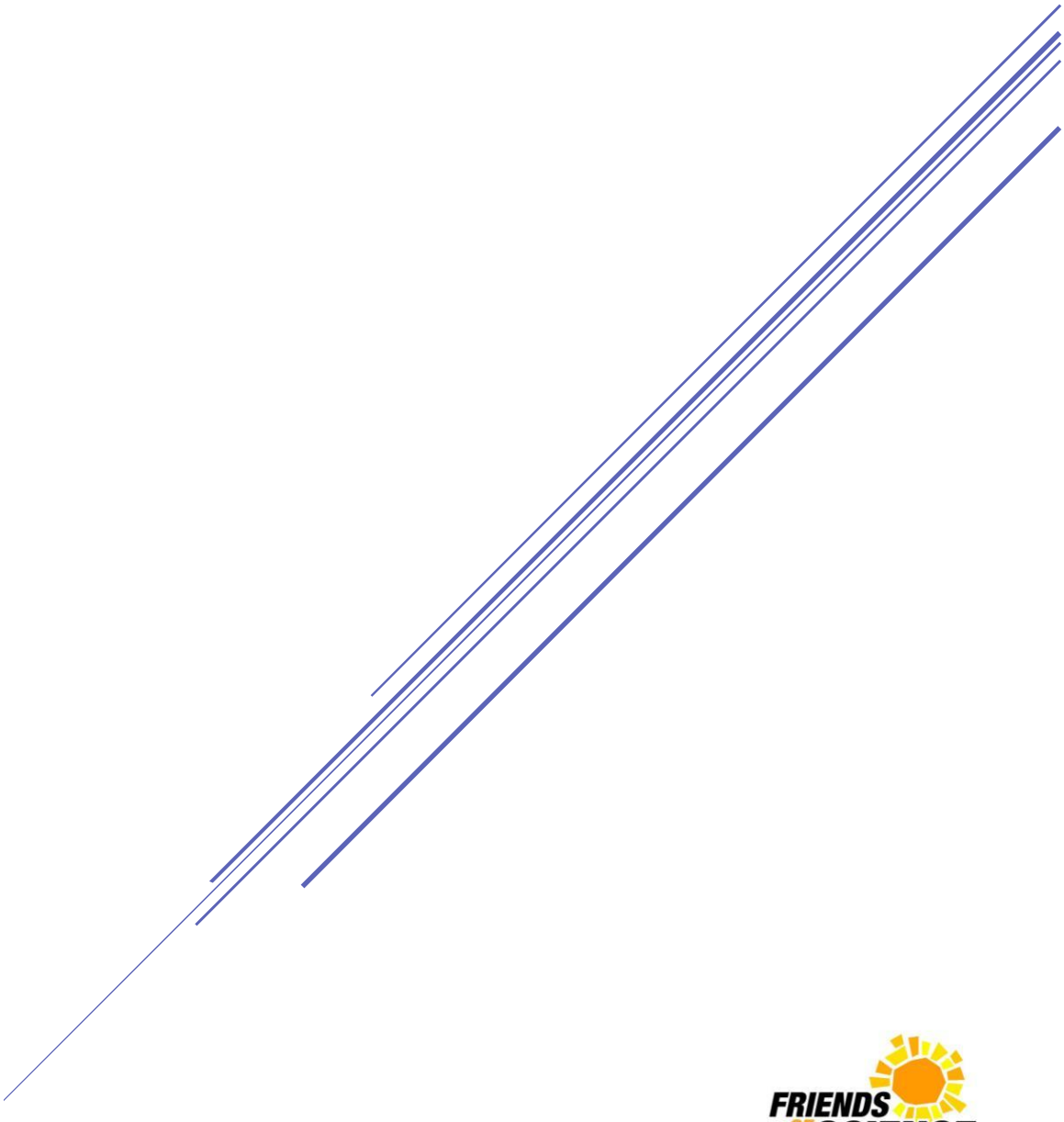
National Energy Board (NEB) – Implications of Proposed Changes: A Review

Contributed by Robert Lyman



June 1, 2017

National Energy Board (NEB) – Implications of Proposed Changes: A Review

OVERVIEW

Many Canadians have been unaware of the work of the National Energy Board (NEB). Since its establishment in 1959, The National Energy Board has served as the federal government's independent, expert, quasi-judicial regulatory body dealing with important energy matters. The Board itself operates at arms' length from politicians, and is supported by a secretariat that includes a group of highly skilled, technical staff who can assess engineering, economic, financial, safety and environmental issues. The NEB's mandate is to carefully review proposals for national energy infrastructure, such as pipelines and power lines, and oil/gas imports/exports, and to carry out energy market analysis with which it can advise the government.

Recently various activists and environmental groups claimed the NEB process was flawed and demanded a review. A panel appointed by the government has just completed the review and offered recommendations for a significant revision to replace the NEB with an entirely new structure and process

Robert Lyman posed the question "Can Canada Survive Climate Change Policy?" at his Calgary presentation on May 9, 2017. The proposed changes to the NEB are a related complication. Canadians must look at the highly competitive global markets and evaluate whether making infrastructure projects **more** difficult to approve, in a process that is apparently less technical, is in the best economic interests of the nation, even as Canada is already an acknowledged leader in environmental management. Ottawa energy policy expert, Robert Lyman, has contributed the following overview. This summary is the first of a multi-part series on this topic. – Friends of Science Society

THE REPORT OF THE EXPERT PANEL ON THE MODERNIZATION

OF THE NATIONAL ENERGY BOARD

Contributed by Robert Lyman © May 17, 2017

This document is intended to provide a summary of the key elements of the May 15, 2017 report of the panel appointed by the current Trudeau Government with a mandate to offer recommendations that would "modernize" the National Energy Board, and specifically would "position the NEB as a modern, efficient, and effective energy regulator and regain public trust".

This summary will focus especially on the policy and regulatory system that would result if the panel's recommendations were accepted and implemented, not on the rationale offered by the panel. As introduction, however, it should be noted that the panel presented its conclusions as a product of its cross-Canada consultations and as part of "a comprehensive vision for the future of the energy transmission infrastructure regulation" in Canada. Notably, the report recommended:

Placing energy infrastructure regulation within the framework of a national energy strategy that furthers Canada's climate change emissions reduction commitments;

Significantly increasing the role and authority of indigenous people ("creating a nation-to-nation relationship") in all phases of energy policy, infrastructure regulation, and lifelong oversight of energy infrastructure;

Radically increasing the scale and scope of stakeholder engagement in all phases of energy project regulation; and

Increasing the transparency and openness of all licensing processes and follow-up actions by the regulator.

To achieve this vision, the panel recommends the following:

Replacement of the National Energy Board with an entirely new policy and regulatory review system

Recommendation that, as the first stage in that system, the government of Canada develop an energy strategy that "reconciles economic, social and environmental (particularly climate change) goals in a way that can meaningfully inform decision making and frame the context for debates about whether, for example, a proposed

energy infrastructure project aligns with Canada's big-picture goals for economic, social and environmental progress".

Establishment of the first step in project review as a one-year process in which the Governor in Council (i.e. the federal Cabinet), after extensive consultations with aboriginals and analysis by a new Major Projects Management Office in Natural Resources Canada of its strategic acceptability, would determine whether the project "aligned with the national interest";

Creation of a new Canadian Energy Transmission Commission (CETC) to replace the National Energy Board. This board, along with the Canadian Environmental Assessment Agency (CEA), would evaluate "the potential risks of a project to Indigenous peoples (based on robust consultation), the environment, and human health and safety". This process would be conducted by a five-person panel of Hearing Commissioners at least one of whom is indigenous), composed of two commissioners from the CETC, two commissioners from the CEA, and a fifth panel member. The environmental assessment would take place under CEA authority. The panel expects this to be a process that would take one year.

The CETC would then examine all the "technical issues" related to the pipeline and whether it could operate safely and securely (there is no mention of regulating safety, engineering, economic viability or rates). This process would take another two years and, if satisfied, the Joint Panel would have authority to grant or deny licences.

Creation of a new, independent Canadian Energy Information Agency, separate from policy and regulatory functions, to provide "information and analysis for policy makers and the public".

The CETC play a major role in "keeping the land pure", by regulating the safety and integrity of pipelines and electricity transmission lines during their operation, recognizing that "as we reduce our global dependence on fossil fuels we can expect the number of new major pipeline projects to dwindle…Overall, the goal shared by the CETC and industry is an ambitious one: zero incidents and zero releases."

Initial Comments on Report

The report is broadly divided into three parts.

The first part sets out the panel's key premises, virtually all of which came from its public meetings with environmental and aboriginal groups. The premises include the following:

That the National Energy Board members and staff are not diverse and lack sufficient expertise in fields such as environmental science, community development and indigenous traditional knowledge.

That the National Energy Board has been "captured by the oil and gas industry, with many Board members who come from the industry that the NEB regulates and who –at least appear to – have an innate bias towards the industry".

That the NEB "limits public engagement, does not account for many of its decisions and generally operates in ways that seem opaque".

That non-industry players "must fight to have access to usable information about NEB-regulated activities, must fight to be heard, and who have little assurance that, when they are heard, their input is afforded any weight."

That the NEB operates in a national policy vacuum.

That the NEB fails because it cannot serve as a forum for public debate about "national policy", meaning climate change policy.

That the NEB is not transparent, because "people are unclear as to the rationale behind NEB and Governor in Council decisions, what factors were considered, and how the process unfolded to arrive at a decision."

That the NEB operates a system in which "the rules are not clear to everyone at the outset."

Every one of these premises is wrong. It will require a longer paper to explain why.

The second part of the report goes on to set out a number of recommendations for institutional change based upon other, seriously problematic, policy views. The most important of these policy views is that Canada has already decided to phase out the production and use of fossil fuels as part of its climate change policy and that all decisions on new energy infrastructure must be taken based upon this over-riding policy goal. At no time has the federal government accepted the premise that meeting Canada's international climate change-related obligations requires us to shut down one of our most important industries or to deprive Canadians of access to low cost, efficient fossil fuels.

The second most important of these policy views is that the federal government's commitment to "reconciliation" with Canada's indigenous people requires that Canada's native bands be given extraordinarily increased decision-making powers as part of the governance regime and be dealt with on a "nation-to-nation" basis. This is an extremely broad interpretation of the federal government's intent in responding to the Truth and Reconciliation Commission's report that examined the experience of aboriginal Canadians in the federal government's former residential schools system. It would give aboriginal groups a virtual veto on all future energy infrastructure development.

Both of these policy views deserve to be fully explained and refuted.

Finally, the third part of the report presents a "vision" of a new policy and regulatory regime that would be a bureaucratic nightmare for any company that sought approval for new hydrocarbon energy infrastructure. The regime would have two stages. The first

stage would entail a policy review and approval by federal officials and the Canadian Cabinet; as described in the panel report, it would be a thinly disguised screening process to test for acceptability to climate change considerations. The second stage would be a more technical review by a panel dominated by environmental and aboriginal interests. The process would, in theory, take one to four years, but as most projects would be denied after policy review, it can be presented as "more efficient". Any project that made it through the entire process would almost certainly be wrapped up in regulatory reviews and public consultations for many years. The delay itself would probably make most projects unfeasible.

It remains completely unexplained, of course, why such an onerous regime should apply to energy infrastructure proposals and not to major project proposals involving emissions-intensive industries like mining, petrochemicals, automobile and parts manufacturing, steel, iron and cement.

The impact of such a regime on the exercise of provincial jurisdiction over natural resources is not explained but, I think, would be onerous indeed.

Over the coming days, I will provide more in-depth comments on the report and on what may happen next.

THE REPORT OF THE EXPERT PANEL ON MODERNIZING THE NATIONAL ENERGY BOARD – FALSE PREMISES

PART 1

INTRODUCTION

On May 15 2017, a panel appointed by the Canadian federal government published its report on how to "modernize" the National Energy Board. This is the first in a series of commentaries that will examine whether the premises upon which the panel report were based, drawn largely from the panel's meetings with environmental and aboriginal interest groups, are correct.

In this paper, I will comment on the following two inter-related premises, drawing especially upon the actual performance of the National Energy Board panels that reviewed two recent pipeline projects in British Columbia – the Enbridge Northern Gateway project and the Trans Mountain Expansion project. The premises are:

That the NEB "limits public engagement, does not account for many of its decisions and generally operates in ways that seem opaque"; and

That non-industry players "must fight to have access to usable information about NEB-regulated activities, must fight to be heard, and have little assurance that, when they are heard, their input is afforded any weight."

THE NORTHERN GATEWAY PROJECT

The Northern Gateway project was a proposal by Enbridge Inc. to build two oil pipelines from Bruderheim, Alberta to Kitimat, British Columbia, and a marine terminal at Kitimat so that tankers could transport oil from Kitimat to Pacific markets.

Enbridge invested more than $450 million to develop the project, including the preparation of extensive reviews of the environmental, land use and social effects. It also carried out broadly based consultations with aboriginal groups. Enbridge offered up to ten per cent of the equity in the project to 40 aboriginal groups, and 26 accepted the offer.

After years of preparatory work, in May 2010 Enbridge filed the project application with the National Energy Board. The Canadian Minister of the Environment and the National Energy Board established a Joint Review Panel to consider the application in accordance

with the requirements of the National Energy Board Act and the Canadian Environmental Assessment Act.

The joint review process took over four years to complete. In 2011, the NEB staff provided 35 public information sessions and 32 online workshops to share procedural information and to answer questions about how to participate in the hearing process. From January to July 2012, the joint panel heard oral evidence from 393 participants in 17 communities. It also heard oral statements from 1,179 individuals. 206 intervenors and 12 governmental participants registered for the formal hearing process. During the formal hearing process, experts presented evidence for and against the project. Northern Gateway and 56 other parties submitted written final arguments.

The joint panel heard voluminous evidence related to the merits of the project (as well as hundreds of political comments that dealt with subjects outside of the panel's scope of review), and listened to many arguments during the formal hearing process and cross-examination. Based on this and the analysis done by supporting staff, the joint panel concluded that the project was in the public interest and recommended to the Minister of Environment and the Canadian Cabinet that the Northern Gateway Pipeline project be approved. In doing so, it recommended the imposition of an unprecedented 209 conditions.

The National Energy Report, as usual, issued a lengthy and comprehensive report on the process it followed, on the issues considered, and on the reasons for its decisions. Copies of the two volumes of the report are available to anyone with access to a computer and the Internet. It can be seen here:

http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprt-eng.html

In June 2014, the (Conservative) federal government accepted the joint panel's report and authorized the issuance of a certificate of public convenience and necessity. On June 30 2016, however, the Federal Court of Appeal, in a split decision, quashed the government's decision. The regulatory approval process and the decision of the then Governor in Council to approve the Northern Gateway Project had been challenged on a number of administrative grounds and on the basis that consultation with Aboriginal groups at various stages had been inadequate. All of the administrative law challenges and a majority of the consultation challenges were rejected. However, two judges (the "Majority") concluded that the Order in Council and the certificate of public convenience and necessity should be quashed on the grounds that Canada had not discharged its duty to consult in the period following the regulatory process but prior to the Governor in Council decision. A dissenting judge of the Court would have upheld the approval. In other words, the Court did not object to the joint panel's decisions or to the process that it had followed in reaching them.

The Federal Court sent the joint review panel's recommendation to the (Liberal) federal government for review. The Liberal government decided that, notwithstanding the findings of the panel, the project was likely to cause "significant adverse environmental

effects that are not justified in the circumstances". It directed the NEB to dismiss the Northern Gateway application. In doing so, it referred to the fact that the project would involve crude oil tankers transiting through the Douglas Channel, but it offered no further explanation. This was directly counter to the findings of the federal government's own Termpol Review Committee, an expert, non-partisan committee of federal government officials that examined the risks associated with the marine portion of the Northern Gateway project. It is notable, perhaps, that no one in the Canadian media reported or made an issue of this.

In summary, the NEB/CEAA Joint Review Panel completed an extensive, prolonged and rigorous review on the Northern Gateway project proposal in which thousands of stakeholders, including notably environmentalists and aboriginal groups, had many opportunities to participate, and did so. The NEB published a full explanation for every aspect of its final decision.

THE TRANS MOUNTAIN EXPANSION PROJECT

Trans Mountain Pipeline ULC is a company that has operated an oil pipeline system that runs from Edmonton, Alberta to Burnaby, British Columbia for over 60 years. After extensive preparation, in December 2013 the company submitted an application to the National Energy Board for a certificate of public convenience and necessity to construct an expansion of its existing system. The project would involve the twinning of the existing 1,147 km pipeline with about 987 km of new buried pipeline along the same right-of-way. It would increase the capacity of the existing system from 300,000 barrels per day to 890,000 barrels per day. The project also involved the expansion and upgrading of the terminal facilities at Burnaby to allow increased tanker traffic.

Starting in May 2012, Trans Mountain Pipeline conducted an intensive series of consultations and exchanges with stakeholders, governments, landowners, aboriginal groups and the general public. These conversations allowed the company to share project information and hear stakeholder feedback, concerns and questions through face-to-face meetings and social media. Throughout these conversations, the company sought feedback on specific routing details, as well as environmental and other local impacts. Stakeholders provided feedback on many aspects of the project. The following is a high-level outline of the stakeholder engagement opportunities the company has offered.

https://www.transmountain.com/reporting-back

In addition to the stakeholder contacts initiated by the company, The National Energy Board required Trans Mountain to contact anyone who lives, works or uses land and resources along the proposed pipeline route. The Board took several steps to ensure that those who could potentially be affected by the project were aware of it and knew how they could get involved in the review. In addition, the Board assigned a Project

Advisory Team to help participants understand the hearing process and decide how best to participate.

To facilitate the participation of aboriginal groups, landowners, individuals and groups, associations and non-profit organizations, the NEB made $1.5 million available to eligible intervenors to participate in the Trans Mountain Expansion Project hearing. There was also special participant funding offered in September 2015 for up to $10,000 per applicant to cover eligible evidence. In all, the

Participant Funding Program offered funding valued at $3,085,370 to 72 eligible intervenors; 79 per cent of this funding was offered to aboriginal groups.

With the exception of oral "traditional evidence" received from Aboriginal groups, evidence was presented in writing, and testing of that evidence was carried out through written questions, known as Information Requests. Intervenors submitted over 15,000 questions to Trans Mountain over two rounds of IRs. Hundreds of other questions were asked, and answered, over six additional rounds of IRs. As there were 400 intervenors and legislated time limits, the Board decided that it was best to test the evidence through written processes. With the participation of about 400 intervenors and 1,250 commenters, the Board received significant information about the pipeline corridor. There were over 1,600 participants in the hearing.

In response to requests from aboriginal groups, the Board heard oral evidence based on "oral tradition" from 49 groups.

During the hearings, there were 291 motions and review applications, and the Board responded to each of these. In each case, it provided reasons for its decisions on the motions.

The Board completed a review of all the issues related to the public interest in the proposed pipeline. In addition to the economic, social, financial, and safety issues traditional to its mandate, the Board completed a comprehensive environmental assessment of the project in accordance with its authority under the National Energy Board Act and the Canadian Environmental Assessment Act.

In May 2016, two and a half years after receipt of the project application, the NEB issued its reasons for decision with respect to the Trans Mountain Expansion Project. It found that the Trans Mountain Expansion project was in Canada's public interest and recommended that the Governor-in-Council (i.e. the federal Cabinet) approve the project and direct the Board to issue a certificate of public convenience and necessity. It also recommended that, if the Cabinet approved the project, it impose 157 conditions dealing with safety, the environment and other issues.

The full text of the NEB's 530-page decision is available for all to read on the Board's website.

After yet further consultations with aboriginal groups and a review by Environment and Climate Change Canada of the greenhouse gas emissions that might be associated with

the upstream suppliers of the pipeline, the federal (Liberal) Cabinet approved the NEB recommendations, including the conditions to be applied.

CONCLUSION

The preceding description of the reviews of the Northern Gateway and Trans Mountain Expansion pipeline projects should make clear that the National Energy Board has gone to extraordinary lengths to hear every view and every person who might conceivably be affected by the projects. It has used its influence and regulatory powers to increase the proponents' already extensive engagement with stakeholders. It has given stakeholders multiple opportunities to be heard and to influence the decision process. Finally, it has explained, repeatedly and at length, the reasons for its decisions. It has met an extremely high standard of openness and transparency.

This shows that the first, and one of the most important, premises of the Expert Panel on Modernizing the National Energy Board is wrong.

THE REPORT OF THE EXPERT PANEL ON MODERNIZING THE NATIONAL ENERGY BOARD – THE CENTRAL FLAW –

PART TWO

On May 15 2017, a panel appointed by the Canadian federal government published its report on how to "modernize" the National Energy Board. This is the second in a series of commentaries that will examine whether the premises upon which the panel report were based, drawn largely from the panel's meetings with environmental and aboriginal interest groups, are correct.

In this paper, I will comment on the central recommendation of the panel, which is that the governance of Canada's public interest review of proposed international and inter-provincial pipelines and electricity transmission systems, as now performed by the National Energy Board, should be jettisoned in favour of a two-phase system. Under the two-phase system, the federal Government should first conduct a "policy" review, and then a joint panel consisting of representatives of the Canadian Environmental Assessment Agency and a new Canadian Energy Transmission Commission would conduct a review based on its assessment of "technical considerations and risk mitigation".

The alleged justification for this departure from long-standing Canadian practice is that the National Energy Board does not now provide an authoritative, independent and expert review of the public interest considerations that apply to energy transmission systems. Various parties, including several environmental and aboriginal representatives who provided comments to the panel, claimed this was so. In fact, the panel appears to have accepted all of this testimony as truth, without making any effort to check the factual accuracy of the allegations.

The establishment of the National Energy Board in 1959 followed the first report of the Royal Commission on Energy (the "Borden Commission") in October 1958. While much of the work of that commission dealt with issues of energy trade and market access (especially the question of whether Canadian crude oil should be exported to the United States or sold in eastern Canada), it followed a number of pipeline and energy supply controversies that were highly politicized. The government of the day recognized that it would far better serve Canada's public interest if the decisions concerning major energy issues were, in the first instance, made by an independent expert tribunal at arms' length from the partisan political process. In setting up the National Energy Board, the government designed it to perform this function.

The government, by taking two other measures, also assured that the board would operate with due consideration for all interests. First, it made the board a quasi-judicial tribunal that had the power and obligation to hear evidence on the record and to submit it to cross-examination. This did not limit the ability of the board to gather information

by other means, such as public hearings, but it ensured that, on matters where the board's decision was required, its process would be fair and consistent with due process. (1) Second, the government provided the board with a strong secretariat, staffed with experts in all the fields in which the board would hear evidence. Thus, the board, in hearing an application for pipeline approval, can draw upon sound professional advice from independent experts on its own staff on economic, environmental, social, engineering, financial, safety and other public interest matters.

In its adjudicative role, the NEB must decide or recommend if a project is in the Canadian public interest. The NEB Act does not explicitly define the Canadian public interest. However, it sets out direction about certain factors to be taken into account. Subsection 52(2) of the Act states the following:

"*The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative effects, weigh its various impacts, and make a decision."*

Under the *National Energy Board Act*, the NEB makes a recommendation on whether it is in the present and future public convenience and necessity that a pipeline project be approved. The Board does so by preparing and submitting to the Governor-in-Council (i.e. the federal Cabinet) a report containing its recommendation on whether a certificate should be issued and its reasons, and setting out the terms and conditions that the Board considers necessary or desirable. The Governor-in-Council makes the decision. It can direct the Board to issue the certificate, direct it to dismiss the application, or refer the report back to the Board for reconsideration of the recommendation and/or a term or condition.

The National Energy Board has been recognized internationally as a model for how independent, expert regulation should occur. The success of the board in assessing the public interest has been such that only twice in its history has a government ever felt it necessary to reject the board's recommendation as to how to deal with a facilities application.

The Expert Panel now recommends that the entire NEB organization and process be overturned in order to "align NEB activities with national policy goals". What are the national energy policy goals? The NEB already undertakes extensive analysis and review of the economic, environmental, social, engineering, financial, and safety issues. Does that not offer a comprehensive list of all the non-political issues that a government might wish to consider on the record and with full public input? Yes, it does, with one large exception that the Expert Panel considers pre-eminent – climate change.

The Expert Panel's report makes clear that it sees the public interest, the "strategic energy policy" consideration, as the need to constrain the growth of greenhouse gas emissions. It finds it intolerable that the "federal government (in partnership with the provinces) is exploring the creation of large pipeline projects which inherently signal

planned increases in our overall production and continued global and domestic use of fossil fuels, an objective that is seemingly at irreconcilable odds with Canada's stated goal of reducing emissions and moving away from fossil fuels." It thus favours the introduction of an initial energy strategy stage at which federal government departments, followed by the federal Cabinet, would make a decision on a project's alignment with the national interest, meaning primarily with the government climate change policy.

The first observation one might make is that, if the Canadian government really has decided that Canadians are henceforth not to make any new investments or take actions that will increase greenhouse gas emissions, this could easily be communicated to the National Energy Board so that it would be included in the considerations applied by the board in dealing with applications to construct new energy transmission facilities. There would be no need for Cabinet to remake this judgment on a case-by-case basis.

The second observation, however, is that withdrawing such a decision from the hands of an impartial board and placing it squarely in the hands of Cabinet would have the effect of politicizing all future decisions on energy infrastructure. Cabinet is not required (and indeed is often most reluctant) to explain to the Canadian public the reasons for its decisions, which may be entirely partisan and driven by what will best serve the interests of the political party currently in power, not by broader concerns about the interests of the Canadian public. Moving decisions to the political level first, and having the Cabinet's "strategic" judgment rest primarily on whether Canada might increase its greenhouse gas emissions would move concerns about Canadians' contribution to (alleged) global warming to the top of the national interest list.

This would sharply impair the quality of Canadian governance of the energy industry. Among other things, if a new "strategic energy policy" filter is to precede regulatory judgments about a project's other merits so as to discourage the movement of fossil fuels to markets, this would surely undercut producers' market access and consumers' security of supply. Would this not represent an unprecedented intrusion into the policy areas of prime interests to the provinces? If the federal government will veto new pipelines transporting energy from the main fossil fuel producing regions in western Canada, why would it allow increased energy transportation from Newfoundland and Labrador, Nova Scotia or the northern territories? To extend the logic beyond the realm of energy production and transmission, why would similarly restrictive "strategic" restrictions and policy judgments not apply to the permitting of major GHG emissions-intensive plants such as those in the mining, petrochemicals, automobile and parts manufacturing, steel, iron, and cement industries?

It is of interest in this context that, according to all of the most respected authorities on future energy supply, demand and emissions (including for example, the International Energy Agency, the United States Energy Information Administration, EXXON/Mobil and British Petroleum) (2), global greenhouse gas emissions will continue to grow significantly for the foreseeable future and that over ninety per cent of this emissions growth will occur in the non-OECD countries. In other words, what Canada does or does

not emit will have absolutely no impact on the path of growing greenhouse gas emissions or on global temperatures. This reality stands starkly at odds with whatever justification might exist for the Expert Panel's recommendation.

The central flaw of the Expert Panel's proposed redesign of Canada's energy regulatory system is thus that it is a thinly disguised attempt to prejudge the merits of energy infrastructure projects based primarily on climate change objectives, when the measures proposed would have no impact whatsoever in furthering those objectives.

The National Energy Board has the powers of a court of record and its processes and decisions are subject to appeal to the Federal Court of Appeal and, ultimately of course, to the Supreme Court of Canada. The Board has an excellent record before the courts on matters of law, such as fairness of process and jurisdiction over interprovincial and international works and undertakings. In practice, the Board is supervised by the courts, and the groups affected by the Board's decisions make frequent appeal to the court system.

See, for example, the Energy Information Administration's June 2016 International Energy Outlook here: https://www.eia.gov/outlooks/ieo/pdf/0484(2016).pdf

THE REPORT OF THE EXPERT PANEL ON MODERNIZING THE NATIONAL ENERGY BOARD – IMPACT ON EFFICIENCY –

PART THREE

On May 15, 2017, a panel appointed by the Canadian federal government published its report on how to "modernize" the National Energy Board. This is the third in a series of commentaries that will examine the panel's presumptions and recommendations.

In this paper, I will comment on the panel's recommendations to lengthen the process of review of proposed international and inter-provincial pipelines and electricity transmission systems from the fifteen-month goal that now nominally guides the National Energy Board, to that which would be required under the panel's proposed two-phase system. Under the two-phase system, the federal Government should first conduct a "policy" review, and then a joint panel consisting of representatives of the Canadian Environmental Assessment Agency and a new Canadian Energy Transmission Commission would conduct a review based on its assessment of "*technical considerations and risk mitigation*".

The duration of regulatory review of energy infrastructure applications has become a subject of increasing controversy. The regulated industry seeks to have a predictable process that is completed in reasonable time without undue delays. However, the increasing interest on the part of a wide range of stakeholders over the past decade has led the NEB (and other regulators) to open proceedings to many participants. In several cases, the participants do not offer any analysis or expert advice on the matters that are subject to NEB review; rather, they treat the NEB process as a generalized public hearing at which they may express their views (especially opposition) on a wide range of issues. There is no question that certain environmental organizations that oppose the construction of energy pipelines (and all other fossil fuel development) have chosen to use multiple interventions and procedural tactics to delay the completion of reviews. Discussion concerning the duration of reviews has thus become, to some extent, a battleground between those who seek efficiency of decision-making and those who oppose pipeline projects on principle.

THE CURRENT SYSTEM

On July 6, 2012, the federal government amended the *National Energy Board Act* to include time limits for the processing of applications made under certain sections of the Act. Notably, the legislation imposed beginning-to-end time limits of 18 months for major NEB applications requiring a certificate. This is broken down into 15 months from the date the Board determines an application is complete until the NEB completes its

assessment with the issuance of a recommendation to the Governor-in-Council (i.e. the federal Cabinet). From that point, the Cabinet would have three months to make a decision.

The legislation also provides for mechanisms to exclude from the time limit the periods that the Board considers are required to obtain additional information or studies from the applicant. This "loophole" has resulted in much longer periods of review. Thus, as noted in a previous commentary, the NEB review of the Trans Mountain Expansion Project took two and a half years to complete.

THE PROPOSED SYSTEM

The Expert Panel proposes to replace the current National Energy Board review by a two-phase process, including a "Strategic Review" followed by a technical assessment and licensing phase.

The Strategic Review phase, in turn, would be divided into three parts: review by federal government departments (led by a new Major Projects Office in Natural Resources Canada) of the consistency of the proposed project with Canada's national interests, a broad-ranging consultation with indigenous peoples (led by another Indigenous Major Projects Office), and review by the federal Cabinet, based on advice provided in a memorandum to Cabinet. In its report, the Expert Panel sets out a quite ambitious list of topics that the Strategic Review would cover – consultation and accommodation of indigenous peoples; alignment with national economic, energy and environmental policy; consistency with relevant provincial emissions limitation strategies; a climate test for upstream and downstream emissions; Strategic Impact Assessments, including available regional and land use planning impact assessments; acceptability of the proposed route; and a catchall "*any other showstoppers*".

The licensing phase "*would seek to ensure that the detailed project plan adequately minimizes risks to the environment and public health and safety and respects Indigenous rights, aboriginal and treaty rights, and title*." The report also notes that the licensing phase would include project-level environmental assessment.

COMMENTARY

The Expert Panel acknowledges that the new process would take longer to complete.

"*Overall, timing for a major project review in our model is expanded from the current 15 months to three years (one for national interest determination plus Governor-in-Council decision-making, and two years for detailed joint panel hearings).*"

Many of the recommendations appear to be based on naiveté or ignorance.

One of the best illustrations of this is the Panel's suggestion that a "Strategic Review" of the most important policy implication of a project could take place before the finalization of a detailed project proposal, including a review of the adequacy of the project application (as is now done by the NEB staff). Without the details of the project, how exactly would departments, or the Cabinet, come to an informed judgment about such issues as the economic, environmental and social impacts? How would they determine the acceptability of the proposed route? On what, exactly, would one conduct expansive consultations with indigenous groups? How would one distinguish between poorly generalized attacks on the project concept and genuine concerns based the actual infrastructure in question?

The answer, of course, is that the National Interest determination under the new system would be based not upon the specific merits of the project in question but upon two central questions that the Expert Panel places at the heart of its report. Those questions are whether the proposed project would, directly or indirectly, result in increased greenhouse gas emissions and whether indigenous groups oppose the project and therefore need to be "accommodated" in some way. Taken together, the answers to these two questions would almost certainly lead to the rejection of any and all pipeline applications.

How long would such a Strategic Review" take? The formulation of new teams within a new Major Projects Office and its Indigenous Major Project Office counterpart would take a few months. Gathering of information, preparation, planning and conduct of consultations with Indigenous (and probably other) groups would take several months. There would follow a period of interdepartmental consultation and the drafting and scheduling of a submission to Cabinet. The federal Cabinet has a busy schedule and is unlikely to be rushed. Accomplishing all this in a single year would be "heroic" to say the least. It would probably take at least 18 months. If the result were the decisive rejection of the project, environmental and Indigenous groups could properly claim that the process was very efficient in terms of getting a prompt decision.

In the rare circumstances in which a proposed project survived the Strategic Review phase, the technical review would present additional challenges. It is notable that the list of subjects the Expert Panel suggests be reviewed is all cast in terms of the concerns frequently raised by environmental and aboriginal groups. The Expert Panel seems to have neglected to list such topics as engineering, financing, toll design, and economic benefits, among others, that might be of interest to labour, consumers and those who would be served by the pipeline. If the technical review were expanded to include such considerations, as is now done as part of the NEB's process, it could take far longer than the Expert Panel projects.

The consequence is that a project that somehow survived the two phases of review would spend at least three and a half years, and probably longer, under policy and regulatory study. This would significantly discourage investors, especially if, as seems likely, the new United States Administration streamlines the regulatory review process that will apply to competing investments in the United States.

CONCLUSION

If the government's objective is to place reducing greenhouse gas emissions and accommodating indigenous peoples' concerns ahead of all other public interest objectives, it can accomplish this more directly by changing the National Energy Board Act to alter the definition of the public interest. It similarly could eliminate any restriction on the duration of NEB reviews. It does not have to adopt the elaborate and ill-conceived proposals of the Expert Panel.

THE REPORT OF THE EXPERT PANEL ON MODERNIZING THE NATIONAL ENERGY BOARD – INDIGENOUS PEOPLES –

PART FOUR

On May 15, 2017, a panel appointed by the Canadian federal government published its report on how to "modernize" the National Energy Board. This is the fourth in a series of commentaries that will examine the panel's presumptions and recommendations.

In this paper, I will comment on the panel's recommendations to increase the substantive participation of indigenous peoples in public decision-making and regulation of energy infrastructure, with the objective of having Canada "fully realize nation-to-nation relationships with Indigenous peoples".

In reporting on its public meetings with various groups, the Expert Panel stated that it heard that:

"Indigenous peoples in all regions of Canada are ready to play a leadership role in resolving some of the most pressing issues of the day. We learned about a unique and invaluable Indigenous world view that sees humanity as one part of a larger network of all life and all creation, where our fundamental obligation is not to exploit the world, but to care for it and ensure that the incredible natural bounty that all Canadians enjoy is there for the next generation, and the generations that will follow…In our discussions

with Canadians, we observed a broad-based expectation that Canada will make good on its promise to reconcile and bring real nation-to-nation relationships to life with Indigenous peoples, involving real change to how decisions are made."

The report strongly endorses these views and calls for a major transformation.

"Building on the Calls to Action of the Truth and Reconciliation Commission, and the Prime Minister's unreserved endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, we see ourselves situated at the beginning of a new era in the history and evolution of Canada, an era where Indigenous peoples will, at long last, assume their rightful place at the table of Confederation as leaders, knowledge keepers, and most importantly as equals, bringing to bear distinct and valuable experiences and wisdom."

The Expert Panel recommends that:

- Every aspect, and every stage, of energy regulation would be modified to "*increase the real and substantive participation of Indigenous peoples, on their own terms and in full accord with Indigenous rights, aboriginal and treaty rights and title.*"
- The National Energy Strategy phase of review would take at least a year to complete, and would require extensive consultations with indigenous people.
- A new Indigenous Major Projects Office would be created in the federal government *"to support true consultation and accommodation, and several other measures to ensure that Indigenous rights, aboriginal and treaty rights, and title are fully taken into account by the regulator*";
- The second phase "technical review" panel would have to include an Indigenous person on it;
- *"In accordance with the results of the Truth and Reconciliation Commission, and the Prime Minister's unreserved endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, modernization of the NEB will be the first major step in assuring that at long last, indigenous peoples will assume their rightful place at the table of Confederation as leaders, knowledge keepers, and most importantly as equals, bringing to bear distinct and valuable experiences and wisdom."* Canada will *"meet Indigenous peoples on their own terms".*
- The new Canadian Energy Transmission Commission would establish *"formal programs to enable and increase the involvement of Indigenous communities in monitoring activities"* related to pipelines' safety, environmental protection and emergency preparedness.

THE CURRENT SITUATION

The National Energy Board has for many years expanded the opportunities for all members of the Canadian public to participate in its hearings and other processes when it is considering a project. The NEB's process is an open and transparent forum designed to obtain as much relevant evidence as possible.

This does not accord any special or pre-eminent status to any group, including indigenous people. However, following a series of Supreme Court Decisions, the federal government has developed elaborate and detailed guidelines with respect to indigenous consultation and accommodation that must be followed by all federal departments and agencies, including the National Energy Board. The guidelines can be read here:

https://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675

Beyond meeting the requirements for consultation and accommodation, the NEB encourages potentially affected indigenous groups to participate in the review process for any project. It requires companies to consult with potentially affected indigenous groups early in the project planning and decision phases to discuss the project, identify concerns and potential impacts and mitigation measures. It also encourages indigenous people or groups with concerns about proposed projects to contact companies and ask company representatives to come and talk to the community about the project.

The NEB has recognized the importance of strengthening relationships with indigenous peoples. At the initiative of the current Chair, it is implementing a multi-faceted Indigenous Engagement Strategy, as part of which the NEB offers to meet with indigenous groups to explain its regulatory process and how to participate in the process. This includes providing information about the NEB's Participant Funding Program. There are also Process Advisors who, as part of their role support aboriginal groups who are participating in the public hearings.

It is important to understand the nature of the NEB hearing process. As it is a quasi-judicial tribunal and works much like a court, when making a decision the NEB can only consider information that has been placed on its public record. This makes indigenous participation in NEB hearings especially important because, beyond the hearing process, the NEB cannot take part in one-on-one discussions with anyone about a project application that is being considered by the Board.

One permanent member of the NEB, Dr. Keith Chaulk, and one temporary Board member, Wilma Jacknife, are indigenous persons.

Finally, it is already the case that the National Energy Board and the Government of Canada in general are legally (indeed, constitutionally) bound to honour indigenous treaty rights and title. No change in current regulatory structures is needed to assure this.

COMMENTARY

Indigenous people already enjoy the same opportunities to participate in and influence NEB decisions on proposed energy infrastructure as do all other Canadians, and indeed also enjoy special privileges with respect to consultation, accommodation and programs to support their involvement in the decision process. Despite this, several indigenous representatives appealed to the Expert Panel for more power and influence over the decisions affecting energy infrastructure. In effect, the groups that spoke to the Panel demanded special powers and privileges that will not be accorded to other Canadians, and (for the time being, at least) they want these powers and privileges to apply to one specific sub-sector of the Canadian economy, energy transmission.

This raises several fundamental questions, of which these are a few:

Would the goal of “reconciliation” justify according such powers to indigenous representatives?

Would the concept of “nation-to-nation” relationships as articulated in the United Nations Declaration on the Rights of Indigenous People justify according such powers to indigenous representatives?

Are there other paths by which indigenous people might attain the benefits that they seek from energy infrastructure (and from energy development generally) that do not require fundamental changes in the current Canadian system for regulating energy infrastructure?

In 2015, the Truth and Reconciliation Commission issued a report based on its study of the experience of indigenous students who attended government-funded residential schools during the period from around 1900 to the late 1970's. Unlike the Truth and Reconciliation Commission in South Africa, the Canadian Commission heard mostly from victims. The Commission's report included a long list of "Calls to Action", with 94 main recommendations and many more sub-recommendations as to what the Canadian government and all sectors of Canadian society should do "reconcile" with indigenous people. It is difficult to find in the Commission's report a succinct definition of what is entailed in reconciliation or what the limits of reconciliation might be. The calls to action are often extremely vague.

Others, however, have strived to bring some clarity to the concept. In a paper entitled *Reconciliation in Canadian Law: The Three Faces of Reconciliation*, Tony Knox of McCarthy Tetrault LLP provided a useful analysis that might help to clarify matters. Knox describes how the Supreme Court of Canada has elaborated on the theme of reconciliation in four key decisions.

Knox's paper cab read here:

http://www.mccarthy.ca/pubs/Reconciliation_Paper_July2009.pdf

A follow-up paper, entitled *A Closer Look at Legal Reconciliation,* may be read here:

http://knoxlex.com/knox_insight-conf-2011_Closer-Look-at-Legal-Reconciliation.pdf

In the *Sparrow* decision in 1990, the Court found that "*federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or diminishes Aboriginal rights*." In the *Van der Peet* decision in 1993, the Court concluded that Section 35(1) of the *Constitution Act* mandated reconciliation of Aboriginal claims to land based on Aboriginal occupation in Canada, which predated Crown sovereignty over the Canadian landmass. In effect, Section 35(1) mandated integrating concepts of pre-existing Aboriginal law, where it applied, with the formal laws of Canada. In the *Gladstone* decision in 1996, the Court concluded that Aboriginal Canadians do form part of the larger Canadian population and that some objectives of government, such as conservation, are important enough to limit Aboriginal rights within the necessary rights of the broader Canadian society. Finally, in the *Haida* decision in 2004, the Court discussed the processes whereby reconciliation of laws might occur, including

negotiation of treaties, consultation and accommodation, establishment of regulatory schemes for determining the adequacy of consultation, government guidelines for dealing with special cases, and ultimately reference to the Constitution.

The central objective of reconciliation, as the courts have defined it, thus has been on reconciling different systems of law. This seems (to the layperson at least) to resemble the questions that might arise from efforts to achieve nation-to-nation agreements and accommodation rather than social or political reconciliation. It leaves unclear where one might look to find an authoritative statement of the principles that might guide "reconciliation" with respect to matters such as regulation of energy infrastructure.

Turning to the implications of the U.N. Declaration, the fundamental question is whether, given our constitutional, legislative and treaty history, it can be applied here. The Hon. Jody Wilson-Raybould, current Minister of Justice of Canada, addressed this question in her speech to the Assembly of First Nations on July 12, 2016. Among other things, she noted that Article 5 of the U.N. Declaration says indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state. She then asked what are the political, economic and social structures the Canadian government should recognize? There are, after all, 614 different aboriginal groups (First Nations?) in Canada. She observed:

"So as much as I would tomorrow like to cast into the fire of history the Indian Act so that the Nations can be reborn in its ashes – this is not a practical option – which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it."

She advocated "an efficient process of transition" that basically would require each First Nation to develop its own political institutions of government and then to have them recognized by the Canadian state, through the negotiation of a whole new set of treaties to replace the historical ones. She did not estimate how long all that would take. (One wonders whether the majority of Canadians would welcome the accordance of European-style nation-state recognition to hundreds of new native bands within our midst.)

The full text of Minister Wilson-Raybould's speech may be read here:

https://drive.google.com/file/d/0B_bPXJbq-wgWenpoa2NIRmgwT2NlWkx3enNSWXJELTFSSzc4/view

Are we left with any clear connection in logic or public interest between the concepts of reconciliation and nation-to-nation relationships on the one hand and improving the regulation of Canadian energy infrastructure on the other? From here, it is difficult to see one.

This leaves the final question of whether it would be possible to attain the benefits Indigenous people seek from energy infrastructure without major changes to our current energy institutions.

In June 2016, Dr. Ken Coates of the University of Saskatchewan published a report for the Indian Resource Council entitled *First Nations Engagement in the Energy Sector in Western Canada* in which he documented the range of interactions and the impact of recent legal changes. After noting the divergence of views among indigenous groups, he describes the complexity of the current relationship to pipelines and resource development generally.

"First Nations people …are rightly concerned about the environmental, social and economic benefits of major projects. But when they are drawn into the sector as real partners, both in terms of appropriate consultation and active participation, First Nations have been able to strike a balance between protecting local eco-systems, ensuring responsible development on their territories, and creating economic space for their communities in a sector that, until recently, left them on the outside looking in. Even as local and regional debates over natural resource development seemingly put First Nations at odds with government, industry and the public at large and heading for further conflict, First Nations engagement in the industry has created models of collaboration, trust and partnership that hold nation-changing promise for Indigenous people and the country at large."

Dr. Coates outlines two starkly different scenarios, one in which some or most indigenous groups continue to oppose every major energy resource and transportation project, especially in western Canada, and one in which there are thousands of indigenous people working in the energy industry, they have equity investments in energy projects, there are hundreds of indigenous-owned service and supply companies,

and there are toughly-negotiated but successful impact and benefits agreements. Both scenarios are possible.

Dr. Coates's report may be read here:

http://www.irccanada.ca/sites/default/files/First%20Nations%20Engagement%20in%20the%20Energy%20Sector%20in%20Western%20Canada.pdf

In considering the report of the Expert Panel the federal government must decide whether the Canadian public interest would be served by changing the current regulatory system from one in which indigenous people are heavily engaged and consulted and in which they have influence as large as, or slightly larger than, any other group of citizens, to one in which indigenous people have the power effectively to veto all new energy infrastructure development. The choice seems clear.

SUMMARY AND RECOMMENDATIONS

The preceding commentaries have addressed the central elements of the report of the Expert Panel on Modernization of the National Energy Board.

We have addressed the main premises of the panel relating to whether the National Energy Board, as it now operates, limits public engagement, accounts for its decisions, operates in way that seems opaque, and explains the rationale for its decisions. As amply demonstrated by the Board's conduct during its review of the Northern Gateway Project and the Trans Mountain Expansion Project, the NEB has gone to extraordinary lengths to hear every view and every person who might conceivably be affected by the projects. It has used its influence and regulatory powers to increase the proponents' already extensive engagement with stakeholders. It has given stakeholders multiple opportunities to be heard and to influence the decision process. Finally, it has explained, repeatedly and at length, the reasons for its decisions. It has met an extremely high standard of openness and transparency.

Recommendation: The findings of the Expert Panel should be rejected as not based upon the evidence.

We have examined the panel's contention that the National Energy Board does not perform an authoritative, independent and expert review of the public interest considerations that apply to energy transmission systems. The public interest considerations that the Board must address are set out in Subsection 52 (2) of the *National Energy Board Act*. The Board operates in a manner consistent with the judgment of Canadian governments since 1959 that decisions on whether to approve major energy transmission systems should be made, in the first instance, by a non-partisan tribunal, and that political judgments should follow. Moving decisions to the political level first, and having Cabinet's "strategic" judgment rest primarily on whether Canada might increase greenhouse gas emissions would move concerns about Canadians' contribution to global warming to the top of the public interest list. This is inappropriate and would sharply impair the governance of the energy industry.

Recommendation: The recommendation of the panel to eliminate the National Energy Board and implement a first-step strategic review based primarily on climate policy considerations should be rejected. If Cabinet indeed wishes global warming considerations to be specifically and factually addressed in the review of energy

transmission projects, the Government should seek Parliament's approval of appropriate amendments to Subsection 52(2) of the National Energy Board Act.

We have examined the panel's contention that the Government's objectives with respect to reconciliation with indigenous peoples and implementation in Canada of the United Nations Declaration on the Rights of Indigenous Peoples requires the elimination of the National Energy Board and the granting to representatives of indigenous peoples of much increased roles and authorities in relation to energy transmission systems, powers not enjoyed by other Canadians. We found no clear link between the generalized concept of "reconciliation" as set out in the report of the Truth and Reconciliation Commission and the requirements of responsible energy regulation. We note that the Minister of Justice has already acknowledged publicly that adopting the U.N. Declaration as Canadian law is unworkable under Canada's current constitutional, legislative and treaty circumstances. We have further pointed out the extraordinary lengths to which the National Energy Board has already gone to strengthen relationships with indigenous peoples and to increase their participation in the regulatory process.

Recommendation: The recommendations of the panel to grant indigenous peoples' representatives special enhanced status, roles and decision-making power above those of other Canadians in the regulation of energy transmission systems should be rejected. The past efforts of the NEB to engage indigenous people should be recognized and applauded.

We have reviewed the likely effects of the panel's recommendations to create a two-part public review process to govern energy transmission systems. We have noted the panel's acknowledgement that this would, at minimum, double the length of project reviews from 18 to 36 months. We have explained why the proposed system would make it extremely unlikely that any new transmission system transporting fossil fuels would ever be approved. Even if this possibility remained open, the complexity and length of the review would present a bureaucratic nightmare for any company that sought approval for a new hydrocarbon transmission system. This, in turn, would impair market access for Canadian energy producers, especially in western Canada, and impinge on provincial jurisdiction over resource development.

Recommendation: The recommendations of the panel with respect to the establishment of a two-phase regulatory system should be rejected.

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Additional reading:

Moving Oil by Pipeline: Examining The Facts

https://friendsofsciencecalgary.wordpress.com/2016/11/27/moving-oil-by-pipeline-examining-the-facts/

Moving Oil by Tanker in Canada: The Facts

https://friendsofsciencecalgary.wordpress.com/2016/11/18/moving-oil-by-tanker-in-canada-the-facts/

About

Friends of Science has spent over fourteen years reviewing a broad spectrum of literature on climate change and have concluded the sun is the main driver of climate change, not carbon dioxide (CO2). Friends of Science is made up of a growing group of earth, atmospheric and solar scientists, engineers, and citizens.

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