction, operation, and abandonment stages; and would capture commitments made during all authorizations, licenses, and permits (including license renewals and amendments) associated with a given project, regardless of the responsible federal, territorial or co-management authority.”*

*“A lifecycle approach by a single regulator is efficient and effective, since the same staff can be involved in oversight of both construction and operations. It is more effective because the staff of a single lifecycle regulator will have full exposure to all aspects of pipeline construction and operation and therefore develop enhanced expertise in the interactions of the environmental aspects of both construction and ongoing operations.”*

*“The efficacy of NEB regulation would be enhanced by the introduction of construction, operating and decommissioning permits or authorizations that more clearly and completely specify facility-specific emissions, discharges, management practices, and requirements related to operating, monitoring and reporting for each portion of a project.”*

*“The NEB not only needs effective tools throughout planning, construction, operation and abandonment of a project, but also for decommissioning, which should be included in the lifetime regulation of a project.”*

*«Dans le système actuel, les sociétés de pipelines affirment posséder les fonds nécessaires pour pallier tout type de déversement de pétrole qui surviendrait par l’exploitation de leurs infrastructures. Toutefois, de telles garanties ou des polices d’assurance ne sont pas suffisantes... L’ONÉ doit imposer des critères de performance garantissant la protection des prises d’eau potable lorsqu’elle examine les plans de mesures d’urgence. »*

*“The modernized Board or its successor should provide a forum for continued dynamic engagement among its regulated industries, indigenous peoples and the general public throughout the life cycle of regulated projects.”*

*“Monetary penalties for non-compliance also need to be increased substantially, as they are far too low to create an effective deterrent. Furthermore, publicly announced penalties may currently be lowered on appeal, but the revised amounts are not communicated to the public by the NEB; this practice must be discontinued to increase transparency.”*

*“The NEB should consider working with the Government of Canada on polluter pay tools and opportunities for strict liability or insurance coverage of a project, based on predicted harms. While the City recommends strict and unlimited liability on a polluter, other risk transfer schemes might be considered.”*

## **Availability of Lifecycle Activity Information**

***There is a perception that information related to the NEB’s lifecycle regulator activities is not publically available and that there are insufficient opportunities for the public and Indigenous peoples to monitor construction and operation of facilities.***

*“The NEB should collect and make publicly available data concerning prior pipeline failures, including more detailed descriptions of environmental consequences, to allow for a rigorous analysis of pipeline failure rates and the resulting environmental impacts.”*

*“The NEB needs to be completely transparent with the public, with accurate maps of proposed pipeline routes and information on those pipelines easily read by the general public.”*

*“It is important that the NEB solicits, reviews and integrates the public interest at every stage of a given energy project’s life cycle. This includes the sharing of detailed information and analysis with public stakeholders, in order to ensure better inclusion of Indigenous, local and remote communities’ interests in NEB decisions.”*

## **Emergency Response Plans**

***Participants felt that there should be more transparency concerning emergency response plans, and that the public, municipalities and Indigenous groups should be able to contribute to them.***

*« Afin d’assurer la meilleure expertise possible en ce qui a trait à la sécurité civile et l’environnement, de même qu’une indépendance qui rassurera la population, [notre organisation] recommande que Sécurité publique Canada et Environnement et Changement climatique Canada assument la direction des opérations de gestion des situations d’urgence en fonction de leurs responsabilités respectives. »*

*“Comprehensive risk assessments that fully analyze the range of socio-economic and environmental consequences of worst-case oil spill scenarios – as well as the cumulative effects of smaller, more frequent, oil spill incidents – must be the foundation of emergency management plans and programs for the NEB and the companies it regulates. Assessments.... must also include the consequences of response and recovery options... To address the conflict-of-interest inherent in companies designing their own risk assessments, the NEB should mandate a process for risk assessment design and analysis that explicitly includes the priorities of local communities and stakeholders affected by projects as determined by these groups.”*

*“With respect to NEB hearings, all information regarding emergency management and environmental compliance plans must be shared during the hearing process so that Intervenors and other stakeholders can assess, comment on, and identify conditions related to the ability of companies to respond effectively to spills and manage emergencies along pipelines.”*

*“The NEB Act should make it mandatory for proponents to engage Indigenous people in the development of monitoring and emergency response plans and to integrate traditional knowledge. Indigenous traditional knowledge is highly relevant to monitoring and emergency response, as knowledge holders are skilled at identifying and explaining changes to the environment caused by a project, including accidents.”*

*“NEB conditions require only that emergency response plans be created by companies, but that the NEB exercises little qualitative oversight over those plans. Emergency preparedness plans and evacuation plans in the event of catastrophic failures should be prepared as part of project applications, not after projects are approved.”*

*“[Company] believes that the existing emergency preparedness and response tools are sufficient. [Company] notes that the NEB has recently introduced new requirements, including communication requirements. To better allow for operators to plan for these changing requirements, it would be helpful if the board communicated a multi-year strategy related to these requirement changes including key activities and associated timelines.”*

## Engagement with Indigenous Peoples

### **Ancestral Aboriginal and Treaty Rights and Titles, and the Duty to Consult**

***Participants suggested that Section 35 of Canada’s Constitution Act, 1982 – which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada – is not adequately reflected in how Canada reviews projects regulated by the NEB. As such, comments were made to the effect that the current process does not uphold the Honour of the Crown, is not in-keeping with the expectations laid out in jurisprudence and does embody the current Government’s promises to build a nation-to-nation relationship with Indigenous peoples.***

*“The political winds have shifted in Canada with the election of a new liberal government, seeking a new nation-to-nation relationship with Indigenous peoples. We have an opportunity to effect positive change reflective of this shift. Despite status as an independent body, the NEB must similarly seek a path of reconciliation in order to modernize its operations, to better align with the current social, legal and political shifts.”*

*“The NEB and its systems and practices need to recognize modern treaties not just as a basis for consultation and accommodation, but as the basis for nation-to-nation relationships in pursuit of the broader objective of reconciliation.”*

*“The question becomes how are Indigenous peoples’ rights recognized, protected and accommodated in regulatory processes such as in CEAA and NEB. What standards ought to be applied to ensure the continued protection of Indigenous rights?”*

*“The NEB process is not designed to account for Aboriginal rights-based values (governance, decision-making etc.), therefore, is in conflict with and does not uphold Canada’s constitutional principles.”*

*“Canada cannot delegate its duty to consult to proponents. Private sector proponents do not understand the nature of the relationship between Canada and Aboriginal communities.”*

*“Canada needs to balance its desire to enable natural resource development and trade with its obligations to implement treaties.”*

*“All that the NEB does should promote relationship building with the Métis Nation.”*

*“In our submission, the environmental law reforms, including NEB modernization, must ensure at a minimum that nation-to-nation consultation must occur at every level. This includes the strategic and regional EA proposed, as well as at the project level.”*

*“In short, a one-size-fits-all approach is not feasible as not all projects are the same, not all impacts are the same, and not all Indigenous interests at issue are the same.”*

*“Indigenous knowledge, perspectives and law should be integrated into every stage of the NEB review process, such as determining the issues to study, the scope of factors, assessment of strength of claim and impacts on Aboriginal and treaty rights, and the effectiveness of mitigation measures.”*

*“Early, informed engagement, processes and timelines that respect cultural protocols and operational capacities, process scoping and assessments that are attentive to social impacts and cumulative effects; these are critical attributes to good consultation and decision-making that help push the needle towards consent. Consent emerges as people become informed and respected through good process.”*

*“We urge a complete overhaul and rebuilding of the entire NEB system through new legislation that includes substantive change relative to Aboriginal Title and Rights.”*

*“Indigenous engagement in NEB processes involves the NEB, industry and the Crown; however there is a lack of clarity as to who is responsible for what, which has resulted in court challenges and is onerous for everyone involved.”*

*«L'ONÉ doit également développer, en collaboration avec les Premières Nations, un processus de consultation parallèle et distinct. Actuellement, les groupes autochtones doivent passer par le processus d'audience publique pour faire part de leurs commentaires, ce qui ne constitue pas un processus approprié pour une Première Nation. »*

*«L'ONÉ devrait également s'adjoindre d'un comité consultatif autochtone, afin de les aider à regagner la confiance et resserrer les liens avec les Premières Nations. »*

*“It is no secret to Indigenous Peoples that the major failing of governments in the past is its presumed role as parent over Indigenous Peoples. Decisions are made for Indigenous peoples by governments and bureaucrats that may not truly understand the situation Indigenous Peoples face. Further to that point, it is no secret to Indigenous Peoples and researchers that the most effective means of addressing issues in Indigenous communities is to empower and support the communities themselves to address their issues in ways that are meaningful to the communities.”*

*“The NEB and the Crown should directly engage with First Nations People regarding the development of Consultation Plans for projects before the project description has been filed; in pre-project planning stages.”*

*“With respect to the role of the federal government, its involvement for major pipeline projects requiring deep consultation needs to be earlier (at the outset of the project), sustained, and better coordinated with proponents to ensure that issues are dealt with in a timely and consistent manner and that discussions do not proceed on parallel but disconnected tracks.”*

*“Linear projects like pipelines require extensive engagement and consultation with a large number of Indigenous groups that will have widely varying interests and concerns, different levels of capacity and knowledge about pipeline developments and operations, and different expectations about how they want to be consulted and engaged with throughout the lifecycle process.”*

## **UN Declaration on the Rights of Indigenous Peoples and Free, Prior and Informed Consent**

***Concern was expressed that the principles of UNDRIP and FPIC are reflected in neither the NEB Act, nor the efforts of NEB to fulfill its mandate. There are also concerns that UNDRIP is not adequately reflected in other consultations undertaken by the Crown and are not currently reflected in the NEB's current relations with Indigenous peoples.***

*“We have heard that UNDRIP implementation in Canadian law needs to happen outside of this NEB modernization process. Perhaps that's true – but that does not mean UNDRIP should not be considered here..”*

*“The establishment of a Section 35 Constitutional Rights Compliance Office is in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A national Compliance Office, established by federal legislation and funded by proponents and the Crown, should be an independent and arms-length office.”*

*“We believe that our cultural, economic, social and spiritual health cannot be separated from the biophysical health of our territory.”*

*“The Crown/NEB determinations of what First Nations are impacted is wholly inconsistent with the Anishinabe worldview that all lands are sacred and everything is interconnected. We must self-determine if we are impacted by a project.”*

*“The NEB should receive training (developed and delivered by a diverse team of Aboriginal peoples) to better understand matters such as the significance of treaty and Aboriginal rights to Aboriginal peoples, the challenges that cumulative effects of development pose to rights and cultural survival, the significance of “temporary” losses of harvesting opportunities to the transmission of intergenerational traditional knowledge, the impacts of residential schools on Aboriginal traditional knowledge, practices and culture, and non-monetary core values that inform Aboriginal perspectives on land and resource decision-making.”*

*“Indigenous-driven regulatory review processes support the inclusion of available traditional knowledge to fully assess a project’s tangible and intangible impacts. For the assessment of a project to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.”*

## **Timing and Nature of Indigenous Participation**

***Views were expressed that engagement and meaningful participation, by way of exchanges related to a proposed project begins too late and that it does not adequately occur throughout the lifecycle of a project.***

*“The NEB should not have inflexible, fixed timelines for reviewing projects; rather, the NEB should set flexible timelines based on the scope of the project and the time required for First Nations to fully participate throughout the entire review process.”*

*“The scope of consultation must include all phases of project review, and the full lifecycle of projects.”*

*“Consultation with Aboriginal Nations at the scoping stage of an assessment can improve the quality of impact to rights identification by using indicators that are most relevant to Aboriginal nations, and that can lead to an identification of impacts to rights. For example, rather than focusing on current and site-specific traditional land use, an assessment could use Harvesting or Land as components for study, where indicators such as preferred conditions required for the exercise of rights could be accurately measured. Similarly, measuring the availability of land or the diminishment or lessening of the priority of rights as a result of construction or operation could also show a project’s impact on Section 35 rights. [Our organization] has experience is using these alternative indicators....if the NEB would require both input in scoping and alternative components for study, impacts of rights are possible.”*

*“The Crown needs to discuss potential project impacts with [First Nation] well before the NEB has made a decision or recommendation.”*

*“[A province] recommends that the National Energy Board (NEB) review process for major energy projects under its authority should include early, meaningful and ongoing engagement and consultation with impacted Indigenous and local communities. A similar approach was used by the Ontario Energy Board (OEB) in its 2-year public engagement with local and Indigenous communities on Energy East. This is consistent with the Interim NEB Rules (i.e., Increase engagement with Indigenous and local communities).”*

*“The Crown and the NEB must engage indigenous communities early in the ESA process in developing consultation plans.”*

*“For Major Pipeline Projects, the Federal government should engage Indigenous communities early in the process to identify whether there are issues that cannot be addressed within a project review and require a separate nation-to-nation process. These steps would help reduce the conflict, frustration, and delay that currently arise over these issues in the NEB process and, in so doing, help advance the government’s broader goals of advancing reconciliation and developing a renewed Nation-to-Nation relationship.”*

*“Indigenous groups must be engaged in the Board’s regulatory process from the early stages, before proposals are submitted and important strategic decisions are made, all the way through monitoring and enforcement. Engagement with indigenous governments must begin before the hearing has commenced. Meaningful engagement must predate the final determination of the project route in order to give affected groups the opportunity to participate in siting decisions, which often have very significant impacts on groups’ rights and interests. It is not sufficient to provide an opportunity to comment on project location in the course of the hearing, by which time significant time and resources have been invested in the proposed location.”*

*“Consultation with Indigenous peoples must take place early, when the project is being defined, and should continue until the project’s completion. This ensures that concerns about a proposed project are addressed and integrated at the earliest stage of government decision-making, before irrevocable decisions about the proposed project are made. The NEB is not the appropriate forum to fulfill the Crown’s obligations because these obligations are often triggered prior to the commencement of the NEB’ involvement in the review of a project.”*

*“Generally speaking, in order for any energy project to be consistent with our rights and values, assessment and decision-making processes must include our meaningful involvement as early as possible.”*

*“... First Nations be informed about any potential projects as early as possible in the process, so that we can begin to work with the government and the proponents as necessary and required.”*

*“...the NEB should be required to communicate clearly and early on in its review process which consultation issues it will and will not address, so that the federal government and Aboriginal groups can consult on those matters in other forums.”*

*“NEB hearings can move forward before we are ready to effectively participate. This is especially concerning because the Crown relies on the NEB to make a recommendation on whether a given project will proceed. Engagement needs to happen as early as possible and should ensure that we have ample time and resources to participate in any NEB regulatory review process.”*

*“Early engagement with Indigenous people can mitigate potential project impacts and result in improved projects. Clarifying the Crown’s “Duty to Consult” and the role of various agencies (e.g., CEAA, NEB, Fisheries and Oceans, etc.) would be very helpful in this regard. [Organization] believes that the NEB can address specific project related impacts through conditions attached to any project approval.”*

## **Indigenous Participant Funding**

***There is a belief that participant funding is inadequate, particularly in light of tight timelines. There are indications that communities must choose between hiring experts or lawyers. Similarly, many Indigenous communities are suffering from consultation fatigue.***

*“The amount of participant funding to Indigenous communities must be re-assessed, in consultation with Indigenous communities, and be proportional to the complexity of the proposed project and magnitude of potential impacts.”*

*“The funding is typically reimbursement-based. This is burdensome and requires substantial administrative effort to request and receive some form of an advance payment. Many First Nations do not have discretionary funding or the personnel to allocate to this type of work.”*

*“The Crown and the NEB can reduce the length of time for project reviews by making a practice of providing adequate capacity funding and commencing engagement with affected Aboriginal groups on procedural and substantive issues early on all relevant issues.”*

## **Oral Traditional Evidence**

***Elders and Indigenous community members may not feel comfortable providing oral evidence and Indigenous Traditional Knowledge in formal hearing settings, leading to a gap in information. Further, there is concern that Indigenous Traditional Knowledge is not well understood.***

*“Due to the intimidating and alienating nature of the process it is not easy for our members to engage in and share their oral testimony, and when it consistently doesn’t lead to better outcomes, the value (real and perceived by our members) of providing this information is undermined.”*

*“It is within these original languages that the Elders and Knowledge Holders carry their expertise and it is within Indigenous institutions such as sacred lodges that Indigenous people and nations can be meaningfully heard.”*

*“The panel should not be given the discretion to hold a hearing only in writing where a First Nation requests an oral hearing. Such an approach would effectively silence many First Nations, given their oral traditions.”*

## **Traditional Knowledge**

***Many indicated that the NEB does not adequately consider traditional knowledge or land use. Furthermore, some participants believe that the NEB does not properly integrate traditional knowledge into its decisions, and that it does not have the appropriate processes and knowledge to do this effectively.***

*“There is currently no mandatory requirement to consider traditional knowledge and no formal guidance on how traditional knowledge should be integrated into NEB applications, decisions or hearings.”*

*“To better protect intellectual property, the NEB should work with communities to establish information-sharing agreements or protocols that outline how IK/TEK will be used, and ensure it will not be mistreated, or taken out of context.”*

*“The NEB mandate, governing legislation and processes must include requirements for proponents and reviewers to work with potentially impacted Indigenous communities in each proposed project application, review, and assessment with the aim of developing and incorporating a foundational understanding of Indigenous perspectives, traditional laws and knowledge of the community.”*

*“Indigenous knowledge, perspectives and law should be integrated into every stage of the NEB review process, such as determining the issues to study, the scope of factors, assessment of strength of claim and impacts on Aboriginal and treaty rights, and the effectiveness of mitigation measures.”*

*“Indigenous-driven regulatory review processes support the inclusion of available traditional knowledge to fully assess a project’s tangible and intangible impacts. For the assessment of a project to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.”*

*“Why are they looking for a relationship now? Are they going to listen to what we say as Indians? Are they going to treat our Traditional Knowledge as equal or more in tune than their knowledge or science?”*

## **Community Impact Determinations**

***There is a perception that the NEB and proponents underestimate the degree to which an Indigenous community is impacted because the location of the reserve is not in the immediate vicinity of the proposed project.***

*“It appears that no one was interested in our traditional knowledge or perspective on project effects to our health and socio-economic conditions, our physical and cultural heritage, or the current use of lands and resources for traditional purposes, or on any structure or site of historical significance, such as the Ottawa River itself.”*

*“Proponents often use “Traditional Use Studies” as tools to fix natural resources and processes in space and time. The current methodology only looks backward in time – it lacks dynamism. This information may be misused in order to downplay the impacts of projects.”*

## **Cumulative Effects**

***Indigenous groups have expressed concern that their rights and interests are disproportionately affected by energy infrastructure development and that cumulative effects are not adequately considered by the NEB, or by Canada—either on a project-level, or a regional level.***

*“We are proposing that the Crown needs to consult with us directly because not only is the Board not in a position to discharge the Crown’s obligations but the Board lacks the statutory mandate to do so and we need to address cumulative impacts with the Crown that fall outside the tasks of the board. ... Cumulative impacts on our rights, particularly on the exercise and assertion of Aboriginal title, as well as cumulative environmental effects as defined by the Canadian Environmental Evaluation Act (CEAA). We are proud Aboriginal title holders, but CEAA does not currently address the impact of development undertaken without our consent or recognize our governance ability to make decisions about development within our title area.”*

*“Cumulative impacts need to be a factor in the NEB’s decision-making in order to also achieve reconciliation.”*

*“Generally, project-based reviews have made it difficult to have overarching issues such as cumulative effects recognized in federal processes, but nevertheless, we are observing and experiencing their impacts on our lands and rights now.”*

*“Cumulative impacts are poorly addressed in EAs if considered at all.”*

## **Decision-Making Process not Conducted Jointly with Indigenous Peoples**

***Indigenous peoples are of the view that the decision making process is not conducted jointly with them. Further, Indigenous peoples have emphasized that NEB decision-making reflects Western, mainstream perspectives that are fundamentally different from their own. They stress that the NEB does not adequately understand Indigenous perspectives, and as a result, the Board dismisses these points of view and relies predominantly on the mainstream perspectives of which they are familiar. Moreover, the formal hearing process is not designed to respect or accommodate elders and their knowledge.***

*“In order to properly assess the potential impacts of a proposed project on our Aboriginal title and rights, regulatory review processes must be informed by Indigenous knowledge, laws, perspectives, culture and traditions.”*

*“If the Crown is going to continue to require Indigenous communities to participate in the NEB or CEAA assessments as part of its consultation and accommodation process, it needs to be either present at the hearings or engaged with and supporting communities throughout the process, from the initial screening of the project to after the NEB’s decision or recommendation is made.”*

*“The NEB’s mandate does not require it to assess the impacts of a proposed project on Indigenous governance and jurisdiction, including the right to decide the uses to which the land and water will be put. This right is integral to the exercise of our Aboriginal title and rights.”*

*“The assessment of a project’s potential effects on Aboriginal Title and Rights must be done from an Aboriginal perspective.”*

*“This consensus based decision-making must be built into the legislation. However, before you can build such structures and processes into the legislation you need to find out from First Nations what consent means to them. The federal government cannot make that determination unilaterally.”*

*“Even with a cooperative and collaborative approach to assessments, there will be circumstances where First Nations and the NEB (or joint panel) will not agree. A consensus based decision-making model with a dispute resolution mechanism in place should be developed as part of the collaborative, harmonized, and coordinated First Nation assessment process.”*

*“Moving forward, Canada’s legislative regime for environmental approval of project development must include Indigenous people, their perspectives and rights, in a meaningful manner, and not as an afterthought.”*

## **Risk Management**

***Views were about the fact that Indigenous communities bear a large share of the risks associated with NEB regulated projects since they impact traditional and treaty lands across the country, yet they receive limited benefits, relative to the benefits that proponents and governments gain from the resource activity.***

*“To truly be in the public interest, there should be an alignment of risks and benefits. If most of the risks... are borne by First Nations or local communities, while benefits (such as project revenues or job and contracting opportunities) are largely enjoyed only by corporate entities and individuals employed hundreds of kilometres away, that alignment is lacking and such a project should not be considered in the public interest.”*

*“Despite living in the geographic centre of some of the world’s [sic] most profitable oil and gas fields, the vast majority of [local First Nations] members are among Canada’s most impoverished people... There is a large imbalance between costs vs. benefits of resource development in [local First Nations’ traditional territory, and these First Nations] pays vastly disproportionately higher costs and [receives] lower benefits than are enjoyed by the rest of Canadian society.”*

*“Aboriginal rights, which include the ability to access food, social, and ceremonial resources, and governance and stewardship obligations, can only be practiced if there are actual resources available to exercise these rights.”*

## **Indigenous Participation in Monitoring**

***Some believe that there are insufficient opportunities for Indigenous peoples to participate in monitoring of the construction and operation of an NEB regulated facility.***

*“An Aboriginal advisory and monitoring committee should be established for every NEB regulated project to facilitate ongoing Aboriginal engagement throughout a project's entire lifespan.”*

*“Project approvals should be contingent on direct involvement of Indigenous people in the development and implementation of emergency response and monitoring plans. There should be a clear commitment to Indigenous ‘boots on the ground’ as monitors and enforcement officers, reporting back to both the NEB and to their respective Indigenous Nations.”*

*“Mandatory and direct participation of indigenous communities in environmental monitoring and emergency response during project construction, operations, decommissioning, and abandonment on their traditional lands.”*

*“Require operators to have lifecycle agreements with impacted Indigenous communities whose Traditional Territories or harvesting areas the project intersects to ensure their direct involvement and advance notification when activities are planned pertaining to the company's operations and maintenance activities.”*

## **Public Participation**

### **Participation Methods Lack Flexibility**

***Public participation in NEB hearings is limited due to the way in which standing has been defined in the NEB Act and applied by the NEB. Participants have noted that the NEB's current approaches to public participation are rigid and lack flexible opportunities for providing input, such as in online forums and town hall meetings.***

*“Engaging the community should be about more than notices and a few town hall meetings. It should involve real consultation with the possibility that plans may change.”*

*«Anomalie : Les gouvernements, ministères et organismes des provinces et territoires, les municipalités et les autorités politiques des Premières Nations sont actuellement traités comme des participants ordinaires, devant loger des demandes de participation, présenter un mémoire écrit et disposant d'un temps de parole identique en audience à celui de tout autre participant. »*

*“The National Energy Board Act was recently modified to reduce public participation in its process. The 2012 amendments reduced intervenor status to those persons directly affected by a particular proceeding and provided for interested experts to become involved only if the NEB permitted. Not un-coincidentally, public trust in the NEB has since eroded.”*

*“One thing about which our interlocutors were more or less unanimous was that almost no one in the public understands the decision-making system when it comes to energy projects.”*

*“Today's public, motivated by a strong distrust of corporate and government authority and by an empowering sense of their political rights and efficacy, demand to be adequately informed and meaningfully involved in the planning of projects proposed for what they regard as their ‘backyard’.”*

## **Limitation of Participation Opportunities throughout a Project’s Lifecycle**

***There is a perception that opportunities to provide input and concerns following a hearing are limited (e.g., to raise concerns about an existing facility).***

*“A notification letter to a landowner or in a newspaper is not adequate on its own. Multiple one-on-one and group interactions to discuss a potential development are necessary to adequately understand and address concerns and interests.”*

*“Current efforts to engage Indigenous peoples are overwhelmingly preoccupied with the project review stage, without adequate attention to construction, operation, and decommissioning portions of the NEB’s ‘lifecycle approach’ to regulation.”*

*“In the project life-cycle oversight exercise by the NEB, there must be a role for Indigenous communities that recognizes their inherent jurisdiction over activities within their territories, particularly those that will have an impact on their Aboriginal rights, title and interests.”*

## **Resources and Participant Funding**

***Some believe that the public does not have sufficient time and capacity to review all of the relevant documents during a hearing, which can be tens of thousands of pages in length, and that funding to participate in NEB hearings is inadequate.***

*“Without sufficient funding from the proponent and/or the federal government, [many First Nations] cannot afford to retain experts to review and respond to the volumes of information, data, studies and reports led by the proponent in relation to the project... As a result, much of the scientific evidence before decision makers is proponent led, untested by individuals and groups with an interest in the project.”*

*“Establish a robust funding program for participation.”*

*“Funding is necessary for landowners during negotiations, not only during the hearing process.”*

*“Timelines should be revised for project reviews per the size of the project and have the flexibility to be modified as needed. The current system is inflexible and not responsive to needs on the ground. For complex projects the 15-month timeline is not feasible, especially given the massive volumes of information involved, which might take months to read, let alone adequately respond to.”*

*“Bon nombre de MRC et de petites municipalités, souvent rurales, ne disposent pas de ressources financières, humaines et matérielles pour évaluer les impacts sur l’aménagement de leur territoire, leur schéma de couverture de risques ou leur plan de mesures d’urgence de même que sur des zones de conservation ou d’aménagement particulier qu’elles jugent importants et non considérés par le promoteur.”*

*“The timelines imposed in 2012 were intended to result in quicker treatment of project applications, but an expedient process which ends up being contested is no more efficient than one which allows sufficient time for communities to consider the full breadth of socio-economic and environmental impacts and to propose appropriate mitigation measures.”*

## **Municipalities' Participation, Costs and Risk**

***Comments were made regarding the ability of municipalities to be heard during project reviews. Specific suggestions were that due to how municipalities were directly impacted by projects, they should not have to apply for standing in order to participate (and their interests recognized), and they should be eligible for participant funding to support their capacity to participate. For example, municipalities note that the risks and costs they incur from projects are greater than the benefits they receive.***

*“In the 21st century, municipalities should be recognized as a third order of government, with significant democratic powers, and with a primary role in respect to regulating projects within their boundaries. The NEB Act should recognize that effective regulation requires cooperation between the interlocking and overlapping jurisdictions.”*

*“A lawful federal regulatory scheme must advance goals within its legislative authority, such as pipeline safety, in a way that minimally impairs municipalities’ ability to regulate matters within their legislative authority.”*

*“To address the conflict-of-interest inherent in companies designing their own risk assessments, the NEB should mandate a process for risk assessment design and analysis that explicitly includes the priorities of local communities and stakeholders affected by projects as determined by those groups.”*

*“For some municipalities, particularly small or remote rural municipalities, the cost to attend hearings or environmental assessments may be prohibitive. It is our view that municipal participation in these hearings and environmental assessments is critical because municipalities provide and maintain the transportation infrastructure necessary for pipeline and powerline projects, but will not receive taxation until the pipeline is operational.”*

## **Land Issues**

### **Land Acquisition Concerns**

***Land owners have raised concerns that proponents’ tactics for land acquisition were intimidating and unfair. Views that the current process for lands acquisition leaves landowners unsupported and unfairly favours companies over landowners were expressed.***

*“The landowners have been the eyes and ears of pipeline safety and security, and stewards of the land for all this time, and even as the importance of the land is to pipelines, the amount invested in the land component of this process is minute in comparison to the costs of projects overall.”*

*“There is ultimately no power for landowners to ensure they have the time and proper support to fully consider a development and the implications for their interests prior to a hearing process.”*

*« Le processus d’acquisition des terrains par les promoteurs, comme l’expérimentent les producteurs agricoles et forestiers, s’apparente souvent au Far West. En effet, un propriétaire foncier agissant de façon individuelle n’a généralement pas les ressources légales et financières pour négocier sur un pied d’égalité avec une compagnie pipelinère. Ce rapport de force déséquilibré, accentué par le pouvoir d’expropriation implicite que constitue l’article 104.1 de la Loi sur l’Office, est un facteur qui peut nuire à l’acceptabilité sociale des projets. »*

## **Disputes, Arbitration and Compensation Processes**

***The NEB does not currently have the mandate to consider issues related to compensation, and landowners must go to the Pipeline Arbitration Secretariat at Natural Resources Canada to resolve disputes. Landowners expressed concerns regarding this arbitration system, and some were not pleased with how compensation was determined for landowners.***

*“We recommend the Board require project proponents to compensate municipalities for all project-related costs they incur. In addition to land acquisition and the cost already identified in section 9 above, this includes project-related roadwork, water mains, sewage maintenance, construction of new infrastructure, disruptions to operations, and other expenses. Without redress, these costs are in effect a taxpayer-funded subsidy to project proponents.”*

*“...land compensation disputes are best addressed through NRCan or another agency. Having the NEB manage compensation disputes would put the NEB in the difficult position of determining not only whether a project is in the public interest but also the specific value of the land required, which is not part of the Boards core area of expertise. By separating the processes, the NEB can focus on its core mandate of determining whether facilities are in the public interest. Currently, the process through NRCan is set up with a view to resolving claims efficiently and expeditiously. The pipeline arbitration committee proceedings are also governed by the rules and procedure set out in the Act, and in [a company’s] view these procedural mechanisms ensure a fair hearing.”*

*“Land by its very nature is unique and, as set out above, land agreements are often site-specific and tend to be private. In addition, the Act grants certain rights to access both private and Crown land for the purposes of conducting initial surveys and examinations on the lands for fixing the site of the pipeline and ascertaining certain lands as may be necessary and proper for the pipeline. While [a company] and other pipelines strive for consistency in the level and form of compensation, and how they exercise rights under the Act, there are circumstances where complete standardization is not practical or feasible. For this reason, [a company] is of the view that individual landowners should retain the right to negotiate land rights agreements on an individual basis.”*

### **Right of Entry**

***Comments were made regarding the NEB’s ability to authorize a company to enter private lands without the agreement of the landowner (for construction or other reasons), and the process by which companies apply for this.***

*“Removing right of entry would effectively give individual landowners complete authority to hold up the project and create an imbalance in negotiating positions. Based on these considerations, the NEB must retain the authority to grant right of entry in appropriate circumstances.”*

*“It can be difficult for a landowner’s issue to be recognized as legitimate if there is a lack of financial impact, even if the social impact is high. This leads to an imbalance of power in negotiations for right of entry... If a disagreement relates to whether the land should be accessed at all, right of entry should not be granted. This represents a major breach of trust with the public, as well as a safety risk to anyone involved with developing a project.”*

# Annex VIII: Expert Panel Member Biographies

The members of the NEB Modernization Expert Panel are: David Besner, Wendy Grant-John, Brenda Kenny, H  l  ne Lauzon and Gary Merasty. Ms. Lauzon and Mr. Merasty will be co-chairs. The Panel will be guided by the [\(External link\)Terms of Reference](#), which set out its mandate. The Terms of Reference reflect input received[\(External link\)](#) during the 30-day public comment period.

## Biographies of Expert Panel Members

### **H  l  ne Lauzon (co-chair)**

Ms. H  l  ne Lauzon chairs the Quebec Business Council on the Environment / Conseil patronal de l'environnement du Qu  bec (CPEQ), which presents the concerns and contributions of Quebec businesses to governments and other stakeholders in the areas of the environment and sustainable development. She is also co-chair of the Climate Change Advisory Committee in Qu  bec's Minist  re du D  veloppement durable, de l'Environnement et de la Lutte contre les changements climatiques as well as on the Board of Directors for the Association mini  re du Qu  bec and the Soci  t   du Plan Nord.



Previously, Ms. Lauzon was a Partner on the Environmental Law Team at Lavery, de Billy where she advised companies on preventive and curative questions pertaining to prior authorizations for projects, the environmental impact assessment and review procedure, management of contaminated lands, control of surface water, groundwater and wastewater releases, management of residual and hazardous materials, control of atmospheric emissions, and transport of hazardous goods.

Ms. Lauzon also served as an ad hoc commissioner for the Montreal Public Consultation Bureau/ Office De La Consultation Publique De La Ville De Montr  al.

H  l  ne holds a Bachelor of Laws degree and a Masters in Urban Planning.

### **Gary Merasty (co-chair)**

Mr. Merasty is President and COO of Des Nedhe Developments LP and serves as a Director at the Canada West Foundation. A member of the Peter Ballantyne Cree Nation, Gary served two terms as grand chief of the Prince Albert Grand Council and as a Member of Parliament serving northern Saskatchewan.

The first status First Nations person from Saskatchewan to be elected to Parliament, Gary served on the House of Commons Standing Committee on Agriculture and Agri-Food, the Standing Committee on Aboriginal Affairs and Northern Development as well as the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities. In the Liberal caucus, he acted as Indian Affairs associate critic and was a Special Advisor for Aboriginal Outreach.

Gary has served on a variety of boards including the Prince Albert Development Corporation, West Wind Aviation Limited Partnership, Saskatchewan Indian Institute of Technologies and Saskatoon Airport Authority. He was previously Vice President, Corporate Social Responsibility at Cameco Corporation.

Merasty holds Bachelor and Master degrees in Education from the University of Saskatchewan. In (External link) 2005, he received an honorary diploma in Entrepreneurship and Small Business from the Saskatchewan Institute of Applied Science and Technology and in 2007 was named one of the 100 Alumni of Influence by the University of Saskatchewan. Gary was awarded the Queen Elizabeth II Golden Jubilee Medal and the Commemorative Medal for the Centennial of Saskatchewan.



### **David Besner**

Dr. David Besner is the President of the New Brunswick Energy Institute, and Chairs its Scientific Advisory Council. He has also chaired numerous air quality standard and air emission standard-setting committees in Canada, served on the International Joint Commission's Air Quality Board as well as the Ontario Environment Minister's Committee on Transboundary Science.

Dr. Besner is a former Assistant Deputy Minister of Intergovernmental Affairs and External Relations for the New Brunswick Department of Environment and Local Government. His governmental career included responsibilities in industrial approvals, pesticide management, environmental assessment, environmental quality, and policy development.

Dr. Besner developed the first Air Quality Regulation for the Province in 1972, as well as its first environmental impact assessment Regulation in the 1980's. In addition, he was responsible for a variety of public consultation programs, and managed program renewal within the Environment Department, and the integration of the Environment and Local Government Departments.



Following his retirement from government, in 2001, he formed his own consulting firm, D. Besner & Associates Inc. He is currently a Senior Affiliate at Independent Environmental Consultants and the Manager of Planning, Marketing and Government Relations at Tire Recycling Atlantic Canada Corporation.

During both his Government career and his consulting work, he has facilitated numerous workshops and reorganization processes, including the development of New Brunswick's Sustainable Development Strategy.

David holds a bachelor of science in chemical engineering from the University of New Brunswick and a PhD in environmental health engineering from the University of Texas.

### **Wendy Grant-John**

Wendy Grant-John served three terms as Chief of the Musqueam and was the first woman elected Regional Chief to the Assembly of First Nations. As Musqueam Chief, she helped to negotiate one of the first Indigenous commercial fisheries in Canada, and played a major role in two important Indigenous rights cases decided by the Supreme Court of Canada: *R. v. Guerin* and *R. v. Sparrow*.



Mrs. Grant-John served as a lay bencher of the Law Society of British Columbia and as a Board Member with Canada Lands Company Limited. She has also served as a Commissioner on the Pacific Salmon Commission. Mrs. Grant-John was a founding member and director of the Aboriginal Healing Foundation and a founder of the Musqueam Weavers. In 2006-2007, Mrs. Grant-John was the official Representative for the Minister of Indian and Northern Affairs Canada on the issue of Matrimonial Real Property on Reserve.

She worked at Indian and Northern Affairs Canada as Associate Regional Director General of British Columbia. Mrs. Grant-John is currently a Senior Aboriginal Advisor at Deloitte and a Musqueam First Nation Councillor.

Wendy is a recipient of the Order of British Columbia and has two Honourary Doctorates of Law from Royal Roads University and Simon Fraser University.

### **Brenda Kenny**

Dr. Kenny has extensive experience in energy regulation, sustainability and strategy development. She spent a number of years with the National Energy Board, where she provided executive leadership in policy, regulatory reviews and finance.

From 2008-2016, Dr. Kenny served as President and CEO of the Canadian Energy Pipeline Association (CEPA) where she worked with industry partners and key stakeholders to advance pipeline safety, operating excellence, environmental performance and sound policy.



Dr. Kenny is an adjunct professor in the Haskayne School of Business at the University of Calgary. She serves on the Board of Governors for the University of Calgary, and chairs that Board's Environment, Health, Safety & Sustainability Committee. She is also the co-chair for the Nature Canada initiative Women for Nature and the Vice Chair of the Board for Emissions Reduction Alberta (ERA), an Alberta independent not-for-profit organization that invests in clean technology solutions.

Dr. Kenny sits on the Member Council of Sustainable Development Technology Canada, an independent government agency that funds Canadian clean tech projects.

Brenda is a Fellow of the Canadian Academy of Engineering Fellow, a member of the Institute of Corporate Directors and has been active in a variety of boards and community groups including WaterSMART, the Calgary Chamber of Commerce, Sustainable Calgary and imagineCALGARY.

Brenda holds a Doctorate in Resources and the Environment, a Masters of Mechanical Engineering, and a Bachelor of Applied Science.







