

The NEB Modernization Report

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Report commented on: [*Forward, Together: Enabling Canada's Clean, Safe and Secure Energy Future*](#), Report of the Expert Panel on the Modernization of the National Energy Board, May 2017, and [Volume II, Annexes](#).

This post provides a summary of and preliminary comments on the *Report of the Expert Panel on the Modernization of the National Energy Board* (NEB), which was released in May 2017. The Report begins with an overview of “What the Panel Heard” and then articulates a set of five principles which underlie the Panel’s recommendations. The Panel follows this with a statement of the Panel’s vision for Canada’s regulator of energy infrastructure and then a set of recommendations focused around six key themes for realizing the Panel’s vision. These recommendations constitute the meat of the report. The six key themes are: (1) mandate, (2) relationships with Indigenous Peoples, (3) governance and decision-making, (4) public participation, (5) Indigenous Operations (keeping the land pure), and (6) respect for landowners.

Volume II contains a set of annexes. Annex II of Volume II contains “Preliminary Findings Regarding Potential Legislative and Regulatory Changes”. These draft provisions do little to supplement the discussion in Volume I.

The key changes proposed by the panel are as follows:

- Alignment of the role of a national energy regulator with a clear articulation of national energy and climate policy.
- Replace the NEB with a new agency to be called the Canadian Energy Transmission Commission (CETC).
- Create a new Canadian Energy Information Agency.
- Establish a two-step decision-making project for new energy transmission projects.
 - Step one, under the authority of a body such as the Major Projects Office, will assess whether a proposed project is in the national interest.
 - Step two, under the authority of the CETC and the Canadian Environmental Assessment Agency, will provide for detailed regulatory approval.
- Create an Indigenous Major Projects Office.
- Provide a greater emphasis on life-cycle regulation of projects and in this context adoption of Indigenous language terms to help capture the importance of respecting Indigenous world views.
- Create a Public Intervenor Office
- Create Regional Multi-Stakeholder Committees

- Provide an enhanced role for municipalities in proceedings
- Create a Landowners Ombudsman
- Establish stronger standards for land agents and review compensation rules for infrastructure rights of way

Three themes pervade the Panel’s analysis. The first theme is the need to re-establish the trust of Canadians in the national energy regulator. The second theme is the importance of establishing a respectful relationship with Canada’s Indigenous peoples. While the latter is clearly a large national project which extends far beyond national energy issues, the Panel attempts to articulate what a re-envisaged relationship might mean for a national energy regulator. And the third theme is that a national energy regulator cannot do it all and should not be expected to do so. We need a national energy strategy and furthermore we need to think carefully about those information and project approval functions that are best assumed by a national energy regulator and those which should be discharged by cabinet or by another office of government.

Background

In June 2016 Minister Jim Carr announced his intention to establish an expert panel to advise on the “modernization” of the National Energy Board. He provided [draft terms of reference](#) for the expert panel which were [finalized](#) several months later. The terms of reference (ToR) emphasised that the Panel was to “conduct a targeted review of the NEB's structure, role, and mandate” with the goal of positioning the NEB as a “modern, efficient, and effective energy regulator and regain public trust”. Issues to consider included: governance, mandate, decision-making roles, life-cycle regulation, indigenous engagement and public participation. In considering the NEB’s structure role and mandate, the Panel was specifically directed to consider “the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).” The ToR made it plain that the Minister expected to see significant stakeholder engagement as well as direct engagement with Indigenous organizations and communities.

The following sections provide an overview of the Expert Panel’s Report following the headings used by the Panel.

An Overview of What the Panel Heard

The Panel made four main points under this heading. First, the Panel indicated that it had heard broad agreement that NEB project hearings were being used as a *de facto* forum for debates about Canada’s energy policy and climate change but that nobody considered that this was a good idea. It was happening because there was no alternative and more suitable forum. Second, the Panel heard that there was crisis of confidence in the NEB. Many apparently regarded the Board as “captured” by the industry it regulated and many found its decision-making opaque. Third, the Panel heard that it was time to establish a new relationship with Indigenous peoples in Canada. And finally, the Panel emphasised (at 9) that it had heard that creative win-win solutions should be possible in which “the interests and rights of the various parties involved [could] be acceptably accommodated in the interest of all Canadians.”

The Five Principles

The Panel distilled (at 10-15) “five fundamental principles” to guide its recommendations.

1. Living the Nation-to-Nation Relationship
2. Alignment of NEB Activities to National Policy Goals
3. Transparency of Processes and Decision-Making and Restoring Confidence
4. Public Engagement Throughout the Lifecycle
5. Results Matter: Regulatory Efficiency and Effectiveness

The Panel’s Vision

Prior to articulating specific recommendations, the Panel set out what it describes (at 16) as “an overall vision of the future of energy transmission infrastructure regulation in Canada.” That “vision” seems to consist of four elements or building blocks.

The first element (at 19-20) is “policy and leadership”. Here the panel called for a “fully realized” Canadian energy strategy led by the Minister of Natural Resources but in partnership with Indigenous peoples, the provinces and the territories.

A second element (at 20) comprises “an enhanced government role for the collection, analysis, and dissemination of information about energy production, transmission, use, future trends, and associated carbon emissions, to inform policy-makers, industry, Indigenous peoples, academia, civil society, and Canadians.” The Panel considers that this function should be discharged by a new Canadian Energy Information Agency.

A third element involves enhanced pre-project “engagement” between project proponents and others (at 21) “to establish stronger, good faith relationships between the regulator, the Crown, industry, Indigenous peoples, and interested parties.”

A fourth element involves splitting the project review and approval process into two (at 21-26). The *first step* is an assessment of the alignment of the project with the national interest. This assessment would not be undertaken by the NEB or the proposed successor CETC but would be undertaken instead by something like the current Major Projects Management Office housed in Natural Resources Canada resulting in a recommendation by the Minister of Natural Resources to the Governor in Council. The Panel explicitly acknowledges that this is ultimately a political decision to be made by democratically elected and accountable government officers at the highest level. The *second step* is a more detailed project licensing review based on an assessment of technical considerations and risk mitigation. This assessment is to be undertaken by the new CETC in conjunction with the Canadian Environmental Assessment Agency (CEAA). A five-person joint review panels will be chaired (at 24) by an “independent panel member” i.e. independent of either the CETC or CEAA.

A fourth element of the Panel’s vision emphasises the CETC’s responsibility for the subsequent operations of any approved infrastructure. To properly describe these responsibilities and to recognize the significance of Indigenous world views, the Panel adopted (at 26) a Cree word Î-kanatak Askiy Operations (meaning “keeping the land pure”). Under this heading the Panel referenced the adoption of best practices, proactive monitoring and preparedness (with greater

transparency and accessibility) which should also extend to emergency and compliance response. A cycle of continuous improvement should pervade every aspect of the CETC.

The Detailed Recommendations of the Panel

Finally, the Panel laid out its specific recommendations (at 31-87) under the heading of “Realizing Our Vision: 6 key themes”. As noted above, those six key themes (at 31) are: (1) mandate, (2) Indigenous engagement, (3) governance and decision-making, (4) public participation, (5) Ī-kanatak Askiy Operations (keeping the land pure) and (6) respecting landowners.

In what follows I have reproduced verbatim (as indented text) the Panel’s recommendations. In the Panel’s report these recommendations are followed by “Notes” from the Expert Panel. I have not reproduced these and have instead provided my own commentary on at least some of the Panel’s recommendations.

Mandate

1.1 Aligning with a Clear Canadian Energy Policy

1.1.1 The Department of Natural Resources, in partnership with Environment and Climate Change Canada (and any other relevant players within the federal house), provinces and territories, in Consultation with Indigenous peoples, and with broad stakeholder engagement, publish and update on a reasonable schedule a formal Canadian energy strategy which plots a course for the future of energy in Canada, balancing environmental, social, and economic objectives. (33)

1.2 Leadership to Increase Federal/Provincial/Territorial/Indigenous Coordination

1.2.1 That the federal government should perform a high level of inter-governmental coordination on all energy-related matters in order to realize its vision of the future of energy in Canada, fully respecting the roles of provincial, territorial, and Indigenous governments. Furthermore, we recommend that this approach include, to the greatest extent possible, the engagement of other stakeholders, to create a united front for making Canada’s energy vision, and related emission reductions, a reality. (35)

Comment. I strongly agree with the proposition that not all the failings of our current regime for reviewing energy infrastructure projects should be laid at the feet of the National Energy Board. Successive federal governments must assume considerable responsibility for these deficiencies by *inter alia*, (1) failing to take a leadership role in adopting a clear national energy strategy (and until recently a climate strategy), (2) through the divisive and confining amendments to the *National Energy Board Act* adopted by the Harper administration as part of its omnibus budget legislation (*Jobs, Growth and Long-term Prosperity Act*, [SC 2012, c 19](#)), (3) through the combative statements of Ministers of the Crown in the context of project reviews (see [here](#) and [here](#)), and (4) by failing to give the NEB clear statutory direction as to how it was to reconcile climate and greenhouse gas policy with energy policy.

Given these observations it follows that I agree with the general tenor of the Panel's first two recommendations. However, the Panel gives the reader no sense of what a Herculean task this will be given the dominant resource ownership position of the provinces within Confederation. Perhaps it would make more sense for the federal government to focus on those matters which are clearly within its jurisdiction and in particular to provide legislative guidance to the national energy regulator as to how it is to incorporate climate change consideration and greenhouse gas policy issues in its decision making. Certainly, I don't find it particularly encouraging for the Panel to suggest (as it does at 34) that the work initiated under the [Canadian Energy Strategy](#) released by the Council of the Federation (i.e. the provinces and territories) has "great potential" for fulfilling what the Panel has in mind. To make your own assessment of that I suggest that you read that document and ask yourself whether you think it would provide any real guidance to a national energy regulator on any of the difficult issues on which it needs clear policy guidance.

Finally, I take it that one of the key challenges that we all face is that of how to do a better job of integrating energy policy and climate policy into decision making by the national energy regulator. If this is correct then it behoved the Panel to address how this might happen. This is not a trivial concern. An administrative tribunal cannot just apply policy (assuming that the policy is discernible) as if it were law – it needs to be told to do so. In the present context the Panel might usefully have considered options for implementing this goal. One option would be to include a statutory requirement that the national energy regulator take into account Canada's obligations and commitments under international climate agreements. Another option would be to include a provision allowing the Minister (or the Governor in Council) to provide directions to the national energy regulator (either generally or specifically) with respect to the integration of energy and climate policy. For examples, see the provisions of the *Ontario Energy Board Act*, [SO 1998, c.15](#) (s. 27) dealing with ministerial directions in relation to energy conservation programs, or more generally s.3 of British Columbia's *Utilities Commission Act*, [RSBC 1996, c. 473](#).

1.3 Information to Support Decision-making

1.3.1 The government establish an independent Canadian Energy Information Agency, reporting to the Minister of Natural Resources, whose mandate would include collection and dissemination of energy data, as well as the production of an annual public report on Canada's energy system, and quantitative analysis of the 'alignment with Canadian energy strategy goals. (36)

Comment. In my opinion the Panel has not offered a convincing argument for the creation of a separate information agency. I think that it would lead to a duplication of function and thus *inter alia* violate the principle of regulatory efficiency and effectiveness articulated by the Panel. A national energy regulator needs to be able to draw upon a rich range of data and resources. It needs to monitor and understand how the sector is operating and to identify and understand trends in costs, prices and technologies. To ask another agency to fulfil these and other functions will lead to duplication and inefficiency since the national energy regulator will still need its own in-house expertise in relation to these matters. The Panel suggests that a national energy regulator will face some conflict of interest in carrying out both an information function and a project regulation function but I cannot see where the conflict is. Why should the collection, organization, presentation and publication of energy data affect how the new energy regulator makes stage 2 decisions about an energy transmission system (and *vice versa*). That said, I do

agree that the national energy regulator needs much more guidance as to how to integrate climate change and greenhouse gas policy (and Canada's international legal obligations) into its information metrics, especially in relation to supply and demand projections. I think that the national energy regulator might also be encouraged to provide a broader range of information reports dealing, for example, with trends in the renewables sector (the NEB has done some of this, see [Canada's Renewable Power Landscape](#)) or with the generic energy challenges faced by isolated communities (both Indigenous and non-Indigenous).

1.4 Determination of National Interest

1.4.1 The enabling legislation of the CETC be amended to provide for the Minister of Natural Resources – based on advice from a whole-of-government perspective – to make a public recommendation to the Governor in Council of whether a preliminary major project proposal is in the national interest, on the basis of Consultation with Indigenous peoples (supported by a new Indigenous Major Projects Office described in Theme 2, below), strategic-level assessment, and engagement with stakeholders. The Governor in Council would have authority for the final national interest determination. (37)

1.4.2 In addition, we recommend that a more complete definition of the national interest, inclusive of Indigenous Consultation, environmental, economic, and social factors, be enshrined in regulation and updated on a reasonable schedule to keep pace with societal change, and that enabling legislation of the regulator be amended to make mandatory the consideration of the national interest so defined. (38)

Comment. Policy makers, lawyers, and academics concerned with major project decision-making, have long concerned themselves with the question of whether it is desirable and possible to separate out the “go-no go” decision from the more detailed technical assessment of a project. While I think that the idea is attractive insofar as it serves to focus on key issues from the outset and should, if it works, avoid considerable unnecessary investment, the idea is difficult to implement, partly because of the challenges of providing a necessary information base for the first order decision and convincingly distinguishing what is at stake at each of the two decision-making stages.

I think that this can perhaps be illustrated in the present context by thinking about how to operationalize the duty to consult in a two stage decision-making process. The Panel clearly considers, and rightly so, that both stages in the process will require consultation with Indigenous communities and perhaps consent. But how will the consultation obligations be apportioned between these two stages of decision-making? For example, if an impact and benefit agreement may be seen in part as discharge of the obligation to consult, or as evidence of consent, when would/should such agreement be negotiated? What level of project detail would be necessary to support such negotiations? What level of project detail would be necessary to support an assessment of national interest, especially if one or more of the Indigenous communities along the linear route remained opposed to the project?

The tension inherent in this last point is well illustrated by the following passage in the Panel's report in which the Panel explains (at 36) why it uses the term "national interest" rather than "public interest":

We have used the term "national interest" here to mean something more inclusive than the conventional "public interest". Explained simply, a determination of whether any type of proposal is in the public interest involves trade-offs between factors like projected economic benefits, risks to the environment, and so on. Every project involves some degree of balancing these fundamental interests, and the art of sound decision-making is all about weighing these factors and judging appropriately on that basis. The critical distinction, however, when it comes to Indigenous peoples, is that they do not simply bring interests to the table. Rather, Indigenous peoples retain a set of rights under the Constitution. While interests can be traded against each other, rights cannot.

Even with this explanation I think that the question of the appropriate standard to be met at this stage of the decision-making is far from clear. What is the connection between the national interest and the rights of Indigenous communities? And, is the Panel suggesting that the concept of unjustifiable infringement (most recently endorsed by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44) does not apply to linear projects? These are hard questions to answer, but it seems to me that the Panel ducks them both generally and in the specific context of the two-stage decision-making paradigm.

The difficulties may be equally apparent when we turn to consider other elements of a project proposal. As the Panel notes in passing (an isolated reference at 17 is, I think, the only reference) the NEB also has, in addition to its project approval jurisdiction, tolls and tariffs responsibilities under Part IV of the *National Energy Board Act*, [RSC 1985, c. N-7](#) (*NEBA*) for interprovincial and international pipelines. In recent years the NEB has been persuaded that it needs to consider tolling methodology issues as part of its consideration of project approval (i.e. the recommendation of a certificate of public convenience and necessity). In some cases (e.g. [Komie North](#) and [North Montney](#)) those issues have proven to be of fundamental importance. They are also issues which lie at the heart of the NEB's core competence. Where should these issues be dealt with in a bifurcated approval scheme? At the first level because they are crucial go-no go issues? Or at the second level because they are issues within the core competence of the NEB and also relate to the on-going economic regulation of the facility once built? There is much to be said for both views.

In sum, while I think that it is useful to have a discussion about a staged decision-making process I am sceptical as to whether such an approach is workable or, at the end of the day, that it will result in increased efficiency. I am however convinced that the final decision on public interest should be made at the highest political level. Ultimately the assessment of public interest is not a technical issue but a political issue although it may (and should be) informed by good science and good technical advice. These are various ways of structuring decision making to achieve this result. The two main iterations of the *NEBA* (pre and post *Jobs, Prosperity* etc) offer two different models (discussed in an earlier post [here](#)). I prefer the pre-*Jobs, Prosperity* model, especially if the national energy regulator receives clear guidance with respect to national energy and climate policy.

1.5 Detailed Project Review and Approval

1.5.1 Enshrined in the CETC Act, a modernized National Energy Board, hereafter known as the Canadian Energy Transmission Commission (CETC) will have the mandate and authority for the licensing of transboundary pipeline and transmission line projects, including the imposition of specific conditions on project proponents. Major projects must first be determined to align with the national interest by the Governor in Council, before any licensing hearing. (41)

Comment. It is not clear whether by this recommendation the Panel intends that interprovincial transmission systems come under the new regulator's jurisdiction.

1.5.2 We further recommend for major and significant projects that the CETC exercise this authority through Joint Hearing Panels which integrate CEA Agency-led project-level Environmental Assessments and the CETC decision making process to achieve the dual goals of delivering a single regulatory review process (not parallel technical and environmental review processes), and assuring that all federally-mandated Environmental Assessments are conducted in a consistent, high quality manner (under the authority of the CEA Agency). Five person Joint Hearing Panels – with at least one Indigenous member – would be comprised of two Commissioners from the CETC, two from the CEA Agency, and a final independent Commissioner. (41)

Comment. We have had considerable experience with joint review panels (JRP) over the last 15-20 years (see [post on the Northern Gateway JRP](#)) and it is interesting to see the Panel reviving this idea. Clearly this is something that needs to be worked through (as the Panel itself recognizes) as part of the government's overall response to the parallel recommendations of the expert group on environmental assessment (for posts by my colleagues on the recommendations of that panel see [Kwasniak](#), [Fluker and Yewchuk](#), [Olszynski](#), and [Mascher](#)). For present purposes however two points seem pertinent. First, the idea of a JRP assumes that the JRP will be discharging obligations under two statutes. This will need to be carefully co-ordinated especially if the government adopts any version of a two-staged decision-making process for the national energy regulator. Second, the concept of an "independent Commissioner" needs much more justification. What does "independence" mean in this context? The rule of law requires that the JRP discharge its statutory obligations within the framework of whatever combination of statutes under which it is operating. The independent Commissioner cannot be free of this obligation. And if all that the Panel means by this term is that the Commissioner should not have an institutional link with either CEAA or the national energy regulator it needs to articulate what additional value this proposal will add to the Panel's recommendations on the diversity of hearing Commissioners (see below).

Prepare for and Enable a Renewable Future

1.6.1 The Canadian Energy Transmission Commission's enabling legislation should have provisions to review and strengthen its capacity with respect to transmission lines, with a particular focus on building capacity for engagement

with Provinces (under whose authority new generation projects will take place), and the integration of new forms of (renewable) energy into the national grid. (43)

Comment. While I agree with the tenor of the Panel’s proposal (and the related discussion in the text) it would be useful to know precisely what the Panel has in mind. At present the NEB has absolutely no role with respect to interprovincial transmission lines unless and until a transmission line has been designated by the Governor in Council (*NEBA*, ss. 58.38 and 58.4). The reasons for this provision can be summed up in two words “Churchill Falls”. Since no such line has been designated the NEB, *de facto* and *de jure*, has no role with respect to interprovincial transmission lines. I would support detailed technical and policy consideration of giving the national energy regulator the same authority over interprovincial transmission lines that it has over interprovincial and international pipelines but it is not clear whether that is what the Panel had in mind. I think that this is precisely the sort of issue on which we might have expected the Panel to be more forceful and specific. If we are to reduce reliance on carbon-based fuels and yet at the same time ensure energy security, and to do so all at the lowest possible cost, then we should certainly be looking at enhancing the national grid and a national energy regulator must have a key role to play in such an exercise.

Relationships with Indigenous Peoples

Nation-to-Nation Relationships Start at the Top

2.1.1 Indigenous peoples should have a nation-to-nation role in determining Canada’s national energy strategy, and we look to the Minister of Natural Resources to define how this commitment can be met within the context of the decisions and recommendations of the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples. (47)

Enhanced Consultation and Capacity Building on Project Decision-Making

2.2.1 The government fund an Indigenous Major Projects Office [IMPO], under the governance of Indigenous peoples (determined as they see fit). Responsibilities of this Office would include but not limited to defining clear processes, guidelines, and accountabilities for formal Consultation by the government on energy transmission infrastructure, regulatory processes and assessing compliance with those guidelines. In addition, the Office would define and disseminate best practices, including coordinating and/or supporting Environmental Assessments and regulatory reviews, to help interested Indigenous communities enhance the quality of their participation in formal Consultation and engagement processes. (51)

Comment. There are at least two parts to this recommendation. The first part involves the creation of an IMPO under the governance of Indigenous peoples but with the responsibility to *inter alia* define guidelines for consultation by the government (i.e. the government of Canada). This is open to the objection that the design of consultation processes should be a collaborative exercise. While consultation guidelines might to this point have been a unilateral exercise of discretion by settler society governments, it hardly seems to be a solution to transfer this

responsibility to the IMPO which takes its direction from Indigenous peoples – especially when such matters extend to questions of accountabilities.

The second part of the recommendation envisages the IMPO acting directly on behalf of Indigenous communities in stage two hearings. This may not be completely apparent from the text of the recommendation but the Panel makes its intent clear in the sentence preceding the recommendation in which it states (at 51):

We therefore envision an Indigenous Major Projects Office representing and supporting Indigenous communities in the strategic and licensing decision phases of projects, and in facilitating Indigenous involvement in the full lifecycle of all projects, to the degree desired by the Indigenous communities in question.

I think that this part of the recommendation is fraught with difficulty. Indigenous communities from coast to coast to coast (as the Report itself recognizes) have vastly different interests and governance structures and face differing resource development pressures (and economic opportunities). While I can imagine that there is value in developing resource materials that can be broadly shared between different communities, it will be much more challenging for such an Office to make decisions about how to allocate scarce resources which must necessarily involve that Office in deciding whether to represent community A rather than community B, or to take position X rather than position Y. The conflict of interest issues that may arise suggest that this proposal is more likely to be a source of conflict than reconciliation.

2.2.2 The CETC Act should empower the CETC to engage in discussions with Indigenous communities to enhance and facilitate the meaningful participation of Indigenous communities in the strategic and licensing phases of projects. (51)

Allocating Formal Authority for Crown Consultation

2.3.1 That the Minister of Natural Resources, working under the framework defined by the Ministerial Working Group, and in partnership with Indigenous peoples, define authorities for Crown consultation in the strategic phase of a project review, in the detailed assessment and regulatory decision making phase of a project review, and for the oversight of CETC operations on an ongoing basis. This must include clear guidance regarding who may or must be physically present on behalf of the Crown during Consultations, not just overall authorities. (53)

Comment: I agree with the general tenor of this recommendation and also agree with two quite specific suggestions made in the accompanying text (which perhaps should have been part of the recommendation) namely: (1) that the CETC should not itself have the duty to consult, and (2) that the major projects management office should have this responsibility. I think that the MPMO office is well suited for this role precisely because it should have all-of-government responsibility (as well as authority).

However, there are two important elements that are missing from the Panel's discussion. Both of these considerations need to be addressed as we move forward. These are the issues of the Crown's responsibility if the proponent is not the Crown, and the responsibility of the regulator

to determine (or not) whether Crown consultation responsibilities have been discharged. It is true that these issues are also before the Supreme Court of Canada in two pending appeals (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. et al* and *Hamlet of Clyde River et al. v. Petroleum Geo-Services Inc. (PGS) et al*), but regardless of the Court's response to these questions it would have been useful to have the Panel's views on these two important matters. My own view is that where the national energy regulator has a decision-making role then it should, as part of discharging its responsibilities, act in accordance with law, and, if its authority extends to determining questions of law (this turns on the terms of the relevant statute(s), then it must reach a conclusion as to whether or not the Crown has discharged its responsibilities before it makes its decision. And in doing so, it makes no difference whether the applicant for the approval is an agent of the Crown or a private party – each is seeking a statutory authorization. For further details, see my comment on the two leave applications in the Energy Law Quarterly [here](#).

Enabling Higher Quality Engagement

2.4.1 The CETC and the Minister of Natural Resources should move to produce guidelines for early engagement, that allow industry and Indigenous peoples to communicate more freely and without prejudice to outstanding claims of right, or subsequent project reviews. This would include pre-filing information sessions, town halls with proponents under the oversight of the regulator, and more. (54)

Nation-to Nation Relationships are Expressed on the Terms of Parties Involved

2.5.1 That the Crown retains flexibility in its processes, reflecting the principle that each Indigenous nation has an independent relationship with Canada. In addition, we encourage the government to do more to meet with Indigenous peoples on their own terms, and in their own places, to the greatest extent possible. (56)

Governance and Decision-Making

Governor in Council Role In Strategic-Level Major Project Approvals

3.1.1 Authority should be enshrined in legislation for the Governor in Council to make the determination of whether or not a major project is in the national interest, based on a public report and recommendation from the Minister of Natural Resources. Furthermore this phase, from preliminary project filing to Governor in Council Decision, should typically happen within 12 months, with three months for GIC decision. The purpose of this phase of the process would be to determine whether a major project may proceed to a detailed project review. (57)

Comment. See comment above on recommendations 1.4.1 and 1.4.2.

3.2 Authority for Granting of a Licence and Imposition of Conditions

3.2.1 The enabling legislation of the Canadian Energy Transmission Commission should establish it as an independent, quasi-judicial body, with full authority to approve or deny major projects - based on technical criteria, detailed environmental assessment and project-specific conditions including social, economic, lands, and municipal interests - that have passed a Governor in Council review. We further recommend that detailed project reviews of major projects typically be concluded within 2 years from time of filing, to allow adequate time for meaningful Consultation and engagement. (60)

3.2.2 We also recommend that Section 58(1) of the NEB Act be repealed, and that the Act be amended to provide authority, mechanisms, and specific criteria for three classes of review: 1. Projects of national consequence, which require review by the Governor in Council; 2. Projects of significance which require a full Joint Panel review (but not review by Cabinet); and 3. Smaller activities which require review and approval, but not a full Joint Panel review. Such criteria should relate to a project's risk and impact, not an arbitrary distance criterion. (60)

3.2.3 Moreover we recommend that processes and authorities for export/import permits and electric transmission line reviews be harmonized, to the greatest extent possible, with those pertaining to pipelines, to afford all review processes the same level of transparency and integrity. This recommendation should be enshrined in legislation. (60)

Comment. It is unclear what the Panel has in mind with this last recommendation, 3.2.3 (and see also the comment on recommendation 1.6.1 above). Is the Panel calling for the national energy regulator to have authority over interprovincial transmission lines? Is the Panel calling for the abolition of the parallel procedures (permit and certificate) for approving international transmission lines? (Abolition would be a good idea in my view; for the complexities of the current system see *Sincennes v Alberta (Energy and Utilities Board)*, [2009 ABCA 167 \(CanLII\)](#).) Is the Panel suggesting a two stage review for export decisions?

3.2.4 In order to ensure clear accountability for permitting authority, the *CETC Act* should specify that the CETC should not exercise any permitting authority delegated to it by the federal entities of Fisheries and Transport Canada (e.g. permitting under the *Fisheries* or *Navigation Protection* acts) and any existing agreement to exercise such authorities on their behalf should be abrogated. (60)

3.2.5 Lastly, we recommend that the government enshrine in legislation two core principles: that no regulated activity shall proceed without proper approval, and that all regulated activities undergo environmental assessment commensurate with the scale and risk of the proposed activity. (60)

Governance of the Commission, Governance of the Board

3.3.1 The enabling legislation of the Canadian Energy Transmission Commission should require that the CETC be governed by a board of directors whose sole responsibility is strategy and oversight of the Commission's activities, while

hearing panels and other regulatory decisions would be the purview of Hearing Commissioners responsible for executing Commission decision-making responsibilities. (62)

3.3.2 We further recommend that the Commission be managed by a Chief Executive Officer who is neither a board member nor a Hearing Commissioner, nor the Chair of the Board (with relevant amendments to the current NEB Act as required). Also, the CETC Act should ensure that neither the Chair nor the CEO has the discretion to interfere with the independent work of hearing panels, such as removal of commissioners dealing with an application. (62)

Comment: Early on in its Report (at 17) the Panel makes the point (drawing on an analogy with the term Holy Roman Empire) that none of the descriptive terms that make up this title are entirely apposite. The point is somewhat forced. The NEB is *national* in scope even though it deals only with a portion of energy infrastructure and trade. The NEB is concerned with *energy* even though it does not deal with the entirety of energy value chain. And the NEB is a *board*, at least as that term is understood in administrative law (where it is a synonym for tribunal). The fact that it does not resemble a “normal” board of directors in a corporate context is hardly to the point. It seems to me that the Panel has simply bought into the assumption that a corporate model of decision making is: (a) a good or the best model of decision-making, and (b) an appropriate model for a body performing a regulatory function. But why is that? Is it so self-evident that the language and structure of corporations is the best fit for a regulatory authority performing governmental functions? And why does the Panel remain wedded to this approach even when it drops the name “Board” from the proposed title of the new agency? And I may have missed it, but beyond the implied criticism associated with the rather forced Holy Roman Empire analogy, I am not sure that the Panel every really explains why we might need to change the name of national energy regulator. But perhaps this too is self-evident.

3.3.3 Finally, we recommend that the government include a plain language report on and explanation of the CETC cost recovery funding model in CETC annual reports, and that the funding model be included in the list of issues for possible consideration by Regional Multi-Stakeholder Committees. (62)

Essential Competencies of Hearing Commissioners and Directors

3.4.1 The CEO of the CETC (or NEB in the immediate term) should be responsible for establishing a competency matrix for hearing commissioners and CETC directors, which represents a broad array of skills, experience, and backgrounds, and for ensuring that each hearing panel contains a cross-section of those competencies. Because Indigenous knowledge is essential to inform sound decision-making, and to enable real nation-to-nation relationships we further recommend that every joint hearing panel consist of at least one Indigenous member with extensive experience with Indigenous issues and worldview. Further, the competency matrix should be subject to Consultation and engagement, made public, and updated on a regular basis. See the Figure 7 for additional information regarding these competencies.

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

Comment. I have commented above on the corporate organization model that the Panel has presented. In this section of the report the Panel goes to the next step in advocating for a clearer distinction (and indeed geographical separation) between the “board of directors” of the new national energy regulator and its other functions or personnel.

I have a number of concerns in relation to the different elements of this proposal but I first recall the history of the Board's location. For many years the NEB was located in Ottawa. The Board moved to Calgary in 1991. My own recollection is that part of the reason for the move was to share the benefits of government offices and employment more equally across the country rather than leaving all of those benefits to accrue to the Ottawa\Hull region and to Ontario and Quebec. Locating the Board in the energy capital of Canada also reduced the need for counsel and experts to travel to hearings in Ottawa (although the NEB has long scheduled project hearings in the location of the project). These (especially the first) are not trivial consideration within the context of the Canadian federation. The Panel's proposal will unravel this objective and for reasons that are not fully worked through. For example, why does the Board of Directors need to be in Ottawa? Will its board be more amenable to government policy direction if it is in sight of the Rideau River? The real issue as noted above is whether the national energy regulator receives adequate legal direction to do so. Why should the regulator's expertise in electricity matters be re-located to Ottawa? It can hardly be because Calgary is also the electricity capital of Canada.

Since the Panel proposes that hearing commissioners may live anywhere in the country, under the Panel's proposals the real core of the regulator will come to be located sooner or later where the regulator's board of directors is located i.e. Ottawa. One gets the sense in reading this report that the Panel's national energy regulator will be composed of hearing commissioners and a board of directors. But the reality is that the largest part of the regulator will be its professional staff. Where that staff will be located in the Panel's model is key. The Panel expressly tells us that the staff of the new information agency will be re-located to Ottawa to facilitate information exchange with other related agencies of government but what of other staff?

It is hard to tell precisely what is embraced in the Panel's “hearing commissioners” model of business and thus the implications of that model need much more exploration. Certainly the Panel intends that the commissioners will have a much more diverse background than the background of current Board members. It seems likely as well that there will be larger number of commissioners than that of current Board members.

These new Commissioners will be called upon from time-to-time as their expertise and background fits the bill. This begins to look more like an ad hoc model of commissioners rather than a standing tribunal in which a smaller number of commissioners\board members develop expertise through continued engagement. What is less clear is the precise allocation of responsibilities as between the hearing commissioners and the board of directors, and as between hearing commissioners and staff.

This model prompts several observations. The first is that not all of the Board’s work is project driven. A significant part of the Board’s work deals with the economic regulation of pipelines. These pipelines are repeat customers before the Board, either in hearings or through negotiated settlements and regular reporting requirements. Familiarity with the different types of regulated pipelines and their different business models and contractual arrangements should improve the efficiency of the regulatory relationship. The model of “hearing commissioners” hardly seems suited to those elements of the Board’s work that are not project related.

Second, a model of ad hoc hearing commissioners who are called upon less frequently may well increase the diversity of values to be taken into account in decision-making, but it may also make those same commissioners more dependent on the expertise of the staff. This may be especially the case insofar as the two-step model proposed by the Panel will necessarily result in the most significant policy issues being dealt with by a different body as part of step one of any project approval stage. Step two will necessarily be more technical in nature.

In sum, I think that the government should look for other ways to realize the valid objectives that the Panel is trying to achieve through these recommendations. The principal objectives would seem to be: (1) greater diversity in the values and world views brought to bear on project-based decisions, and (2) the need to enhance public trust of the regulator by dealing head-on with the issue of regulatory capture. I think that the government should be able to achieve these objectives without engaging in the wholesale dismantling of the current model. Surely we should try to avoid any model in which part of the new regulator is located in Ottawa and part either continues in Calgary or is moved elsewhere.

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

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

Public Participation

4.1 Who Can Comment and How

4.1.1 Standing tests be repealed as a criterion for input into project hearings and operational oversight, and the CETC Act should be adapted to allow for a wider array of input (from simple letters to the provision and testing of evidence). (69)

4.1.2 Furthermore, it is recommended that the CETC Act provide a provision for all Canadians be permitted to submit a Letter of Comment to the CETC for consideration during its deliberations. (69)

Comment. These recommendations need to be read in the context of the supportive narrative. While they read as if the Panel is intending to expose the national energy regulator to open-ended hearings and participation rights the Panel's discussion is quite nuanced. The bottom line is that all interested persons should be able to provide comments but that the regulator will be able to develop rules so as to ensure a fair (but effective) process. I support this objective.

4.2 Making Quasi-Judicial Hearings Fit People and Not the Other Way Around

4.2.1 The government should amend enabling legislation of the CETC to empower the regulator and demand that it performs its quasi-judicial role to a high standard, but also that its processes are designed and implemented in such a way as to maximize the inclusion of all parties. The regulator should examine and reform its processes to achieve a higher degree of engagement and flexibility, toward the outcome that the public feel welcome and to enable the participation of interested parties who may not be experts in legal process. (71)

Comment. The challenge here is balance. The Panel recognizes that it heard a variety of views. One viewpoint stresses informality and the need for an inclusive, welcoming and informal environment. A second viewpoint stresses the need to be able to test evidence in the crucible of cross-examination. It is not possible to legislate this balance. Much must depend on the selection of Board members/commissioners. The greater diversity of the proposed commissioners proposed by the Panel should help the national regulator to achieve this balance.

4.2.2 In addition, tests of standing should be abolished, and every interested party should have a reasonable opportunity to participate commensurate with their contribution to the process. Finally, Letters of Comment from any party should be permitted without qualification. (72)

Comment. See comments above on recommendations 4.1.1, 4.1.2 and 4.2.1.

4.3 Enabling a More Effective Public Voice

4.3.1 Enshrine the enabling legislation of the CETC a Public Intervenor Office, based on successful models from other jurisdictions, to represent the interests and views of parties who wish to use the service, and to coordinate scientific and technical studies to the extent possible. (73)

Comment. It would be nice to know more about the origins of this proposal and the types of hearings in which public intervenor offices work well. For example, it may be that public intervenor offices are best suited to tolls and tariffs hearings where it is perhaps easier to define a consumer interest. But even that model may be of questionable value in the context of national regulatory authority where the regulated entities serve major carriers rather than end-of-pipe consumers. Where there is a diversity of interest it is hard to see how a public intervenor office

will be able to satisfy all sorts of divergent interests and avoid both technical and practical conflicts of interest.

4.4 Engagement Throughout the Lifecycle to Drive Continuous Improvement

4.4.1 CETC legislation establish Regional Multi-Stakeholder Committees, open to all interested parties, with a mandate to review all aspects of the regulatory cycle and operational system (for example, issues like: emergent environmental risks, monitoring performance, socio-economic impacts of regulated activities, and more). (74)

4.5 Modern Public Outreach and Accessibility

4.5.1 The CETC should continue to reform its online presence, driven by the priorities of its users, not the regulator. We further recommend the creation of a visible and accessible online public outreach office charged with engaging citizens and helping them to navigate the many processes and documents that can represent a barrier for participation in the regulatory system. (75)

Î-kanatak Askiy Operations (Keeping the land pure)

5.1 Standards and Best Practices

5.1.1 That the CETC regulate and clearly communicate its standards and approach to ensuring compliance with standards and expectations for management systems, and water protection specifically, in a way that can be understood by non-specialists, and that it should engage its (proposed by us) Regional Multi-Stakeholder Committees to identify specific elements for review and revision, as appropriate. (79)

5.1.2 We further recommend that the CETC explain in plain language how rules for liability work, how the relative monetary amounts are calculated, and consider a public review of the surety bond amount to ensure that it adequately addresses risk as intended. (79)

Comment: While the national regulator surely has a duty to explain how it operationalizes liability rules, the government must also share this responsibility. After all it is the government of Canada that developed the liability rules and the government of the day that put these rules in the form of a bill to parliament. To discharge this obligation the government needs to assume the responsibility to explain proposed rule changes through appropriate discussion papers, white papers, regulatory impact statements and the like.

5.2 Proactive: Monitoring and Preparedness

5.2.1 The CETC immediately improve transparency of monitoring information, incident reports, and follow-up, including the provision of better online tools to help all citizens interact with this information. (80)

5.2.2 That the government enter into formal agreements with Indigenous nations who wish to participate, in order to deliver local Indigenous energy infrastructure monitoring programs which are considered as a vital input to existing monitoring tools and systems. (80)

5.2.3 We further recommend that Regional Multi-Stakeholder Committees review emergency preparedness plans with citizens, first responders, and other groups, to ensure their completeness, and to recommend any gaps for further action to be addressed by the CETC. (80)

5.3 Reactive: Emergency Response and Compliance

5.3.1 That the CETC publish regular reports – written in plain language, not jargon, without sacrificing accuracy – on incidents and compliance actions, that will allow any interested party to know what happened, why, and what was done in response. (82)

5.4 Continuous Improvement

5.4.1 That the CETC Act would enable the creation of Regional Multi-Stakeholder Committees. The intention in operation is that these Committees be formally integrated into the CETC's management and continuous improvement systems, allowing all participating parties to assess aspects of the CETC's practices and outcomes, and make recommendations for improvements. (83)

Respect for landowners

6.1 Ombudsman and Dispute Resolution

6.1.1 The CETC Act should establish a Landowners Ombudsman to review and make recommendations on improving relationships with landowners, provide advice and best practices on how to navigate processes, enable better mediation, and potentially administer a fund so that landowners can access relevant legal advice. (85)

Comment. As with other recommendations (such as 1.6.1 and 3.2) it would be nice to know more about the specifics of what the Panel has in mind. For example, the Ombudsperson proposal is intriguing, but does the Panel have examples on which it was basing its proposal?

6.1.2 We further recommend that CETC Hearing Commissioners take on the alternative dispute resolution, with support from alternative dispute resolution staff as appropriate, and adjudication functions, and reform the current process to streamline it significantly, and make public the results of adjudication decisions. (85)

Comment. The current scheme for adjudicating disputes over compensation in pipeline right of way cases involves private arbitration which results in confidential decisions and sometimes significant disruption in proceedings: *Smith v Alliance*, [2011 SCC 7 \(CanLII\)](#). This is quite

unlike the process adopted in other expropriation and surface rights schemes across the country and would I think benefit from reform. One possibility would be to allow for the application of provincial expropriation or surface rights institutions to deal with these matters since these bodies already have the requisite expertise. This is already possible in the context of land acquisition for an international power line where the proponent opts for the permit scheme (see *NEBA*, s. 59.19(b)).

6.2 Fair Interactions with Industry and Land Agents, and Fair Compensation

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

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

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

Comment: Once again it is hard to get a handle on what the Panel believes to be the problem that it is trying to address with this last recommendation (6.2.3). Is it the lack of transparency? Is it a perception that compensation payments are too low? By what measure? Absent such an explanation it is hard to evaluate the Panel's recommendations. However, as noted above in the comment on recommendation 6.1.2 I do agree that the current scheme does merit review.

Final observations

Minister Carr gave this Expert Panel a challenging and difficult task and very little time within which to accomplish its work. Indeed, the original announcement of the decision to create the Panel in June 2016 would have had the Panel reporting out by January 31, 2017. In the end this was extended to May 15, 2017 due to delays in finalizing the composition of the Panel; but this was still a far too aggressive timetable within which to expect the Panel to develop a thoughtful and well-reasoned report while drawing on significant engagement stakeholders and Indigenous communities.

I think that the Panel has offered useful recommendations both to the Government of Canada and more generally the people of Canada, and in particular to the Indigenous peoples of Canada. These recommendations merit debate. But not all of the Panel's recommendations are supported by comprehensive reasons justifying the Panel's specific conclusions and recommendations.

This post may be cited as: Nigel Bankes “The NEB Modernization Report” (14 June, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/06/Blog_NB_NEB_panel_recommendations.pdf

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