

**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.

## **THEME: Governance and Structure**

### **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.

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

### **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.

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

### **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.

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

### **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.

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

### **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.

## **THEME: Public Participation**

### **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.