

**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.

THEME: Governance and Structure

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.

THEME: Mandate and Future Opportunities

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 their 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.

THEME: Decision-making Roles, Including on Major Projects

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 goings-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.

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 that 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.

THEME: Compliance, Enforcement, and Ongoing Monitoring

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.

THEME: Engagement With Indigenous 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.

THEME: Public Participation

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.

GENERAL COMMENT

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.