

**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 8<sup>th</sup>, 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.

## **THEME: Governance and Structure**

**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.

## **THEME: Mandate and Future Opportunities**

**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.

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

**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.

## **THEME: Compliance, Enforcement, and Ongoing Monitoring**

### **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".

## THEME: Engagement With Indigenous Peoples

### 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 Métis Nation would like to see their relationship with the NEB and federal government changed. They stated that the Métis 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 Métis 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.

## **THEME: Public Participation**

### **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.

## **GENERAL COMMENTS**

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.