



FORWARD, TOGETHER
**Enabling Canada's Clean, Safe,
and Secure Energy Future**

REPORT
OF THE EXPERT PANEL ON THE
MODERNIZATION OF THE NATIONAL
ENERGY BOARD

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Message From the Panel

Minister Carr appointed the five of us to tackle a great challenge: analysing the structure, role, and mandate of today's National Energy Board, and coming up with a set of recommendations to modernize the organization, and restore public trust in the institution. This was a daunting task, and by ourselves we never would have been able to answer the Minister's call. However, we were exceedingly grateful to benefit from a vast array of knowledge and support in reaching our conclusions.

We met with Indigenous leaders, and federal and provincial and territorial government representatives, and we held public and Indigenous engagement sessions in all the regions of Canada which allowed us to speak directly with representatives from indigenous communities, environmental groups, members of industry, academics, municipalities, hundreds of citizens passionate about a clean, safe, and secure energy future for our country. We cannot thank each and every one of you enough for your time, your experience, and your advice in helping us to understand the issues and see a path forward through what could sometimes seem to be a treacherous landscape. Participants took time away from work and family, travelled hundreds of kilometres, or battled trying winter weather just to share their views with us, and to them we owe a great debt.

We also received an incredible volume of detailed, thoughtful written submissions from an array of groups and individuals, who helped form and test our views. These submissions were an invaluable resource for us throughout our deliberations, and we read and seriously considered every one of them. And in addition we received many comments on our website that also aided us. Overall, all of the views that were shared with us in person, online, and via formal submissions informed our thinking and enriched the quality of our debates about the future. We were deemed an "Expert" Panel, but we are humbled by the deep expertise from which we were able to draw in building our recommendations.

Not surprisingly we heard a great diversity of views on virtually every issue, and we believe that this diversity and respectful disagreement provided us with a truly full picture of the issues. We took every viewpoint seriously, and looked to find the best solutions informed by differing perspectives sharing a common goal: clean, safe, and secure energy. We hope that everyone who provided us with their point of view will know that we have heard them, and further hope that they might see traces of their ideas in our report.

We benefited from diversity ourselves, in being a Panel composed of so many of the different backgrounds, skills, and experiences that we believe are necessary for world class energy regulation in the future. Combining our own knowledge and experiences – engineering, Indigenous issues, law, regulation, science, energy operations, environment, government, Indigenous worldviews, politics, and so much more – our Panel was far more than the sum of its parts. Through building mutual understanding we arrived at a powerful consensus about the future of energy regulation in Canada. We are hopeful that, as the process of modernization unfolds, the many diverse groups and interests involved can reach a similar consensus and engage constructively to build a positive future.

Lastly, we wish to thank the National Energy Board Modernization Secretariat who supported us from day one, and without whom this report would simply not have been possible. Your high quality assistance, expertise, and constant professionalism in the face of challenging expectations are a credit to yourselves and your organization. We cannot thank you enough.

We hope that you, the reader, find this report interesting, challenging, and indicative of the kind of future we would all like to work toward.



Hélène Lauzon
Co-chair



Gary Merasty
Co-chair



David Besner



Wendy John



Brenda Kenny

Executive Summary

We are pleased to present to the Minister of Natural Resources and the Canadian public this report on the modernization of the National Energy Board, the culmination of a months-long period of engagement with Canadians across the country, and intensive study of the many high quality analyses, reviews, and proposals provided to us.

When Minister Carr convened our Panel in late 2016 we were provided with a broad mandate:

“Efforts to modernize the NEB will deal with a focused set of issues related to the Board’s structure, role, and mandate pursuant to the NEB Act. Specifically, these efforts will aim to position the NEB as a modern, efficient, and effective energy regulator and regain public trust.” – Expert Panel Terms of Reference

Our Terms of Reference (see Annex III for the complete document) further suggested exploring possible reforms in several theme areas, which we have excerpted here:

- 1) Governance:** Ensuring the Board’s composition is diverse and has sufficient expertise in relevant fields such as environmental science, community development, and Indigenous traditional knowledge.
- 2) Mandate:** Defining and measuring public interest (e.g., consideration of national, regional, Indigenous, and local interests as well as environmental, economic and social factors); potentially clarifying and expanding the NEB’s mandate with respect to collecting and disseminating energy data, information, and analysis.
- 3) Decision-making Roles:** Ensuring there are appropriate decision-making roles for the NEB, Minister, and the Governor in Council regarding projects, licenses, and compensation disputes.
- 4) Legislative Tools for Lifecycle Regulation:** Providing findings and recommendations regarding lifecycle oversight and public engagement tools; safety and emergency preparedness tools (e.g., effective compliance monitoring and enforcement legislative tools; safety standards and emergency response requirements); and land acquisition matters and related negotiation proceedings.
- 5) Indigenous Engagement:** Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by specific projects under the NEB’s mandate; facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making; further integrating Indigenous traditional knowledge and information into NEB application and hearing processes; developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.
- 6) Public Participation:** Identifying legislative changes to support greater stakeholder and public participation in NEB activities (e.g., hearings, developing emergency response plans, etc.) that would enhance the outcomes of these activities.

Our review examined all of these elements and more, and we have developed a comprehensive vision for the future of energy transmission infrastructure regulation which, we believe, will chart an ambitious and thoroughly modern course as Canada enters a new era in the development of its vital energy sector. All of our Panel’s recommendations are designed in the service of realizing

this vision – described at length in the chapter Our Vision – and we see many of the actions we have recommended as mutually reinforcing and interdependent in achieving the ultimate goal of positioning the energy transmission infrastructure regulator as a modern, efficient, and effective regulator, which regains public trust.

What is our vision? In broad strokes, we envision:

- A regulatory system that **aligns with a clearly defined and coherent national strategy** to realize energy, economic, social, and environmental policy objectives.
- A new, independent **Canadian Energy Information Agency**, separate from both policy and regulatory functions, accountable for providing decision-makers and the public with critical energy data, information, and analysis
- A modern **Canadian Energy Transmission Commission**, which would replace the National Energy Board, governed by a Board of Directors, with decisions rendered by a separate group of Hearing Commissioners
- For *all* major projects, **a one year process to determine alignment with national interest** by the Governor in Council *before* detailed project review or licensing decisions, informed by substantive Indigenous Consultation and stakeholder engagement
- For all major projects (and other large undertakings), *full* environmental assessment and licensing by a **two year Joint Canadian Energy Transmission Commission/Canadian Environmental Assessment Agency Hearing Panel process**, exercising authority under the enabling legislation of the respective organizations
- **Real and substantive participation of Indigenous peoples**, on their own terms and in full accord with Indigenous rights, aboriginal and treaty rights, and title, in every aspect of energy regulation
- A Canadian Energy Transmission Commission which **radically increases the scale and scope of its stakeholder engagement** to build trust and drive better outcomes for all Canadians
- **Better relationships with landowners**, on whose land so much vital infrastructure sits

We have endeavoured in our recommendations to address the most important concerns shared with us by Canadians, and to do so in a way that is both innovative and realistic.

Canadians told us that they expect to see their energy regulator fully realize **nation to nation relationships with Indigenous peoples**. We agree. Our recommendations call for the equal recognition of traditional knowledge in hearings, acknowledgment of Indigenous worldviews in decision-making, a new Indigenous Major Projects Office 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.

Canadians told us that they expect their energy regulator to be **transparent and open** in all facets of its operations. We agree. Our recommendations include public decision rationales for all licensing decisions, fully open information on monitoring, compliance verification, and enforcement actions, a Public Intervenor to increase engagement in decision-making processes, and a fundamentally reformed approach to open and inclusive proceedings.

Canadians told us that they expect their energy regulator to be **fully independent, and deserving of a high level of public confidence**. We agree. Our recommendations fundamentally re-order the governance of the future Canadian Energy Transmission Commission, define new competencies for independent Hearing Commissioners representative of a wide range of skills and experiences, and articulate clear decision-making roles.

Canadians told us that they expect their energy regulator to achieve the highest standards in terms of results, **delivering safety, security, and environmental protection**. We agree. Our recommendations call for Regional Multi-Stakeholder Committees designed to improve emergency preparedness and make standards more rigorous, enhanced monitoring, and more robust analysis of risks to set priorities and drive continuous improvement. The synergy achieved through these Committees will also provide deep insight as to the scope of regional interests for any future project reviews.

This report begins with an overview of some of the key messages we drew from our engagement sessions and the materials submitted to us. Volume II features full reports from each engagement session, (see Annex VI) and a comprehensive roll up of the major ideas presented to us (see Annex VII). We are grateful to every single group and individual who offered us their perspectives and advice.

We then articulate and explain five core principles, which we have used to guide all of our recommendations:

- Living the Nation-to-Nation Relationship
- Alignment of Regulatory Activities to National Policy Goals
- Transparency of Decision-Making & Restoring Confidence
- Public Engagement Throughout the Lifecycle
- Results Matter – Regulatory Efficiency and Effectiveness

After describing our overall vision in detail, we have provided a series of specific recommendations, grouped into themes, along with context and analysis for each recommendation. We have also included Expert Panel Notes on each recommendation to offer guidance, examples, or further explain our thinking for the benefit of those tasked with implementing the government's direction, informed by this report.

We have greatly enjoyed the opportunity to work on these important issues, aided by the wisdom and experience of so many, and it is our hope that this report will help all concerned to find common ground and realize a clean, safe, and secure energy future for Canada. Going forward, together.

Overview of What We Heard

Over the course of our deliberations, we had the opportunity to review and take into account the recommendations stemming from the other environmental and regulatory reviews, and we feel that these perspectives helped us greatly during the NEB Modernization review. We also had the honour of speaking directly with hundreds of Canadians, from coast to coast, in small centres and our largest cities. Volume II of our report includes the following annexes: our recommendations, preliminary findings regarding legislative and regulatory amendments, an overview of our engagement process, Terms of Reference, discussion papers, summaries of engagement sessions, an index of participants' ideas, and biographies. We heard from industry representatives, environmental organizations, Indigenous peoples, academia, landowners, municipalities, provincial and territorial governments, community organizations, and individual citizens of various backgrounds, all of whom took the time to present their views and engage in dialogue on this important issue in a respectful and constructive manner. We would like to thank everyone who attended a public engagement session, as well as all of the parties who submitted written reports for our consideration. The depth and quality of all of this feedback is a testament to how much Canadians care about the future of their country and their world, and the degree to which issues of how we generate, transport, and use energy are intertwined with the broad question of what kind of world we will leave to future generations.

In response to what we have heard and our discussions and analysis, we have made a number of recommendations on a broad range of topics related not just to the National Energy Board itself, but also affecting Canada's overall approach to energy and climate change. Before delving into the specific details of these recommendations we would like to share the broad picture of the National Energy Board that we gleaned from our consultations. This high level understanding is what informs the principles of this report and is the basis on which all of our findings and recommendations stand.

Resolving Climate and Energy Policy Through Pipeline Projects

We heard from almost every group, and in every part of the country, that there exists a major challenge to reconcile Canada's energy, economic, and climate goals, and that this challenge plays out in the context of National Energy Board (NEB) hearings which are fundamentally incapable of resolving such challenges. On the one hand the government has expressed clear goals for action to combat climate change, action which includes drastic reductions to the combustion of fossil fuel. On the other hand secure access to energy at home and abroad, and a large part of Canada's economic prosperity is driven by continued fossil fuel exploitation, a process at least partly enabled by NEB-regulated infrastructure projects. Reconciling these critical environmental, social, and economic goals is essential for a coherent energy policy, however there is an apparent absence of a forum for this discussion, and single government authority for taking appropriate action.

Canadians stressed to us the global nature of many of these issues as well. Canada is an energy supplier for the world, not just its own domestic market, and much of our economic prosperity is driven by a rising global demand for energy. Policy in this area – particularly in light of the many global interdependencies – is complex.

We heard from many groups and individuals that Canada’s approach to energy is cut up into dozens of jurisdictional siloes. Canadians are concerned that government action is fragmented and risks not meeting our goals, as it seems that each party can credibly pass the buck to someone else. While Constitutional and jurisdictional issues are important, Canadians are ultimately unswayed by the idea that each player in the system is responsible only for a small piece of the puzzle, particularly as it relates to a critical issue like climate change that by its very nature requires concerted and coordinated action across all sectors of the economy and government jurisdictions and departments. Clarity and predictability are important to align regulation to policy, and to ensure a predictable investment environment. This doesn’t mean policies and processes that *favour* industry, but that are clear enough to allow industry to make informed decisions about potential major investments be they related to fossil fuels or renewables.

This fundamental dynamic plays out in NEB project reviews and hearings that have become an inadequate *de facto* forum for debates about Canada’s energy policy and climate change strategies. Both industry and environmental groups told us the same thing: Canadians feel forced to use NEB project reviews as the venue for resolving policy questions about climate change because of an absence of any better alternative. The end results are NEB proceedings that serve no one’s interests, and which needlessly exacerbate conflict between industry groups (who may rightfully feel as though they cannot follow a predictable path for licensing projects under clear criteria when broader environmental concerns are introduced) and Indigenous and environmental groups (who may rightfully feel as though any participation in NEB project reviews forces them to accept a vision of the future that is inconsistent with goals to combat climate change).

A Crisis of Confidence

In our consultations we heard of a National Energy Board that has fundamentally lost the confidence of many Canadians. A large measure of this lack of confidence comes from the issue described above – i.e. NEB proceedings that cannot address the strategic concerns of participants. However, resolving high level policy questions cannot answer all of the NEB’s public confidence challenges.

We heard that Canadians have serious concerns that the NEB 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 the very least appear to – have an innate bias toward that industry. Canadians told us that, while energy industry expertise is critical, they expect to see NEB Board members who represent a broader cross-section of Canada, and wider scope of knowledge and experience, particularly Indigenous knowledge, regional understanding, and climate science.

More than just who sits on the Board, Canadians described an organization that limits public engagement particularly since the legislative changes enacted in 2012, does not explain or account for many of its decisions, and generally operates in ways that seem unduly opaque. We heard a broad consensus from non-industry players who feel as though they must fight to have access to usable information about NEB-regulated activities, who must fight to be heard, and who have little assurance that, when they are heard, their input is afforded any weight. From the

definition of who has standing to participate in NEB processes, to the very aggressive timelines afforded intervenors for their participation, to the formal settings of NEB hearings which favour well-resourced parties, the project review process of today feels to many as though it is designed to expedite decisions in favour of industry, and not to generate a robust debate to determine the best way forward, nor safeguard the public against the risks of NEB-regulated infrastructure.

The opaque nature of decision-making also has a negative effect on industry. Companies may invest hundreds of millions of dollars in a project designed to conform to the relevant rules and standards. Today a project might be denied – at the very end of a single project review process – based on broader policy or political factors known at the earliest stages of that project’s design, thereby wasting considerable time, energy, and resources for all involved.

Confidence is an issue affecting economic growth, as well. Most new energy investments – in renewables and fossil fuel – are made with private capital, not government funds, and companies have a preference to invest and create jobs in jurisdictions with clear, efficient, and predictable regulatory frameworks. Without reform, Canada may lose out on the future investment required to create our new energy future to competitors like Norway and Australia.

The Time For A New Relationship With Indigenous Peoples is Now

If climate change is the pre-eminent long-term global challenge facing Canada, then surely reconciliation with Indigenous peoples is Canada’s most important domestic opportunity. We heard from Canadians everywhere a deep yearning for a new relationship with Indigenous peoples, based on mutual respect and acknowledgement of our many shared goals and values. Indigenous peoples shared with us their experiences of being considered at the last minute, of having their knowledge ignored, and of being “accommodated” to the barest extent possible so that projects can move forward. In spite of these experiences, it is critical for us to note that we did not hear from embittered or defeatist peoples. Our Panel heard from Indigenous peoples in all the regions of Canada who 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 worldview 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 which will follow. Indigenous peoples told us that they do not want to waste time proving the existence of their Constitutional rights, nor spend years in courtrooms that could have been spent making a difference. Instead, they wish to have a meaningful seat at the table now, and lend their experience and wisdom to helping Canada navigate its energy and environmental challenges in new ways that respect the land, the air, the water, the people, and the animals that are all inextricably connected to one another.

We would also like to note that this message did not come to us solely from Indigenous peoples themselves. In our discussions with Canadians we observed a broad-based expectation that Canada will make good on its promise to reconcile and to bring real nation-to-nation relationships to life with Indigenous peoples, involving real change to how decisions are made.

Win-Win Solutions Are Possible

We heard about some serious challenges affecting the National Energy Board, and Canada's overall approach to climate and energy policy. We heard about major issues around how the NEB works with Indigenous peoples and the public, and how its processes can limit and even exclude the input of important parts of Canadian society. These are important, difficult issues, but based on the input we received, they are solvable issues. We did **not** hear about a battle between government, industry, environmental groups, Indigenous peoples, and land owners where one party must win and the rest must lose. Instead, we heard a number of creative solutions from all sides that offer a forum to resolve environmental, social, and economic conflicts, that allow Indigenous peoples to play a meaningful role and exercise their rights, that offer industry a predictable system in which to make investment decisions, that ensure landowners a fair deal, and that offer the public insight and influence over how the NEB functions. Nowhere did we hear that these goals are mutually exclusive, or that the interests and rights of the various parties involved cannot be acceptably accommodated in the interest of all Canadians.

Principles Underlying Our Recommendations

Beginning on page 21 we will articulate a broad vision for the future of the National Energy Board and specific observations and recommendations under six themes. All of these recommendations are guided by five fundamental principles that form the basis of our thinking. We have tried to be bold and articulate a compelling vision, and we also feel that our work is realistic and implementable, even where it might demand change to conventional approaches. In all of our recommendations we challenged ourselves to deliver advice that respects these five principles:

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

What follows is a brief explanation of each of these principles and why we think they are so important.

Principle 1: Living the Nation-to-Nation Relationship

Canada is in the midst of a major transformation of the dynamics that have formed the foundation of the country since before Confederation: the relationships between Canada and Indigenous nations. 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 beginnings 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 rights of Indigenous peoples are already firmly established under the Constitution and via extensive jurisprudence, and the time is past wherein Indigenous peoples must prove the existence of their rights. Work underway now between federal and Indigenous governments to guide the implementation of the UN Declaration and the nation-to-nation imperative will provide further direction as to how existing Indigenous rights, aboriginal and treaty rights, and title are exercised in the generations to come.

Our Panel has been moved by the testimony and experiences of Indigenous people in all the regions of Canada, and we have witnessed firsthand the great wealth of knowledge and opportunity within our many Indigenous nations, waiting to be afforded its rightful place. We know that neither our Panel nor the National Energy Board can make right the many injustices and broken promises endured by Indigenous peoples since the first European colonists reached our shores centuries ago, and this is not our aim. Looking at this complex set of issues with all the weight of history upon it can make it seem impossible to make a difference. We believe, however, that a modernized National Energy Board can be a leading example of bringing to life the ideas and principles of the UN Declaration, and the government's commitment to nation-to-nation relationships with Indigenous peoples. We see a future where Indigenous people are respected partners whose wisdom and interests are sought out not to check a box, but for their own inherent merits.

We encourage the government, in acting on our recommendations, to bear this same principle in mind, not just at the outset, but as a constant north star against which to orient all future action. As with any relationship we can expect challenges and missteps, but provided that real effort and energy is invested, and that the government consistently demonstrates its commitment to a new era in nation-to-nation relations, we are confident that a powerful, long lasting change will occur.

Questions we asked to ensure that our recommendations live up to this principle

- Does this honour the commitment to nation-to-nation relationships?
- Do our recommendations respect and give full expression to Indigenous rights, aboriginal and treaty rights, and title?
- Does the system we envision meet Indigenous peoples on their own terms?

Principle 2: Alignment of NEB Activities to National Policy Goals

As noted above (in Overview of What We Heard), there exists today a considerable amount of friction arising from questions around the NEB's role. Is it a licensing body? Is it a policy centre? Is it a hybrid of the two? Does it serve the economy? Does it further Canada's environmental goals? Resolving these fundamental questions is a critical feature of any modernized National Energy Board because almost everything else about the organization depends on a firm and clear understanding of its role and mandate.

Our answer is simple, but nuanced. First, the National Energy Board must align itself to the government's environmental (particularly climate change), energy, social, and economic policy goals. This means that the NEB of the future is not on one side or the other of the energy vs. climate debate; it must strive to make decisions consistent with both policy frameworks. Moreover, we believe that it is unreasonable and unfair to expect any regulatory agency to make or interpret such policies in the absence of guidance. In terms of its role in assessing and approving pipeline and transmission line projects, the NEB must perform as a regulator, not as a policy maker.

However, simply instructing a modern NEB to “follow government direction” is unhelpful without assuring that such direction is available, up-to-date, clear, and consistent with its legislative mandate. It is for this reason that we have included in our vision of the future NEB a structure and process for resolving the important national interest questions upon which the NEB as a regulator must depend. We feel that any vision of a future NEB that does not provide for resolving this gap would be incomplete and destined to experience gridlock until a clear reconciliation of these policy concerns occurred.

And finally, inherent in this principle is a respect for the Constitutionally-enshrined jurisdictional powers of the provinces, territories, and Indigenous governments over natural resources and energy generation. Our recommendations do not in any way entail a reordering of this bedrock of Canadian federalism. Where we express a desire for a coherent national policy and alignment amongst governments, we envision a federal role for convening discussion and working to achieve consensus. This in no way represents any expression of federal usurpation of provincial, territorial, or Indigenous powers and responsibilities.

Questions we asked to ensure that our recommendations live up to this principle

- Does our vision provide a forum for answering major policy questions?
- Does the regulatory system deliver a credible whole-of-government view?
- Does our vision ensure that regulation will follow, not make, policy?

Principle 3: Transparency of Processes and Decision-Making and Restoring Confidence

We heard from Canadians a strong desire for a more transparent National Energy Board. On a multitude of issues a common theme emerged: people were 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, especially at a time when the public is more interested than ever before in energy and environmental issues. This perceived lack of transparency has a direct correlation with the lack of trust in the regulator that was so prevalent during our engagement sessions.

Public engagement session participants told us that in many cases they did not object to the outcome of a decision, so much as the opaque process by which it was achieved. This is especially the case for decisions rendered by Cabinet, where decisions are protected by Cabinet confidence, and are therefore not explained or justified. Canadians told us that under such circumstances, despite seeing the reasons for an NEB recommendation, it can be difficult to accept or even understand a final judgment, furthering perceptions that processes are arbitrary or favour the viewpoints of project proponents.

In addition we heard real fear from many Canadians about the risks faced by their communities, as they either host NEB-regulated infrastructure or are directly affected by potential spills into drinking water sources, for example. For these people transparency of emergency response plans is not just an academic concern, but a question of safety for themselves, their families, and their communities.

Transparency is a broadly accepted feature of good governance today and we feel that a modernized National Energy Board should operate in the most transparent way possible, by default, not by exception. Transparency is, of course, balanced against privacy (particularly of proprietary and competitive information) and security, but as a guiding principle we feel that a new spirit of transparency can and should be imbued into all of the NEB's operations and decisions wherever possible. And transparency is also about predictability; we heard from industry representatives who argued that they desire a transparent, fair process, where the rules are clear for everyone at the outset, and where companies can make informed decisions about investing time and resources in large project proposals.

We envision a regulator that earns the confidence of Canadians through transparent practices and easy access to useful information relating to project decisions and ongoing operations.

Questions we asked to ensure that our recommendations live up to this principle

- Can all parties see and understand the criteria for decision making?
- Can decisions in the system we envision be explained meaningfully?
- Is information available to any interested party and is it easy to find?

Principle 4: Public Engagement Throughout the Lifecycle

Our fourth guiding principle relates to public engagement. At the NEB's inception in 1959, public engagement in government decision-making was largely limited to elections, and there was no expectation that the public would have direct, ongoing involvement in any government business of any significance. Since that time, public attitudes in this regard have changed drastically, and the NEB is now behind the times.

With regard to hearings, we heard from Canadians who were barred from simply sending the NEB a letter about a project under consideration, because they didn't have official standing to do so. We heard from Canadians who received funding as official intervenors, but had to choose between procuring legal advice and scientific study. We heard from parties to NEB hearings who felt that the entire system was one of "people vs. suits" and that the "suits" have outsize influence and resources. Overall we heard from people across the country who feel as though the NEB does not listen to their concerns, and, indeed, has no process by which to do so.

It is our expectation that the energy transmission infrastructure regulatory system of the future will involve a radical rethinking of how it engages the public, from its role as an educator on energy issues related to its mandate all the way through to seeking and enabling the participation of all Canadians who wish to have a say in NEB matters. This will undoubtedly require a culture change toward becoming a more welcoming forum, in addition to procedural reforms. Moreover, we hope to see a move away from today's overwhelming focus on new project reviews and decisions, toward a system that sees public engagement on the entire lifecycle of infrastructure regulated by the NEB. We envision a future where industry representatives, environmental organizations, Indigenous peoples, academia, landowners, municipalities, provincial and territorial governments, community organizations, and individual citizens of various backgrounds can work with the NEB to direct research, inform Canadians and decision-makers, and work collaboratively to make sound decisions, advance sound solutions, address emerging risks, and protect the livelihood and well-being of all Canadians.

We have used the term "lifecycle" throughout our report to denote the full range of activities from the first design of a project, through its review, construction, operation, and all the way up to that project's eventual decommissioning. Canadians are understandably most interested in the decision making process for major projects, however approved projects remain under regulatory oversight for decades of operation, and we do not wish to lose sight of this fact.

Questions we asked to ensure that our recommendations live up to this principle

- Are all interested parties able to inform decision making?
- Will participants feel heard and respected, and are decision-making processes inclusive?
- Will the regulator reach out to inform the public and ensure that it receives the best advice, and hears the best ideas?

Principle 5: Results Matter: Regulatory Efficiency and Effectiveness

Our fifth and final principle is really an affirmation that the results of the energy infrastructure regulatory system are of vital importance. Pipelines and transmission lines are critical drivers of economic prosperity and social good, but without the right regulatory system in place they can represent a threat to Indigenous ways of life, to communities, and to our environment. We believe that every single person and group we interacted with through our engagement sessions shares the goal of maximizing the benefits of regulated infrastructure, minimizing its impact, and avoiding incidents or releases into the environment. We see an efficient, predictable, fair, and effective regulator as critical in realizing this goal.

This report necessarily focuses on governance structures, review and decision processes, and the machinery of how today's NEB goes about its work. We have endeavoured, however, to continually bear in mind the important results that this entire system is designed to achieve, and have made sure not to recommend any reforms that subtract from this fundamental goal. We believe that a future energy transmission infrastructure regulatory system which engages and consults Indigenous peoples on a nation to nation basis, that aligns ground level action with national policy, that is transparent and inspires confidence, and that is open to real public engagement, is a system that will do an even better job of delivering shared economic prosperity while protecting our communities and the environment.

Questions we asked to ensure that our recommendations live up to this principle

- Will the regulatory system we envision ensure safe, secure, and environmentally responsible energy transmission infrastructure?
- Will the regulator and the whole of government – fulfilling all of our principles – be able to operate efficiently?
- Are the right tools, systems, and practices in place to ensure compliance, and take effective action to address issues?

Our Vision

Based on all of the testimony and advice offered to us, and our own extensive deliberations, we have formulated an overall vision of the future of energy transmission infrastructure regulation in Canada. We have further refined specific recommendations under six key themes, below. In this section we would like to describe our high level vision, to which the specific recommendations contribute.

Rationale

Institutions of all kinds are in a constant and evolving state of conflict with their surroundings, as society changes and as the institutions must adapt to a host of new factors. Changes in technology, in thinking about the environment, in political power, in public engagement, and many other things all place stress on any public institution. The National Energy Board is no exception to these many changing factors, and – like any institution – there comes a time when it requires a wholesale review of its practices and structures, as the pace and depth of change has outpaced the NEB’s ability to adapt incrementally.

We have observed many simple problems within the NEB of today which have relatively simple fixes, like changing a rule or process. These sorts of modernizing updates are important and valuable, and we have several recommendations in this vein to help bring the NEB’s practices into the modern age. We have also observed that many of the changes made over time through new standards and regulations, including the more recent *Pipeline Safety Act*, have the goal of improving safety and oversight. We heard that the NEB is respected internationally for its approach to oversight during operations and heard that benchmarking has placed Canada among the most stringent of regulatory regimes, and we acknowledge that the NEB has adapted in many areas.

Notwithstanding these improvements, though, we have endeavoured very carefully not to simply focus on the trees, at the expense of the forest. In addition to a need for certain administrative and procedural updates, we have observed in our many discussions with industry, NGOs, Indigenous peoples, government experts, and interested Canadians, a larger gap that affects the overall operation of the National Energy Board and creates a tension that cannot be resolved through more modest reforms. It is for this reason that our deliberations have led us to make recommendations affecting decisions that are rightly in the realm of Canada’s overall policy-making and coordination.

We are aware that the vision articulated here is a comprehensive one, and cannot be fully realized through easy procedural reforms. Some of the changes we suggest require a much larger re-thinking of the entire system and its component parts. We have purposely designed our recommendations based on this comprehensive vision, and it is our hope that the government, in taking action in response to our report, fully considers this broad vision, and does not merely enact piecemeal reforms. In many respects the components of our vision are mutually reinforcing and, we believe, far stronger as a network of modernizing changes. We are equally aware that this type of big-picture approach may be more challenging to put into practice than a set of administrative changes, but we believe that the benefits of doing so will be more than worth the required effort, and we firmly believe that our recommendations are realistic and can be implemented.

Is the NEB “just” a Regulator?

It was famously said of the Holy Roman Empire that it was neither Holy, nor Roman, nor an Empire, and the same might be said of the National Energy Board. It is not truly national in scope (its mandate is limited to a small slice of energy infrastructure and energy trade), it deals only with the transmission of energy (it has no role in energy generation, and no mandate whatsoever for enabling alternative energy sources), and it does not operate as a traditional Board of Directors (its Board is more akin to a group of commissioners or judges). In this, then, we can already see the seeds of dissonance between what the NEB is organized to do and what might reasonably be expected of it by a broad range of players.

So what does the NEB do? Simply put, the main responsibilities of the NEB are provided in the NEB Act and include the regulation of the construction and operation of interprovincial and international oil and natural gas pipelines, international power lines and designated interprovincial power lines. For the pipelines under its jurisdiction, the NEB also regulates tolls and tariffs. In addition, the NEB regulates the export of natural gas, oil, natural gas liquids, and electricity, and the import of natural gas.

The NEB also publishes information regarding trends, events, and issues related to Canada’s energy markets. As well, the Board regulates oil and gas exploration and development on specified areas that are not regulated under joint federal/provincial accords.

In its role regarding infrastructure projects the NEB – at the outset of a project – reviews issues across the spectrum of social, environmental, and economic interests, and, where warranted, permits the construction of these projects in a way that ensures safety, security, environmental and human health, and which takes into account Indigenous rights, aboriginal and treaty rights, and title. The NEB also – throughout the life of a project – oversees project operations to ensure compliance with the terms of its licence, and regulatory requirements, and maintains high standards of safety and security right up until the infrastructure is decommissioned, and even afterward, where the asset remains in place.

At the Board’s inception its focus was on cross-border transport of energy, the import and export of resources, and ensuring that there was adequate supply and access to energy for all Canadians. This is a job that the NEB is generally organized to do (though not without major reforms, as detailed below). There was also, as there remains today, consideration of how infrastructure would be paid for, by whom and under what terms, seeking outcomes that would be fair and reasonable. In the mid-1980s environmental assessment became a part of the NEB’s responsibility for every project, and as engineering design advanced so too did the scrutiny of safety details.

Today, however, the expectations of stakeholders ask the NEB to mediate larger conflicts: should we have pipelines at all? And even more broadly, should we even have the energy projects to which the pipes and transmission lines are connected? These are major policy questions that are fundamentally unanswerable by a regulator or licensing body, and even a modernized National Energy Board will continue to struggle with these issues if they are not properly dealt with.

The consequence of this dynamic is that the NEB is left to appear unresponsive, undemocratic, and fundamentally unsatisfying to the needs of the public. We can fully understand how the NEB seems to be failing in its mission, however, we have also seen that the issue is much larger than simply the performance of the NEB in and of itself.

We heard over and over in public consultations in all the regions of Canada that the NEB appears to be operating in a national policy vacuum. On the one hand we have a clear expression of high level government policy and targets to reduce greenhouse gas (GHG) emissions. Following the 2015 Paris Agreement on Climate Change, governments in all the regions of Canada agreed to calls for major reductions in energy emissions and, by implication, a significant restructuring of our energy production, use, and related energy infrastructure, revolving around a radical change in our production and use of fossil fuels. Most of the actions required to realize these goals are in the hands of provinces and territories, who design strategies that meet their unique circumstances, and are supported by broad agreements with the prime minister and premiers. However, at the same time, the same 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.

Added to these considerations is Canada's innovation agenda and desire to mobilize clean technologies. This type of innovation will not just create "green jobs" but may also be the fundamental bridge between energy and environment objectives. The goal for many in this regard is much cleaner energy production to position Canadian energy as one of the cleanest choices in the world market. Even if fossil fuel use is cut in half, there may still be significant opportunities for Canada in both energy trade and in technology and know-how; these are key parts of the Canadian energy strategy for a thriving economy and sustainable world.

Therefore, when the NEB is considering a licensing decision for a pipeline project it is at the same time being asked by participants to reconcile the extraction of energy resources, transported by pipelines with the overall policy framework that may, itself, contain certain contradictions. This is not the role of a regulator, and the NEB cannot possibly succeed when pushed to serve as a forum for debate about national policy. On the one hand, if it denies a project because it deems the underlying activity (energy extraction) to be inconsistent with emissions reduction, it is exceeding its mandate, making government policy, and issuing judgments that run up against provincial jurisdiction for natural resources and energy. On the other hand, if the NEB retreats to being "just" a regulator, and ignores the larger concerns it loses legitimacy and is accused of being tone deaf and buck-passing, and undermining the government's policy goals around climate change. This is an untenable and unfair position for any institution, and most critically this situation cannot be rectified by tweaking the mandate of the NEB itself. It requires a higher level solution.

And we know that delivering a safe, secure, and environmentally sound energy future cannot be achieved by governments alone. We look to industry, Indigenous peoples, academia, civil society, and the public for the leadership and collaboration that will deliver on the kind of future we would all like to see as our collective legacy.

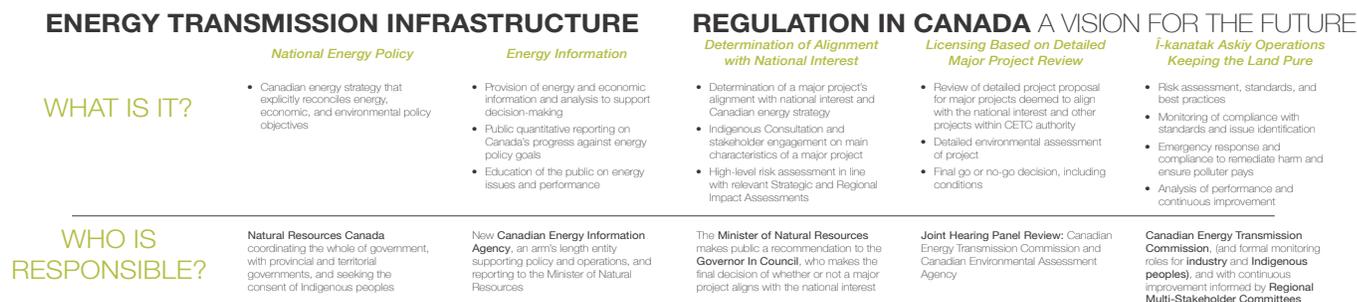
Our Vision: A Coordinated Approach from Energy and Environmental Policy through to Operational Oversight

For these reasons, we envision a future – consistent with the principles that we have articulated above – that calls for:

- Whole-of-government policy direction via a Canadian energy strategy
- A new Canadian Energy Information Agency
- strategic-level review of proposed major projects, with decisions by the Governor in Council (Cabinet)
- Detailed project review and licensing decisions by Joint Hearing Panels made up of Canadian Energy Transmission Commission (formerly the National Energy Board) and Canadian Environmental Assessment Agency appointees, plus an independent member
- Modernized structure, role, and mandate of the Commission which drives high rates of compliance, and continuous improvement of the entire regulated system

The following section describes the major features of our vision, and how the pieces interact with one another. Our recommendations articulate the specific reforms that we believe will enable this vision to become reality. Broadly speaking, our vision is provided in Figure 1 below, which was extracted from the full chart provided on page 30-31.

Figure 1



POLICY & LEADERSHIP

Modern regulators assure safety, security, environmental protection, and broad public engagement, but they must do so within the broader policy context that drives regulatory activity. Our vision of the future of Canada's energy infrastructure regulatory system starts at the very top: policy and strategy defined by Canada in partnership with Indigenous peoples and the provinces and territories.

“Policy” is a concept that can describe a great many things, from very general approaches to issues, to highly specific direction. What we see here is a fully realized Canadian energy strategy – which governments, under the leadership of the Minister of Natural Resources, are continuing to refine – 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.

It is critical to note that the federal government does not act alone in this regard. Provinces and territories are indispensable partners in bringing about our shared energy future. The federal government plays a key leadership role, and can help coordinate policy at a national level. However in bears keeping in mind that in all the regions of Canada there are more than 840,000 kilometres (km) of transmission, gathering and distribution pipelines, and of those, only 73,000km are federally regulated. So the NEB has a strong opportunity to lead, but the provinces are accountable for the safety and environmental performance of most energy infrastructure.

Moreover, we envision policy at this level being fully informed by Consultation with Indigenous peoples; this is the expression of real nation-to-nation relationships. We understand that the Prime Minister has convened a Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples under the leadership of the Minister of Justice, and which will work with Indigenous organizations to chart the course for how nation-to-nation relationships will be realized, and we look forward to the Working Group's conclusions. We see our vision as entirely consistent with the overall goal of making nation-to-nation relationships and decision-making a reality, the specific implementation of which will be defined more clearly in the near future.

INFORMATION

We envision 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 NEB of today has a mandate to produce information about energy, however in our model this role would be larger (considering a broader range of sources of data), and would be performed by a body independent of both the policy making and regulatory oversight functions. In plain language: a new Canadian Energy Information Agency responsible for the production of regular public reports about projected energy demand, energy sources (including renewables), progress in implementing innovative clean energy technologies, climate change, international benchmarking, and performance against Canada's policy objectives.

Why does Canada need an independent source for energy information? We feel that the Canadian Energy Information Agency needs to have the mandate and ability to tell it like it is on energy matters, and inform the development of energy policy and strategy, without being involved in the determination of energy policy, or administering energy infrastructure regulation. This will help to assure that information is seen as neutral and credible.

PRE-PROJECT ENGAGEMENT

We envision a system wherein the regulator, with project proponents, delivers higher quality early engagement in the conceptual design phase of a proposed project. We see the regulator playing a stronger role than it does today in establishing a framework that works for everyone to guide early conversations about possible project proposals, and to improve the quality of project plans. This process occurs today but it can be improved.

The purpose of this early engagement is not to seek the approval of communities or interest groups, but to develop the best possible conceptual design and engagement strategies, and – most importantly – to establish stronger, good faith relationships between the regulator, the Crown, industry, Indigenous peoples, and interested parties. These relationships are necessary so that project creation and review can become less adversarial, and more about working collectively to achieve positive economic, environmental, and social outcomes. Fundamentally the type of engagement we envision here is not about more rules and processes (though they can be helpful), but is about creating and enabling a collaborative decision-making culture that moves toward seeking the consent, to the greatest degree possible, of Indigenous peoples and all stakeholders. We know and expect that some parties will disagree fundamentally about some issues, however we firmly believe that the areas of potential common ground are larger than the islands of discord.

PROJECT REVIEW

We envision a completely new way of reviewing proposed transmission infrastructure projects, in which both the *if* (is a proposed project aligned with the national interest and policy?) and the *how* (does a project proposal minimize risk and maximize benefits?) of a proposed project are addressed openly, fairly and separately. Our vision seeks to create appropriate fora for both classes of decision, while respecting the simple fact that policy-makers are not equipped to make effective operational decisions about safety and risk management, and regulators cannot make valid determinations of the national interest on major projects. This vision articulates distinct phases, conducted and approved separately, of decision-making to determine whether a major project is in the national interest (should it happen at all?) and, if yes, to review the detailed project plan (can the project be done safely, securely, and with adequate protections of the environment?).

We understand that not every regulated activity is a major project that requires review and approval by Cabinet; our vision calls for clearer criteria in determining what is and is not a project which requires a full national interest determination. We wish to be clear, though, that our vision is one where *every* regulated activity is reviewed commensurate with its scale and impact, without exemption. Moreover, we have designed our recommendations to respect the principle of one project: one review.

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

PROJECT REVIEW: DETERMINATION OF ALIGNMENT WITH NATIONAL INTEREST

Before the specific technical details of any project are even developed (a process which requires the expenditure of considerable time and hundreds of millions of dollars on the part of project proponents), much less considered, every major project regulated by the Canadian Energy Transmission Commission should first be reviewed for alignment with the national interest, against a number of strategic criteria. These criteria (expanded upon below) would include: Consultation and accommodation of Indigenous peoples, alignment with national economic, energy, and environmental policy, consistency with relevant provincial emissions limitation strategies, economic benefits, and Strategic Impact Assessments, which would include available Regional, and land planning Impact Assessments. We envision an open, inclusive, and

transparent process that allows all parties to be fairly heard. Moreover we see this phase of a project's approval as an inherently political question which must be answered by the Governor-In-Council. In plain language: before going too far down the road of considering a new project, Cabinet must decide if, at a high level, that project is in the national interest (followed by a detailed project review covering the full range of issues). At this stage “yes” means “yes, subject to further regulatory approval after a detailed project review” and “no” means “NO”.

Our vision of this first phase of major project review would unfold as follows. A single office would lead the comprehensive, whole-of-government review of a proposed energy infrastructure project at a strategic level. Today the government operates a Major Projects Management Office, which is housed within the Department of Natural Resources, and is a template of the type of body we envision, with the power to convene all federal departments and ensure a full and complete federal approach to all aspects of a project review. This phase of decision-making would include formal Consultation with Indigenous peoples (designed and assisted by a complementary, new Indigenous Major Projects Office) and strategic analysis of major national interests.

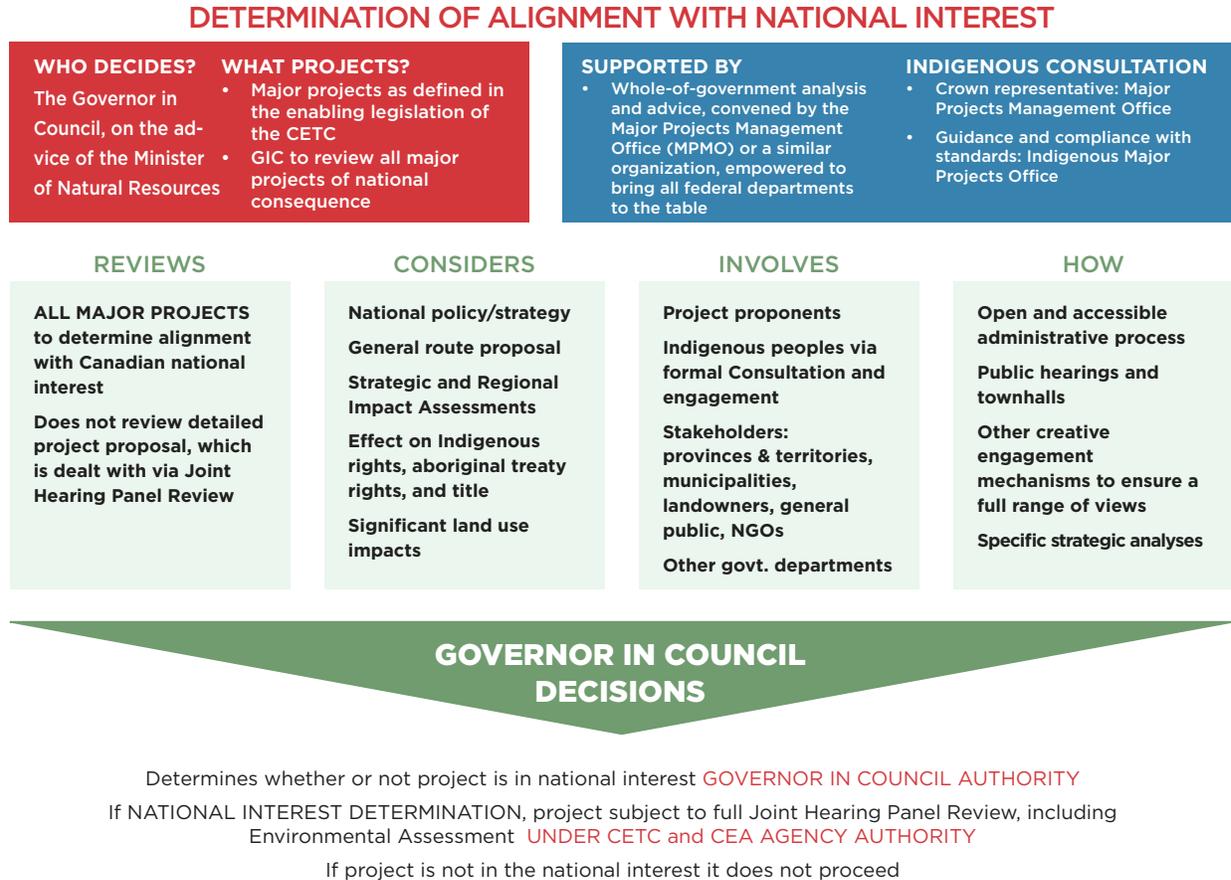
Examples of Factors Considered in Determining Alignment with National Interest

- Net economic benefits to Canada, and reasonable distribution of benefits
- Impact on and accommodation of Indigenous rights, aboriginal and treaty rights, and title
- Consistency with existing rules for inter-provincial trade
- Climate test for upstream and downstream activities (including consideration of any relevant emissions targets or caps)
- Cumulative effects
- Are there significant or unique environmental effects beyond the scope of existing mitigation?
- Are there unique engineering challenges so great or uncertain that the project should be rejected?
- Is the proposed route fundamentally acceptable?
- Alignment with national policy
- Any other showstoppers

In short, the process would culminate in a public recommendation by the Minister of Natural Resources to the Governor in Council on whether the project aligns with national policy objectives and interests, Governor in Council The final authority for determination of whether or not to proceed with the regulatory process would then rest with the Governor in Council. If the Governor in Council finds that the project aligns with national interest, it may stipulate conditions and areas of special interest for scoping the regulatory review to follow.

We see this as typically a year long process, from the date of filing to the time that the Governor in Council is provided a recommendation, and a three month target for a decision from the Governor in Council. Figure 2 describes, at a high level, how we see this process:

Figure 2



This phase of a major project review is not intended to be a detailed review of things like the specific engineering details of a project, or a comprehensive project-level environmental assessment; these factors would be assessed in the subsequent Joint Panel Hearing project review.

PROJECT REVIEW: LICENSING BASED ON ASSESSMENT OF TECHNICAL CONSIDERATIONS AND RISK MITIGATION

For major projects that have passed a national interest determination, and for all other significant projects that do not require a Governor in Council decision, but still merit a full Joint Panel Review, we envision a second, more detailed regulatory approval process, under the authority of a new Canadian Energy Transmission Commission (CETC) and the Canadian Environmental Assessment Agency. This phase would evaluate, at a much more detailed level, the potential risks of a project to Indigenous peoples (based on robust consultation), the environment, and human health and safety. Critically, this licensing phase would not re-argue whether or not a project is in the national interest. Rather, this 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. In making this distinction we aim to empower the CETC as a regulator to focus its efforts on ensuring that all projects are held to the highest standards of planning and operation, without diluting the regulatory process with political considerations that it cannot adequately address.

We envision this process 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 nominated by the Canadian Environmental Assessment Agency (CEA Agency), and a fifth independent panel member. This single Joint Hearing Panel would review the entirety of a project, supported by staff from both agencies (and other government departments, as necessary), and would be responsible for environmental assessment – under CEA Agency authority – and licensing decisions and imposition of conditions under CETC authority.

The Joint Panel would be guided in its work by widespread engagement with interested parties – industry, environmental organizations, Indigenous peoples, academia, landowners, municipalities, provincial and territorial governments, community organizations, and individual citizens – to ensure a full and robust review that incorporates a wide range of information and perspectives.

Examples of Factors Considered by Joint Panels

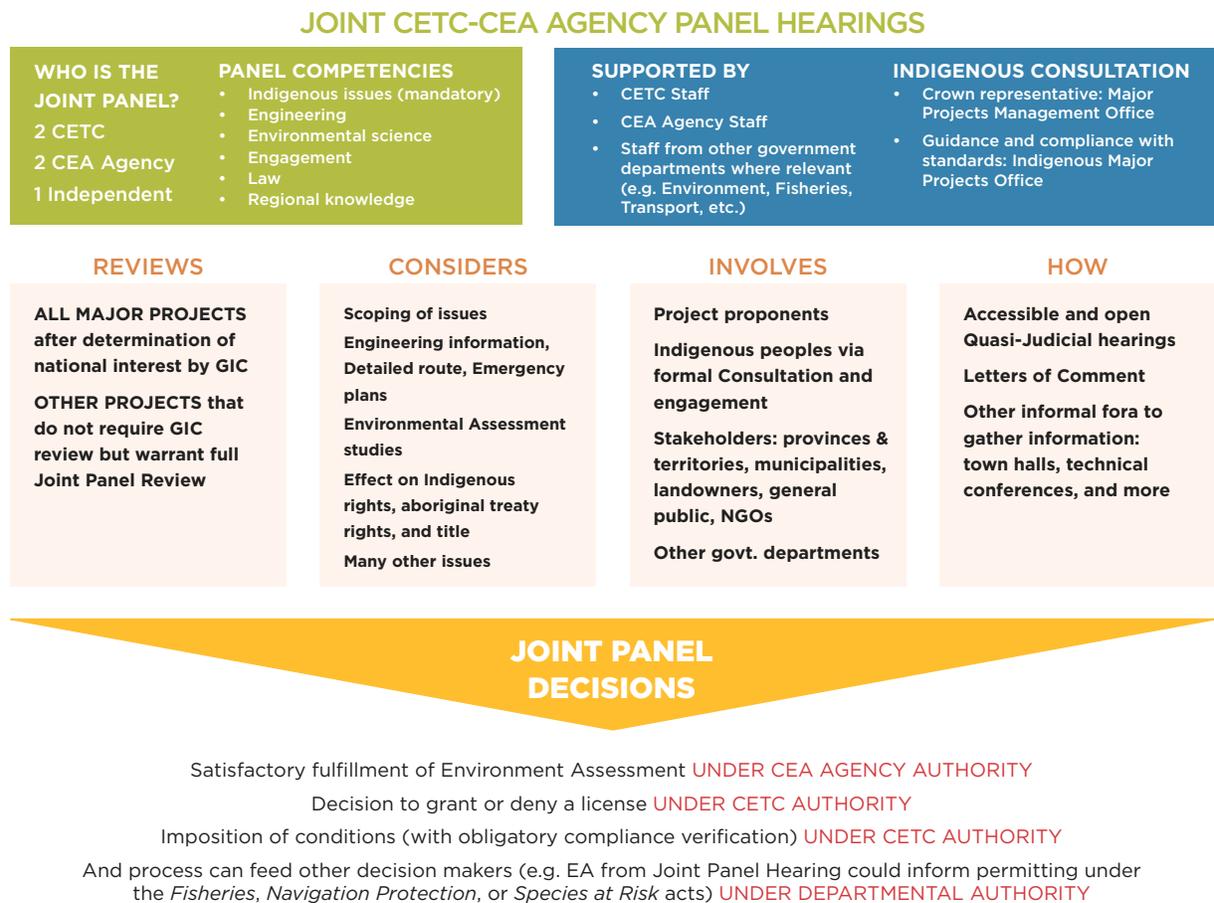
- Determination of the scope of the project and issues to be considered
- Detailed environmental risks and proposed mitigation measures
- Specific engineering details and concerns
- Impact of the infrastructure itself (e.g. land acquisition, GHG emissions, socio-economic)
- Specific proposed route
- Consideration of Indigenous rights, aboriginal and treaty rights, and title
- Emergency preparedness plans
- Monitoring and compliance verification activities

In short, the Joint Panel would consider all of the things required to ensure that the proposed regulated activity can and will be conducted safely, and securely. Moreover, all of the above would include the substantive involvement of Indigenous peoples and consideration of their rights and interests.

The Joint Panel would have authority to grant or deny licences reviewed via this process, and would issue a clear, public decision letter explaining its judgment so that all parties can clearly understand how a decision was made, and how evidence was considered. We see this as typically a two year process, from the time of filing until a decision is rendered.

Figure 3 provides a high level overview of our vision for Joint Hearing Panels.

Figure 3



OPERATIONS: Î-kanatak Askiy A Cree term meaning “Keeping the Land Pure”

Our Panel was moved and informed by the testimony of Indigenous peoples – First Nations, Inuit, and Métis – from across the country, who encouraged both us and the government to take a leading role in protecting the environment on behalf of the generations that will follow us. In honour of this message, we have chosen a Cree term Î-kanatak Askiy (respectfully interpreted as “keeping the land pure” in English) – to describe the overall operations of the CETC, outside of project reviews and approvals, which ensure that our land, air, water, and people are protected on an ongoing basis.

Why choose a term from an Indigenous language? We did so as a means of acknowledging a broader Indigenous worldview that has driven much of our thinking. There is, of course, no monolithic Indigenous culture in Canada, but we heard consistently from people from many nations about the importance of seeing the issues of today – especially those involving the environment – from a different point of view. A point of view that looks at the health of the whole, not its component parts. A point of view that sees humanity as part of nature, not its master. And a point of view that holds that we have an obligation to care for our resources, on behalf of future generations. We are encouraged to see this Indigenous worldview entering mainstream discourse; Western thinking about environmental systems aligns very well with this Indigenous way of thinking and seeing.

It is understandable that public discourse, and even our Panel’s own deliberations, may be focused on the big pressing questions of how major projects are reviewed and approved, but in fact Î-kanatak askiy is most importantly exercised in the context of ensuring the safety and integrity of over 73,000 km of existing federally regulated hydrocarbon pipelines (as well as some 1,500 km of electric transmission lines). Moreover, as we reduce our global dependence on fossil fuels we can expect the number of new major pipeline projects to dwindle. But, the CETC will still play a vital role in ensuring Î-kanatak askiy relating to the existing infrastructure network. Overall, the goal shared by the CETC and industry is an ambitious one: zero incidents and zero releases. For as long as we have to move energy between provinces and territories to meet Canadian needs, and to trade with others who need Canadian energy, we see striving to realize this goal at the heart of CETC operations, which consist broadly of:

- Assessing risks
- Enacting standards
- Conducting inspections and – with Indigenous and public involvement – monitoring / auditing and verifying industry management systems
- Taking action to address issues and enforce legislation and conditions
- Communicating results
- Involving all stakeholders in assessing risks and system performance in mitigating risks
- Continuously driving improvements throughout the regulatory system

Figure 4 provides a quick overview of how we see this aspect of the Canadian Energy Transmission Commission’s operations and process of continuous improvement:

Figure 4



REGIONAL MULTI-STAKEHOLDER COMMITTEES

HOSTED BY: CETC and including industry, regional governments, Indigenous peoples, academia, landowner and community groups, environmental organizations

MANDATE: Inform all stakeholders of CETC plans and activities, identify concerns, recommend and review studies on specific issues, provide advice to the CETC on risks and priorities

SCOPE: Any issue within the purview of the CETC, excluding ongoing project reviews; includes emergency plans, socio-economic effects on communities, safety standards, and much more

Standards and Best Practices

We see the CETC defining (and ensuring compliance with) the absolute standards for safe and secure operation of energy transmission infrastructure, as well as engaging with industry to identify and promote best practices to help industry continually drive better performance. We heard concerns about a “self-regulating” industry, and we wish to be explicitly clear on this point: the independent regulator – not industry – assesses risks and defines the compliance standards for transmission infrastructure, and monitors and enforces compliance. At the same time, every minute of every day, pipeline operators are responsible for running their systems. Regulatory standards work in tandem with company practices and internal safety procedures to deliver on the protection of people and the environment. Progressive regulators work to ensure that risks are identified proactively by companies and shared across the whole industry to minimize those risks everywhere.

Proactive: Monitoring and Preparedness

We envision the monitoring network of the future as having four important components:

- CETC inspectors,
- Industry monitoring and mandatory reporting,
- Formal programs to enable and increase the involvement of Indigenous communities in monitoring activities, and
- Avenues for landowners and other parties to report observed potential risks and incidents.

In addition, we see a role for greater transparency and accessibility of the results of monitoring and compliance activities, including amendments to the CETC’s enabling legislation to ensure that it plays a strong role in compliance verification and action. This information should be searchable in real-time and by location. We also envision greater engagement in emergency preparedness planning on an ongoing basis, to ensure that the public sector and industry first-responders are ready, and that communities understand the risks and have influence over mitigation plans that affect them.

Reactive: Emergency and Compliance Response

We envision a CETC which oversees actions when an emergency or other compliance response is triggered, and which takes strong action in cases of non-compliance to ensure that harm is remediated to the greatest extent possible, and that the polluter pays principle is upheld. We see a greater degree of transparency so that all parties can easily see and understand the real compliance issues (not just potential risks) at play, and assess the adequacy of responses by industry and the regulator.

Continuous Improvement

Finally, we envision a cycle of continuous improvement of every aspect of the CETC and its operations, based on the lived experience of all parties working together to reduce incidents and releases to zero. This means constantly and openly reviewing the performance of the entire system, asking and answering tough questions, and involving all stakeholders to drive innovative reforms and take action to address issues. This constant and transparent flow of action, learning and improvement is crucial for ensuring the best possible regulatory outcomes, and for enabling future project reviews to benefit from the experience gained by regulating. This cycle of continuous improvement would affect everything the CETC does and oversees, from the design of project reviews all the way down to adjusting a specific emergency response plan in one community.

Our Vision – Summary

The chart on the next page gives a high level overview of our vision, showing the main components, and who is responsible. We have also provided a brief picture of how our vision lives the five principles that we have woven into all of our recommendations.

ENERGY TRANSMISSION INFRASTRUCTURE

National Energy Policy

Energy Information

- Canadian energy strategy that explicitly reconciles energy, economic, and environmental policy objectives

- Provision of energy and economic information and analysis to support decision-making
- Public quantitative reporting on Canada's progress against energy policy goals
- Education of the public on energy issues and performance

WHAT IS IT?

REGULATION IN CANADA A VISION FOR THE FUTURE

i-kanatak Askiy Operations Keeping the Land Pure

Licensing Based on Detailed Major Project Review

Determination of Alignment with National Interest

- Risk assessment, standards, and best practices
- Monitoring of compliance with standards and issue identification
- Emergency response and compliance to remediate harm and ensure polluter pays
- Analysis of performance and continuous improvement

- Review of detailed project proposal for major projects deemed to align with the national interest and other projects within CETC authority
- Detailed environmental assessment of project
- Final go or no-go decision, including conditions

- Determination of a major project's alignment with national interest and Canadian energy strategy
- Indigenous Consultation and stakeholder engagement on main characteristics of a major project
- High-level risk assessment in line with relevant Strategic and Regional Impact Assessments

WHO IS RESPONSIBLE?

Natural Resources Canada coordinating the whole of government, with provincial and territorial governments, and seeking the consent of Indigenous peoples

New Canadian Energy Information Agency, an arm's length entity supporting policy and operations, and reporting to the Minister of Natural Resources

The **Minister of Natural Resources** makes public a recommendation to the **Governor in Council**, who makes the final decision of whether or not a major project aligns with the national interest

Joint Hearing Panel Review: Canadian Energy Transmission Commission and Canadian Environmental Assessment Agency

Canadian Energy Transmission Commission (and formal monitoring roles for **Industry and Indigenous peoples**), and with continuous improvement informed by **Regional Multi-Stakeholder Committees**

LIVING THE NATION TO NATION RELATIONSHIP

- Seeking the consent of Indigenous peoples as per the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples

- Inclusion of Indigenous knowledge in the universe of energy data

- Pre-project engagement
- Formal consultation
- Indigenous Major Projects Office (IMPO) to support representation of Indigenous perspectives

- Formal Consultation
- IMPO to define guidelines for effective Consultation and share best practices to increase Indigenous capacity for engagement

- Seat for Indigenous communities at multi-stakeholder tables
- Formal role in monitoring and emergency preparedness programs
- Ongoing engagement as defined by Indigenous communities

ALIGNMENT WITH NATIONAL POLICY

- Independent assessment of progress in implementing policy vision

- Determination for all major projects before detailed design is considered

- Licensing possible only for major projects on which the Governor in Council determines alignment with the national interest

- Continuous improvement of operations to realize policy goals, and ensure safety and security

TRANSPARENCY AND RESTORING CONFIDENCE

- Arm's length centre for energy information, independent of policy and regulation

- Public report and recommendation on project approval
- Governor in Council encouraged to explain ultimate decisions

- Published rationales for all decisions
- New, more inclusive competency profile for Hearing Commissioners
- Clear criteria for appointments

- Governance by a Board of Directors that is not involved in regulatory decisions
- Clearer reporting on safety improvement, monitoring results, and compliance actions

PUBLIC ENGAGEMENT THROUGHOUT THE LIFECYCLE

- Public education mandate to inform meaningful engagement

- Engagement of all stakeholders, everyone has an opportunity to comment

- Engagement of all stakeholders, everyone has an opportunity to comment
- Open and accessible quasi-judicial hearings and engagement activities
- Public intervenor

- Multi-stakeholder committees, by region, to enable engagement on all aspects of operations

RESULTS MATTER: EFFICIENT & EFFECTIVE REGULATION

- Information and analysis to drive better-informed decisions

- Determination of national interest before proceeding with licensing does not waste industry and intervenor time on a full review that might have fundamental flaws

- Clearer, more focused project reviews which get at the most important issues to ensure safety, security, and environmental protection

- Clearly enhanced oversight and engagement in all facets of CETC operations to drive constantly improved results

Realizing Our Vision: 6 Key Themes

Realizing the vision articulated above depends on reforms to many parts of the current energy infrastructure regulation system. Therefore, this section of our report will summarize what we heard, our findings, and our recommendations for change, based on the 6 themes. It is these issues and findings that have informed the design of the vision that defines this report, and it is through these recommendations that we suggest the government might realize this vision. Some of the recommendations are relatively straightforward and speak for themselves. Others, however, are larger or more nuanced, and for these we have provided examples or further suggestions to guide the government in interpreting and implementing what we mean. These further elaborations are meant to be illustrative of the ideas at play, not necessarily specific guidelines; we are fully cognizant of the practical challenges of implementing large changes, and do not intend our specific examples to be authoritative.

The themes into which our findings and recommendations are organized are:

- Mandate
- Indigenous Engagement
- Governance & Decision-Making
- Public Participation
- Î-kanatak Askiy “Keeping the Land Pure”
- Respecting Landowners

We have also included in Annex II suggested specific legislative amendments to help realize many of our recommendations. That document is meant to be a starting point for legal drafters to indicate the Panel’s perspectives, and should not be interpreted as an attempt at a comprehensive legislative and regulatory review.

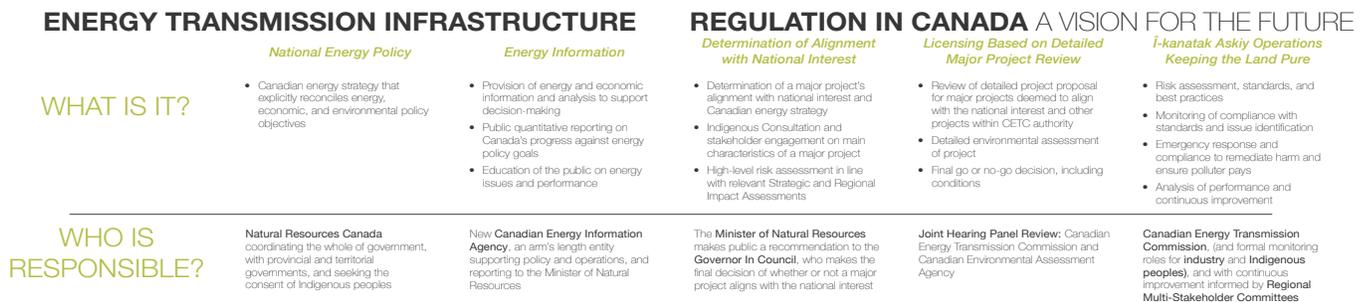
1. Mandate

We looked at the mandate of today’s NEB, and asked Canadians questions like: who should determine the public interest in the context of a major project approval? How should national interest be determined? What is the role of the NEB in producing information about the energy sector to support decision-making? Should the NEB’s mandate be expanded to cover more transmission infrastructure? Should the NEB play a greater role in the adoption of renewable?

What we heard, our findings, and our recommendations can be broken down into the following sections:

- 1.1 Aligning With a Clear Canadian Energy Policy
- 1.2 Leadership to Increase Federal/Provincial/Territorial/Indigenous Coordination
- 1.3 Information to Support Decision-making
- 1.4 Preliminary Determination of National Interest
- 1.5 Detailed Project Review and Approval
- 1.6 Prepare for and Enable a Renewable Future

Figure 1



(Note: Figure 1 was extracted from the full chart provided on page 30-31).

1.1 Aligning With a Clear Canadian Energy Policy

Canadians across the spectrum, from industry representatives to Environmental Non-Governmental Organizations told us that Canada’s energy infrastructure regulator must operate within the context of a clearly defined, comprehensive national energy policy which defines our energy strategy and reconciles economic and social goals with environmental commitments. We heard that today the process for major project approvals is deeply compromised by the fact that stakeholders with legitimate opposing viewpoints find themselves debating national policy questions in the context of regulatory hearings. These hearings do not and cannot provide satisfactory outcomes for groups wishing to have input into higher-level policy, and as a result the integrity of and trust in the regulatory system suffers greatly at the very outset. It is important to note that this is a concern expressed by a range of players including environmental groups and industry. The current system is frustrating for everyone.

Why does this happen? Precisely because there is no other forum for public debate, and there is a lack of clear direction to guide regulatory decision-making. This is not a failing of the NEB, nor can it be described fairly as a failing on the part of government. The fact of the matter is that our conception of the environment, the economy, and society has evolved and recognizes a series of intrinsically interconnected components. This systems thinking is akin to many regulatory excellence practices around the world, and is informed by an Indigenous worldview.. Our collective mindset has evolved, but our institutions may take longer to catch up. The federal government is understandably organized into jurisdictional lanes like “Environment” and “Fisheries” and “Natural Resources” and “Transportation” but everyone involved knows that reality does not conform to these same jurisdictional boundaries. This is a major challenge faced by governments around the world, trying to articulate coherent approaches to policy and programs that involve a multiplicity of disciplines, stakeholders, interests, and legal jurisdictions. Cross-government approaches to issues like climate change are laudable and necessary, and we need to now go further to integrate government direction and action in the service of major societal goals.

We heard in our engagement sessions that national policy is not and should not be the role of the energy infrastructure regulator, as this would create an inherent conflict. More importantly, policy of this nature is so critical to Canada, and even the world, that it cannot be left to a group of appointed commissioners who are not directly accountable to Canadians. Policy is political. This is a fundamental tenet of democratic systems, and we believe that political accountability is important for the type of policy decision-making and direction we are talking about here.

Many participants urged us to recommend the creation of a new national energy agency to oversee energy policy and regulation on behalf of the government. We considered this option seriously but ultimately determined that simply creating a new government organization would not change the overriding dynamic, nor bring about the desired outcome of clearer policy. The Department of Natural Resources is, today, equipped and empowered to address energy policy issues. A modern government must support and drive effective whole-of-government policy making. Implementation of whole-of-government policy for major resource projects is greatly enhanced by the Major Projects Management Office (MPMO), whose *raison d’être* is horizontal coordination of government policy and project review for major natural resources projects. The issue is a question of leadership and direction, not organizational structure or capability. Good policy is informed by sound facts, evidence and analysis, and we should not throw out existing useful mechanisms because they are imperfect. We see a need to improve on the policy world of today and find new ways to consider meaningful decisions in a complex multi-faceted policy environment.

RECOMMENDATION

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.

Expert Panel Note: We see a refined Canadian energy strategy articulating answers to questions like, how do plans for resource exploitation square with efforts to limit emissions? What does the future of renewable energy look like for Canada? How will changes in housing and transportation affect how Canadians use energy in the future? What are major challenges to overcome in order to realize our vision? We understand that some questions of this nature have not yet been answered, and that there is considerable work to be done in order to resolve certain tensions amongst the various stakeholders and objectives. Our view is that a beginning to doing this, even if not perfect at first, will play a major role in helping to reform many of the other challenges within the system that result from directional uncertainty. We acknowledge that progress has been made to date, and we see great potential in the work initiated under the Canadian Energy Strategy released by the Council of the Federation in 2015.’ We see this question as a critical piece of the puzzle, but at the same time believe that reform of energy infrastructure regulation can proceed even if the issue of policy direction is not entirely resolved immediately.

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

In our discussions with Canadians we heard a desire for strong federal leadership and action on energy policy, generation, transmission, and use. Many of the people we talked to have bold and exciting visions of a future Canada as a world leader in energy innovation and renewable technologies. We share this optimism and hope for the future, and agree that Canada’s energy potential writ large has only begun to be fully realised.

At the same time we are fully cognizant of the specific jurisdictional limits of the federal government with respect to energy and energy infrastructure, and natural resources more generally. The Constitution is not negotiable, and it defines roles for the federal, provincial and territorial, and Indigenous governments. These parties are not “stakeholders” to be merely considered or dragged along by the federal government. They have defined rights and authorities, and all action to realize a Canadian energy strategy occurs within this framework.

Additionally, the current *National Energy Board Act* limits today’s National Energy Board (and a future Canadian Energy Transmission Commission) to the regulation of a very narrow slice of Canada’s overall energy system: transboundary pipelines and electric transmission lines and energy exports and imports. As such the NEB or a future CETC is in no way positioned to independently reshape the large and complex system that is the Canadian energy system.

We therefore wish to acknowledge the fact that the federal government has a strong leadership role to play – particularly as a convener, influencer, and negotiator – but within the constitutionally defined framework around energy. Further to this point, it is critical to note that governments are, in many cases, not the prime mover for energy research, investment, and generation. Industry and other stakeholders play a major role today, and will play a decisive role tomorrow in realizing a new energy future for Canada. Similarly, consumer choices about housing, transportation, and what to buy greatly impacts energy demand. Collaboration and cooperation, guided by federal leadership, will bring future energy systems into being.

RECOMMENDATION

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.

Expert Panel Note: many people told us that the NEB should make solar farms in southern Alberta, or tidal power in the Bay of Fundy, happen. We fully understand the sentiment, but must note that these sorts of goals are well beyond the mandate of an infrastructure regulator. However, this type of vision is not naïve or pie-in-the-sky, and deserves to be heard and considered. We do not mean to suggest that the federal government is not providing adequate leadership, merely to reinforce the importance of the federal role, while acknowledging the importance of the other governmental and non-governmental players in the system.

1.3 Information to Support Decision-making

Canadians told us that they expect to see better, and more accessible information about energy to inform policy-makers, industry, and other stakeholders. This includes energy production, use, trends, and challenges. Today the NEB produces Energy Futures Reports and other energy information products, statistics, analysis, and provides tools for members of the public to explore data and draw their own conclusions about the state of energy in Canada. These products are well produced and useful, but Canadians expressed a desire for more data, and more independent analysis.

We heard that researchers and analysts often have to seek multiple sources of energy data, including sources in the United States like the US Energy Information Administration, and that there is no single reliable Canadian centre for most energy data.

A further challenge we heard expressed is the conflict faced by a regulator which produces the information and analysis that underpins many of its regulatory decisions. Our Panel heard real concern that this dynamic raises real questions about the perceived independence and integrity of current NEB energy information and analysis. It must be noted here that this concern is linked to the larger concerns – expressed across the country – about the risk of a lack of independence of the NEB from the industry it regulates. Many of the people and groups we listened to expressed concern that the NEB is staffed with experts from the fossil fuel industry and is therefore operated with an industry perspective in mind.

Several environmental groups told us that NEB energy market analyses – which are highly regarded and inform analysis and decisions by industry, financial institutions, governments, and academia – are predicated on societal failure to address climate change via reductions in fossil fuel use. This in turn creates an analytical framework that does not include a wide enough range of scenarios and inherently shades decisions in favour of expanded fossil fuel usage. Change is required now, and the current model is not sustainable.

RECOMMENDATION

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.

Expert Panel Note: the Canadian Energy Information Agency would serve as a single clearinghouse for all energy data (sourced variously from Statistics Canada, Environment and Climate Change, Natural Resources, Transport, and others – including international agencies), offering researchers a one stop shop for data, and would also be responsible for greater outreach to inform the public on the major issues and state of affairs within the energy system.. Section 26 of the current NEB Act empowers the organization to study and review matters relating to safety and security, and we feel this duty should remain with the CETC.

1.4 Determination of National Interest

On the question of determination of “public interest”, we heard strong views that the current definition is too narrow, too ill-defined, and critically does not properly acknowledge the obligation of the Crown to uphold, respect, and protect special Indigenous rights, aboriginal and treaty rights, and title enshrined in both the Constitution and extensive jurisprudence, and expressed via the UN Declaration on the Rights of Indigenous Peoples.. 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.

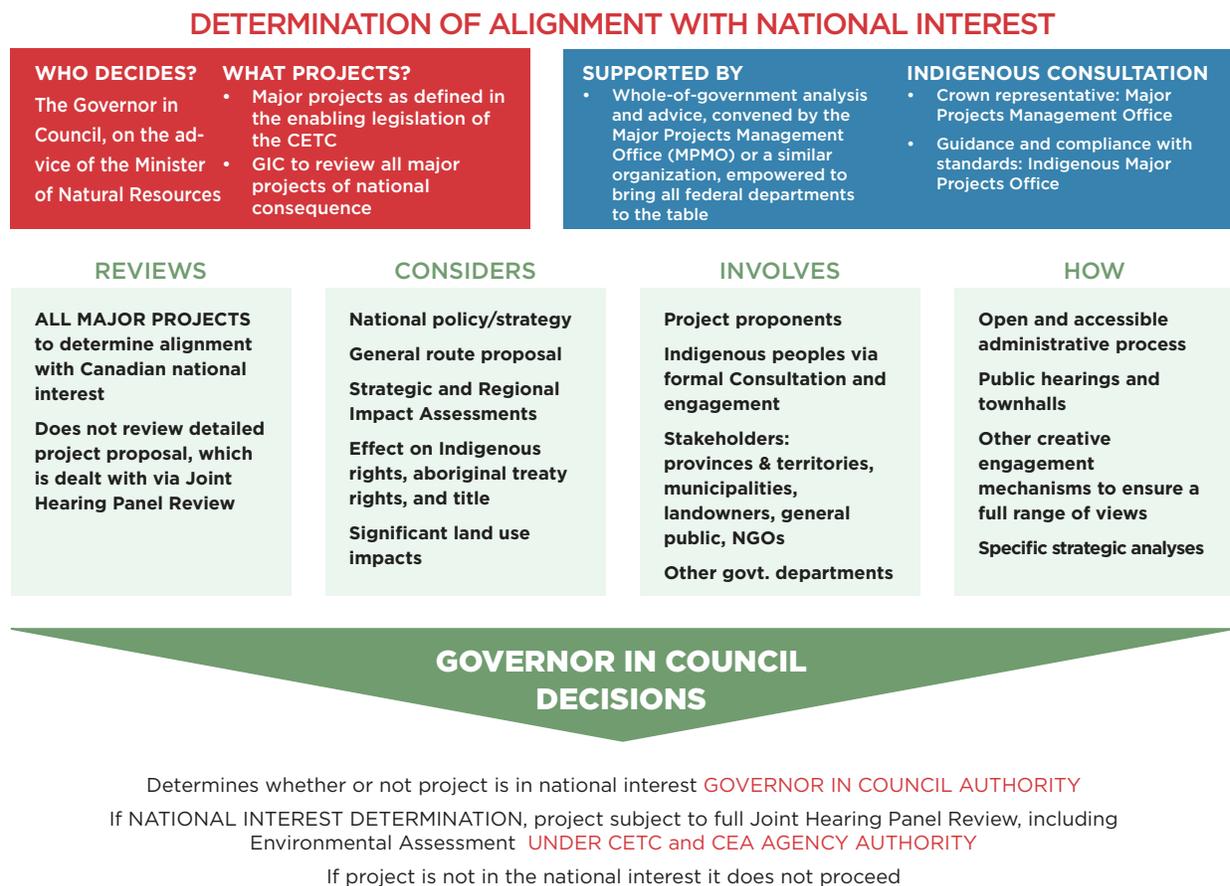
It is for this reason that we conceive of the national interest consisting of both the typical public interest determination (informed by clear policy and assessed through extensive study and engagement with all stakeholders) and a specific determination of the impact of a project on Indigenous peoples based on nation-to-nation formal Consultation. We understand that the Ministerial Working Group being led by the Minister of Justice is working now on providing further direction in this area. Our analysis is based on how we see things today, knowing full well that significant changes may result as an outcome of the Ministerial Working Group.

We heard that, with respect to the public interest, Canadians would like to see a more instructive definition of public interest to guide decision makers. Public interest is a constantly evolving concept that moves with society's mores and priorities, but further clarification would be helpful in guiding decision-making in this regard.

With respect to mandate, we heard that the energy infrastructure regulator cannot make an appropriate decision as to whether a project aligns with national interest. Doing so is an intrinsically political decision-making process, which is exactly what an independent and de-politicized arm's length regulator is not set up to tackle (though it should be noted that some

Canadians believe that an arms' length regulator *should* make these types of decisions). Today the regulatory function is making *de facto* policy through its decisions; a situation not foreseen in the design of the NEB. Equally importantly, determination of national interest including Indigenous peoples requires that the Crown representative have the authority to assess and remedy potential infringement on Indigenous rights, aboriginal and treaty rights, and title. Here again we defer to the evolving legal and political solutions on the nature of Consultation. However, as a Panel we believe that an energy infrastructure regulator should not exercise this authority and therefore cannot act on behalf of the Crown in nation-to-nation Consultation with Indigenous peoples in order to determine the degree of a project's infringement on their rights, and order appropriate measures of accommodation.

Figure 2



RECOMMENDATION

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.

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.

Expert Panel Note: this addresses the mandate component of a determination of national interest for major projects, as described in the corresponding section of Our Vision. For the governance and decision-making components of this phase see the relevant theme, below. With respect to achieving a whole-of-government perspective the current Major Projects Management Office (MPMO) is a good starting point. The MPMO is a readymade forum for convening departments, discharging the Crown's duty to consult, offering project proponents a single window into government, and ensuring a whole of government approach that integrates policy and regulatory considerations, at the highest levels of the public service. This model is not perfect today, but we support its intent, and believe that working within this existing structure would be far more effective than creating a new organization out of whole cloth, to perform largely the same function as the MPMO is now empowered to do.

1.5 Detailed Project Review and Approval

Canadians told us that, questions of policy notwithstanding, there exists a strong need for an independent, evidence-based review of the detailed proposals for major projects. We heard extensive testimony about the many ways in which the current process can be improved, from the nature of how hearings are conducted, to who has standing, to how non-industry participants are funded to play a role in the decision-making process.

Regardless, however, of real or perceived shortcomings on the part of the NEB of today, we heard near universal support for the role of an arm's length regulatory commission charged with making licensing decisions, imposing conditions on project proponents, and overseeing energy infrastructure operations to ensure safety and environmental protection. This, the core role of the current NEB, is just as relevant and vital as it was at the inception of the NEB in 1959, if not more so.

One specific function, which comprises a major part of the detailed project review and decision process, is the Environmental Assessment. This subject might be the one on which our Panel heard the greatest diversity of views. Today, projects of various sizes either undergo formal environmental assessment under the *CEAA, 2012* or assessments under the *NEB Act*. Currently the NEB is responsible for all environmental assessments related to federally regulated pipelines, and the Board evaluates the risks and applies mitigation measures to the project.

To help further understanding, we might think of Environmental Assessments as generically consisting of three significant phases. First is scoping and design, which is led by the regulator, and determines what issues and aspects of a project will be considered. Second is the actual conduct of studies that form the basis of the assessment; this phase is conducted by experts procured by project proponents. The third phase is the review of the studies and determination of mitigation measures, which is again conducted by the regulator. This is, of course, a simplification (see the report of the Expert Panel for the Review of Environmental Assessment Processes for far more detail), but we raise this because it is the perception of some that today

government (the Canadian Environmental Assessment Agency in particular) actually does the many and varied studies that form the basis of an Environmental Assessment.

In our engagement sessions we heard some parties suggest that government itself, not industry, should be responsible for the conduct of the extensive studies that inform Environmental Assessments, rather than just their design and oversight. Other parties disagreed with this view, not least because of the significant costs involved (environmental assessments for major projects can be extremely expensive) and diversity of expertise required, which no government entity would have available in-house.

We heard suggestions that environmental assessment should be independent of the regulator – as environmental assessment are planning tools, not licensing processes – and that the NEB lacks the capacity and expertise required to oversee Environmental Assessments effectively. We were told that the CEA Agency process is more inclusive and open than that of the NEB. We also heard the exact opposite argument, i.e. that CEA Agency lacks deep expertise in energy transmission infrastructure, and that Environmental Assessments conducted without NEB aid and oversight would be lacking in essential knowledge of the subject matter.

We were told that having a single entity responsible throughout the assessment and regulatory process is valuable and prevents regulatory fragmentation. Indeed, we heard that having separate processes for technical and environmental reviews diffuses accountability, breaks apart assessment of related items (e.g. environmental risks at river crossings, slope design, and pipeline engineering), and furthermore, may unintentionally weaken the participation of Indigenous communities and stakeholders suffering from Consultation and engagement fatigue as a result of scarce resources.

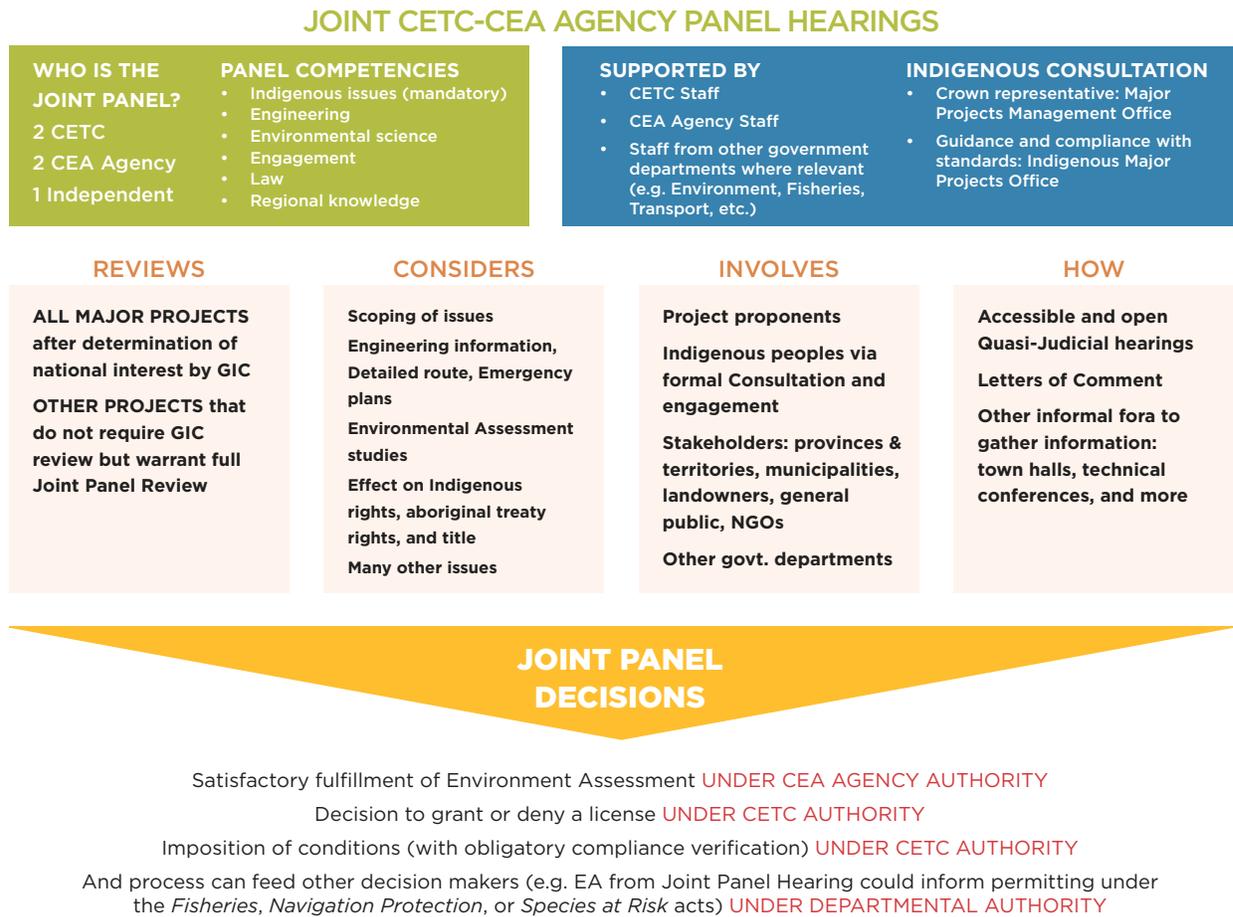
Ultimately we heard many well justified and differing views on where the mandate for Environmental Assessment should reside. Canadians outlined strengths and drawbacks of models with either CEA Agency or CETC responsibility, which we have displayed in the table below, including citations of some of the groups who raised these points. There is no perfect answer but we have recommended a model that we think represents the best features of both models: Joint CEA Agency-CETC Panel Review. We feel that this model – taking into account the full suite of changes recommended in this report – best addresses the many concerns we heard on this issue and will deliver the best outcomes for environmental protection (see Figure 5).

Figure 5: Key Features of Process Models

CEA Agency lead	CETC lead	JOINT CETC/CEA Agency PANEL REVIEW
Strength	Strength	Finding the best outcome
More open and inclusive process	Respects one project, one review principle	Respects one project, one review principle
Expertise and experience in managing EAs	Reviews all aspects of a project together	Allows for strong role for both EA experts and energy infrastructure experts
Public trust	Integration with lifecycle regulation role to ensure compliance	More open and inclusive process, in light of our proposed reforms
More flexible timelines		Allows for broad scope
Broader scope of issues than NEB		Integrates with lifecycle regulation to enable strong compliance monitoring
		Builds greater public trust than energy regulator acting alone
Con	Con	Con
Does not hold to one project, one review	More formal, less inclusive quasi-judicial process	More complex process, involving more organizational coordination
Does not review all aspects of a project (i.e. engineering, social impacts, etc.)	Less experience in managing EAs	
Low integration with lifecycle regulation	Tight timelines can limit depth of review	

In this model the CETC would retain the full mandate for compliance verification and enforcement action, following the licensing phase.

Figure 3



RECOMMENDATION

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.

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.

Expert Panel Note: We believe that our vision is conceptually consistent with that of the Expert Panel for the Review of Environmental Assessment Processes, however we must note some significant procedural differences. In our model the Governor in Council retains authority for national interest determination, and we feel strongly that this function should not be delegated to any arm's length agency. With respect to final project review and approval we see a strong role for Environmental Assessment as a fully integrated component of licensing decisions. The crucial flow of knowledge gained during the assessment process through to the imposition of conditions, follow up and monitoring throughout the lifecycle is too important to risk fragmentation between assessment and regulatory oversight.

1.6 Prepare for and Enable a Renewable Future

The last point with respect to the mandate of the current NEB is about its future. We heard from many people who wish to see an expanded role for – if not the NEB (or the modernized CETC), then government in some capacity – preparation for the next era of energy generation. Participants urged our Panel to consider ways in which the energy transmission infrastructure regulator might lead or promote the adoption of renewable sources of energy. Canadians are cognizant of the major global challenge presented by climate change, and understandably expect to see real action at a systemic level in response.

We heard suggestions to leverage solar power in the Prairie Provinces, to explore tidal power in Atlantic Canada, to invest in research, and to fundamentally restructure Canada's energy generation and transmission system in order to radically reduce greenhouse gas emissions, and position Canada as a leader in renewable technologies for the future.

We agree with the spirit of these suggestions, even if they are outside the scope of our review (particularly because so much of natural resource exploitation and energy generation falls within the Constitutional jurisdiction of the Provinces). We do, however, see one way in which the CETC can help to realize a renewable future: leadership in facilitating interprovincial electricity transmission systems that will enable Canada to take full advantage of new and emerging sources of renewable energy.

The overwhelming majority of our Panel's engagement sessions and the documents submitted to us focused on pipelines, and understandably so as pipelines are far and away the current focus of the NEB. However, we expect that new pipeline projects will be fewer and fewer in the future, while the generation, transmission, and storage of electricity from a wider variety of sources will necessitate a modern transmission network that enables and captures the full value of renewables. While many of the overall issues affecting pipeline operations apply equally to transmission lines, electric transmission system design and integration requires specific expertise, and we can see this as a growth area within the existing mandate of the CETC. While not a mandate change, per se, this is an area of likely greater emphasis in the coming decades, and one for which Canada should be prepared.

RECOMMENDATION

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.

Expert Panel Note: pipelines are a major point of emphasis today, and will retain continued relevance for some time. At the same time, though, issues around electricity transmission and integration of various systems will become more and more important in the years and decades to come, and Canada cannot be caught flatfooted. There exists a great opportunity for Canada to benefit economically and socially from the energy sector of tomorrow. The CETC may also be called upon to adjudicate trans-boundary issues related to grid access, rights to interconnect, rules of trade, and other issues.

2. Relationships With Indigenous Peoples

Our Panel examined the full range of relationships with Indigenous peoples in the context of energy policy, energy infrastructure project review and approval, oversight of operations, and more. We asked questions such as: What are expectations for early engagement on projects? How should the Crown consult with Indigenous peoples? How should ongoing engagement work? How can Indigenous knowledge be better integrated into decision-making? What needs to happen to live up to the legal obligations enshrined in the Constitution, jurisprudence, the Calls to Action of the Truth and Reconciliation Commission, and the principles of the United Nations Declaration on the Rights of Indigenous Peoples?

Our findings and recommendations are grouped into the following categories:

Context for Consideration of Indigenous Issues

2.1 Nation-to-Nation Relationships Start at the Top

Graphic – How We See Nation to Nation Policy Cascading Down to Regulatory Decisions

Expert Panel Note: Our Understanding of Some Key Terms

2.2 Enhanced Consultation and Capacity Building on Project Decision-Making

2.3 Allocating Formal Authority for Crown Consultation

2.4 Enabling Higher Quality Engagement

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

Context for Consideration of Indigenous Issues

Before reviewing detailed findings and recommendations with respect to relationships with Indigenous peoples, we would like to establish some of the broader context of this topic. Discussions about the NEB's legislation or governance structure are comparatively straightforward and self-contained, and changes to how a process operates can be enacted relatively simply (this isn't to suggest that doing so is easy or uncomplicated). In contrast, we have encountered first-hand, in our engagement sessions and through our deliberations a fact that will

surprise no one: Indigenous issues in Canada are nested within a broad and far-reaching historical, cultural, and legal framework including the Constitution, jurisprudence, treaties (where applicable) and the UN Declaration on the Rights of Indigenous Peoples. These factors can make any discussion challenging, as there are so many layers and critical considerations at play. Indigenous peoples have rights enshrined in the Constitution. The exercise of those rights is shaped by an evolving body of jurisprudence with dozens of major cases, and this area requires deep study and expertise to master.

What is at issue here is not just system of rules, but a network of relationships, and in this regard the federal government is not the only player. Civil society groups, industry, and others have a valuable role to play in improving this system, not through laws and regulations, but through good faith relationships Indigenous peoples. Legal standards are important, but positive relationships are where we will see the vision of reconciliation fully realized.

Indigenous cultures and languages vary widely in all the regions of Canada, but share certain overriding values and ways of approaching humanity's place in creation. Understanding these ideas is critical for understanding why Indigenous peoples' knowledge and worldview demands a place at decision-making tables. We represent our own views and perspectives, and don't mean to misrepresent the views of the many and varied Indigenous peoples we heard from. We have broadened our understanding of the Indigenous worldview, and have tried to honour and implement those teachings to the best of our ability.

The history of Canada's relationships with Indigenous peoples is a long, complex, and often tragic subject, which further helps us to understand the situation of today, and that understanding can help us to work together for a better future. The Report of the Truth and Reconciliation Commission and its Calls to Action are instructive in understanding one aspect of this history.

Individual Indigenous nations have their own practices, ceremonies, laws, territories, and unique relationships with Canada and each other, and many of these elements differ fundamentally from Western conceptions of same. As a small example we heard about Indigenous nations with overlapping historical territorial claims, which to Western eyes might look like a dispute that must be legally resolved. From an Indigenous perspective the same situation might be indicative of lands rich enough to be shared and co-managed.

Governments are changing their own structures and processes today to include Indigenous peoples in decision-making that affects them. The Government of Canada has stated its unreserved endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, which helps shape the rights defined in the Constitution, and is a powerful expression of a new type of relationship between governments and Indigenous peoples across the globe.

All of this is to say that there is a vast web of constantly-evolving considerations, institutions, political arrangements, and relationships which have a significant bearing on what might seem to the uninitiated to be a simple question like "how should an energy regulator engage Indigenous peoples?". We have tried, as a Panel, to consider these issues in the broad context in which they live, and to make recommendations that acknowledge and align with the big picture of which we have traced but an outline, above. It is not our mandate to provide an authoritative treatise on all of these subjects, but it is our firm expectation that the implementation of any action resulting from our recommendations with respect to relationships with Indigenous peoples will take into account the full spectrum of cultural, spiritual, historical, political, legal, and other factors governing this area.

Finally, we wish to offer an insight from our own deliberations. As we travelled the country we heard from people of all backgrounds on an incredible spectrum of issues relating to Indigenous peoples. We heard stories of how the system has failed, and we heard thoughtful suggestions as to how it can be repaired. In our deliberations, we benefitted immensely from having a diversity of people on our Panel, including Indigenous Panel members who helped us to better understand the information and experiences shared with us on this subject. We feel that our collective comprehension of the issues has therefore been magnified immensely. We thus view our own experience as a testament to the practical value of listening to Indigenous peoples on their terms, and the critical importance of involving Indigenous peoples as decision-makers.

2.1 Nation-to-Nation Relationships Start at the Top

We heard significant feedback on establishing nation-to-nation relationships between Canada and Indigenous peoples, and we also heard (as noted in the Themes 1 and 3) about the gaps in national policy guiding energy infrastructure regulation. We understand nation-to-nation relationships to be based fundamentally on Canada honestly seeking the consent of Indigenous peoples on matters that affect their rights, and working toward co-decision making on all such matters, to the greatest extent possible.

Indigenous rights, aboriginal and treaty rights, and title in Canada are enshrined in the Constitution, and reinforced in a growing body of jurisprudence. A further evolving factor in this area is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which is a Declaration of the United Nations General Assembly, passed in 2007. It contains 46 articles concerning the individual and collective rights of indigenous peoples, as well as state obligations to protect or fulfil those rights. Canada has declared its unqualified support for UNDRIP, and its intent to implement its vision. One of the most important and discussed components of UNDRIP is Article 19, which declares that states shall consult and cooperate in good faith to gain the free, prior, and informed consent of Indigenous peoples in all matters that affect them.

Policy and jurisprudence in the making today will help guide our understanding of how the UN Declaration generally, and Article 19 in particular, will be implemented in Canada. We see all action and reforms taken to move toward seeking the consent of Indigenous peoples as positive, and we believe that all Canadians stand to gain in so doing.

Below are some findings and recommendations that seek to build and shape how these types of relationships will play out within the context of future CETC project reviews and operations. However, we would be remiss if we did not also include in this picture the overall policy direction that was the focus of so much discussion during our engagement sessions. We have concluded elsewhere in this report that the Canadian energy strategy is an important enabling policy for energy infrastructure regulation, and have recommended that the Department of Natural Resources along with the whole of government to formally adopt and work to implement such policy. We further believe that nation-to-nation relationships must start at this high-order policy level, and that Indigenous peoples should be formally Consulted and involved in the creation of such a policy. The goal is to achieve consensus on these issues to the greatest extent possible.

But how should this be accomplished? We understand that this question has a critical bearing on our vision for a renewed relationship with Indigenous peoples in the context of energy infrastructure decisions and oversight, and that the issue of how Canada and Indigenous peoples govern together has ramification beyond just the area energy regulation. We are heartened, however, that the Prime Minister has recently struck a Ministerial Working Group, led by the Minister of Justice, to work with Indigenous peoples and define at a high level how Canada will make good on the principles of the UNDRIP and building true nation-to-nation relationships. We look to this body for guidance on how to achieve co-decision-making on major policy.

RECOMMENDATION

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.

Expert Panel Note: We are aware that the implementation of our recommendations regarding Indigenous Consultation and engagement will be subject to alignment with direction now being determined on realizing nation-to-nation relationships. Nonetheless, we have developed here a framework for how regulatory decision making can be better aligned with the spirit of nation to nation relationships at every phase, and in full partnerships with Indigenous peoples. As this issue evolves, we may see the creation of high-level institutions that monitor and breathe life into nation-to-nation relationships on an ongoing basis; we would wholly support such a practice.

GRAPHIC – How We See Nation to Nation-Defined Policy Cascading Down to Regulatory Decisions

Figure 6 is a high level illustration of how we see Indigenous Consultation and Nation to Nation relationships cascading from high level policy development, through the two stages of major project review.

Figure 6

FRAMEWORK FOR NATION TO NATION RELATIONSHIPS

Defined by Ministerial Committee and Indigenous Organizations
Sets a whole-of-government standard for nation to nation relationships

AS IT APPLIES TO ENERGY INFRASTRUCTURE

STRATEGIC PROJECT REVIEW

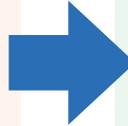
What: Determines whether a major project aligns in principle with national interest

Considers: Indigenous Consultation, Strategic and Regional Impact Assessments, economic analysis, stakeholder engagement, etc.

Crown: Major Projects Management Office

Timeline: typically 1 year

Decision by: Governor In Council



DETAILED PROJECT REVIEW

What: Determines whether a license shall be granted, and what conditions will be imposed

Considers: Indigenous Consultation, Project Environmental Assessments, engineering studies, stakeholder engagement, etc.

Crown: Major Projects Management Office

Timeline: typically 2 years

Decision by: Joint CETC-CEA Agency Hearing Panel

FOR ALL MAJOR NATURAL RESOURCE PROJECTS

INDIGENOUS MAJOR PROJECTS OFFICE

Ensures alignment with high-level guidelines in all phases of project review

Oversees conduct of consultation and accommodation by the Crown

IMPO is Indigenous-run and managed, utilized by communities if and how they see fit

Shares best practices with Indigenous communities

Assesses compliance with Consultation guidelines

Linked to MPMO throughout

MAJOR PROJECTS MANAGEMENT OFFICE

Coordinates natural resources major projects policy and process, from a whole-of-government perspective

Designated Crown Agent for all Consultation on CETC-regulated activity

MPMO is representative of the Crown

EXPERT PANEL NOTE: Our Understanding of Some Key Terms

In discussing Indigenous issues we grappled with several key ideas and terms, and spent considerable time, for the purposes of our own deliberations, defining these ideas and ensuring a shared understanding of them amongst Expert Panel members. Experts in this field will already be well versed in these ideas, however average Canadians (especially non-Indigenous Canadians) who have only some familiarity in this area may benefit from a brief guide to our understanding of these foundational concepts. This is not a dictionary or legal reference guide, but merely an explanation of our own understanding, with the hope of helping the reader better interpret our intent. We have found through our own deliberations that precision about these concepts can clarify certain issues and prevent misunderstanding. The seeds of conflict are often sown unnecessarily when parties to a dialogue don't share a common understanding of ideas at issue.

Consultation

Based on what we heard, and our own discussions, we view Consultation as a formal process whereby the government (and to a lesser extent, project proponents) enter into discussions with Indigenous peoples about any project or undertaking that may affect their rights. The purpose of Consultation is not for the government to be able to say “we listened to expressions of Indigenous interest”. The process is designed to inform Indigenous peoples of issues affecting their rights, to seek consent, and to determine appropriate and necessary accommodation measures (see below). Importantly, the Crown (the government) has a *duty* to Consult Indigenous peoples; it is not an option or a nice-to-have.

There is ongoing legal debate about the finer points of what Consultation is and isn't, and how it must be conducted, but this view is our operating understanding that informs our reasoning.

“Consultation” is a word that is used regularly in a non-Indigenous context to denote a host of activities that generally fall under the category of listening to what people have to say. A municipality might consult citizens about a new library, for example. This is not the meaning of Consultation in an Indigenous context, however. We know it can be confusing at times, and we have therefore capitalized Consultation to underline the specific legal meaning intended.

Accommodation

From the explanations we heard, we understand accommodation as the other side of Consultation coin. That is, where Consultation determines the effect of a planned undertaking on Indigenous rights, aboriginal and treaty rights, and title, accommodation is the process by which governments and project proponents make whole Indigenous communities whose rights have been or may be abridged. Consultation is merely a conversation without the force and expectation to direct actions that accommodate Indigenous peoples.

Accommodation is by design a broad definition that encompasses any number of actions designed to mitigate risk, compensate communities, and share benefits. Appropriate accommodation is highly context specific, and is not merely the product of a simple formula or economic calculation.

Engagement

We view engagement as an informal process of dialogue and communication about all aspects of activity affecting Indigenous peoples. This category is exceedingly broad, and can be expressed in any way that is mutually satisfactory to the parties involved. For example, early engagement on a project might consist of industry meeting with Indigenous communities and describing their broad plans.

Engagement is not a process by which to determine rights or title, or to define accommodation measures. Instead, engagement allows Indigenous peoples to work with government and industry to achieve solutions to issues informally. The sessions of our own Expert Panel were Engagement Sessions, to hear views and exchange ideas, not Consultation. “Engagement” also describes the identical process by which government interacts with non-Indigenous stakeholders (which we might also think of as “consultation”). We have used the term “engagement” in both contexts.

2.2 Enhanced Consultation and Capacity Building on Project Decision-Making

We heard extensive discussion about the role and form of Crown consultation with Indigenous peoples in all aspects of a project review, and particularly on the detailed aspects of a project review such as route selection, and impacts on Indigenous rights, aboriginal and treaty rights, and title.

Based on what we heard, Consultation with Indigenous peoples today is a mixture of informal engagement and formal Consultation, conducted variously by the NEB, by the Major Projects Management Office, or by project proponents, either separately or in combination with one another. Indigenous people told us clearly that they often don’t know if they are being Consulted with, or by whom. The government seems to often delegate many of its responsibilities for Consultation to industry, who cannot and should not determine Indigenous interests or recommend remedies for infringement on Indigenous rights, aboriginal and treaty rights, and title. Moreover, for many communities Consultation and engagement activities appear to be haphazardly designed and implemented, with no clear sense of the process to be followed, the objectives to be achieved, or the legal obligations governing the activity. We should be clear here: many Indigenous people told us that they often feel as though the purpose of Consultation activities today is so that government and industry can say “we consulted” and not to achieve the real purpose of formal Consultation: to assess the impact of an activity on Indigenous rights, aboriginal and treaty rights, and title, and – critically – to determine and enact accommodation measures that adequately address any infringement. In this sense Consultation is much more than just a conversation, or a process by which to gather input which may or may not be considered.

Today’s processes for Consultation must be improved, with clearer guidelines, clearer accountabilities, and a clear understanding that Consultation is the responsibility and duty of the Crown, and should not be delegated to or discharged by industry (though project proponents may be present during Consultation as a resource, if desired by the Indigenous community in question).

Meaningful Consultation depends not just on sound processes and accountabilities. We heard clearly that real and meaningful Consultation requires Indigenous communities enabled by the capacity to engage on energy infrastructure project reviews and operational oversight. One of the legacies of the colonial experience for Indigenous communities is a self-perpetuating lack of resources and capacity to engage with government, which in turn reinforces the false belief that Indigenous peoples are incapable of performing this role. We believe that with the right mechanisms and support in place, capacity can be effectively and efficiently made a reality. The NEB today provides funding to enable the participation of Indigenous communities, and we support this practice unreservedly. At the same time, though, we heard that the current funding programs largely fund legal representation and some third-party science, which does little to enhance the long-term capacity of Indigenous communities, or improve outcomes at a systemic level.

We should note as well that we heard concerns that levels of funding allotted to Indigenous communities are not adequate or befitting the complexity of the issues in question. This is an important question, but a rigorous determination of the adequacy of participant funding is simply too complex and detailed a question to be resolved by a Panel like ours.

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.

RECOMMENDATION

2.2.1 The government fund an Indigenous Major Projects Office, 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.

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.

Expert Panel Note: As noted above, Consultation processes would be consistent with the forthcoming work of the Ministerial Working Group to define parameters for nation-to-nation relationships. In line with our mandate, this recommendation for an Indigenous Major Projects Office applies to energy transmission infrastructure regulation, but of course it may be a model that could be expanded to other areas of government. We further suggest that the government undertake a specific review of participant funding for Indigenous peoples to assess its adequacy and any measures that might be undertaken to improve Consultation outcomes.

As we have discussed, Indigenous communities in particular are required to participate more intensively in Consultation and engagement processes than most other Canadians. For example, Indigenous peoples are expected to engage with the proponent on project specific matters such as the Environmental Assessment and socio-economic issues before a project proposal is even filed. Then, they are expected to participate in Strategic and Licensing phases on the same issues and more, some of it in a quasi-judicial environment which requires more stringent analysis and preparation. Then they are expected to engage with governments to advance and argue many of the same issues including ‘potential rights violations’, ‘funding’, and so on. Then they are also expected to engage with their communities to provide updates, seek input into all phases, provide traditional knowledge, and more. Taken together the amount of time, resources and effort required by Indigenous communities is huge, and arguably more than any other Canadians.. This is one of the key reasons for an Indigenous Major Projects Office: to build capacity, and help reduce Consultation fatigue. Each community and rights holder can determine how or whether to leverage the IMPO services, but the potential for much improved outcomes and much reduced consultation fatigue is great.

2.3 Allocating Formal Authority for Crown Consultation

In the context of discussions about formal Consultation with Indigenous peoples at every level our Panel heard a great deal about specific accountability to discharge the duty to Consult and accommodate Indigenous peoples, an issue distinct from administrative questions around how such processes should be operated. The question of authority for Consultation is an important and nuanced one, and we want to treat it here separately to ensure clarity and specificity in our discussion of this issue.

From the input we received, we understand the issue as follows. By law it is the Crown who is responsible for fulfilling the duty to consult with Indigenous peoples about potential impacts on their rights, for enacting adequate measures of accommodation commensurate with that impact, and for assuring the adequacy of the Consultative process itself. Furthermore we understand that pending judgments in the *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* cases now before the Supreme Court will provide further clarity on which entities have a role in or responsibility for determining the adequacy of consultation. Clear as this basic duty might be in the abstract, when operationalized there is significant, important debate about who can, in fact, perform this duty. Obviously neither the Queen nor the Governor General can, practically speaking, undertake Consultation processes, so this role must be executed by delegates of some form. Delegates performing this role must represent the government (i.e. industry members cannot be delegated to perform formal Consultation), but the required level of authority sufficient to effectively “represent” the Crown, and the logistics of when and how such authority must be involved in actual Consultative processes remains a grey area fraught with significant pitfalls.

This issue can become dizzyingly complex, but an underlying fact remains. The framework and procedures for determining who is a formal agent of the Crown for the purposes of Consultation with Indigenous peoples are unclear, and existing rules are implemented inconsistently. All parties agree that *someone* must assume this role. We need to decide who that someone is, and move forward. We believe that the CETC, as the regulator, should not be the agent of the Crown for the purposes of Consultation, and that the Major Projects Management Office is positioned to perform the role. Should MPMO not perform the role, as recommended, that office should at least be accountable to confirm for each project who explicitly holds that responsibility.’

RECOMMENDATION

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.

Expert Panel Note: Without clarity on this fundamental question we believe it will be difficult for government and Indigenous peoples to foster nation-to-nation relationships without being sidetracked by process questions and doubt about the legal legitimacy of consultation process, however well-designed and well-meaning they might be. We would further suggest that any agent of the Crown working with Indigenous peoples have strong consultation skills (and be present on the ground), in addition to subject-matter expertise.

2.4 Enabling Higher Quality Engagement

Much of our discussions with Canadians focused on the formal process of Consultation and accommodation, which we have discussed at length above. While much attention was understandably placed on Consultation, we also heard about the broader issue of engagement with Indigenous communities by both government and industry, to build and maintain relationships and to help all parties understand one another and work together in the service of mutually satisfactory outcomes.

Engagement is not a formal process, bound by the same rules and legal weight as Consultation, but it is still extremely important, and represents a large degree of interaction between Indigenous peoples and government over the course of a project (far beyond just the formal project approval process). Canadians told us that the energy infrastructure regulator should encourage and enable better engagement for Indigenous peoples throughout the lifecycle (everything from project review, to construction, to operation, through to decommissioning) of a project, with a particular focus on early engagement, before projects have advanced to formal review stages. We heard that Indigenous peoples can often be surprised to learn of projects put forward for review and approval, which have undergone extensive design and other work, without any communication or engagement with affected Indigenous peoples, who may well have useful input and advice for project design, and at the least might benefit from advance notice in order to organize their own communities to input into project review and approval processes.

With respect to lifecycle management and ongoing operations, simple good faith engagements between industry, government, and Indigenous peoples can be a far more effective way to resolve issues and achieve better safety and environmental protection outcomes. Broadly speaking, any time that freely given consensus can be reached through dialogue and mutual understanding, without requiring formal remedies, is a success. It is important to recognize, though, that the legal Consultation obligation of the Crown must always be fulfilled.

The important distinction to be made here is that the purpose of engagement is to inform and work together, but not to seek formal consent for actions within the context of the nation-to-nation relationship.

RECOMMENDATION

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.

Expert Panel Note: Our vision here is one of productive relationships between actual people engaging in meaningful dialogue. We recognize that any sort of statutory change or official guideline can only do so much to achieve this type of outcome, and that in many respects this recommendation depends upon that character, willingness, and commitment of all of the parties to create better relationships. The US Federal Energy Regulatory Commission has developed extensive pre-filing engagement best practices which could be looked to as a model.

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

Lastly for this theme, we wish to emphasize a point that we heard expressed in many of the documents, presentations, and discussions to which we were a party over the course of our engagement sessions. That is, that a fundamental concept of nation-to-nation relationships is that those relationships are lived on the terms of the nations in question. We heard that for far too long Indigenous people have been invited to the table, supposedly as equals, where their rights, treaty rights and title are concerned, but on the condition that they follow the processes, customs, and practices of Canada. This is not the dynamic of equal partners, but one in which Ottawa sets the conditions for debate and decision, and Indigenous peoples are invited to participate.

We heard clearly that Indigenous nations have their own ways of making decisions, of understanding the environment, of storytelling as a key form of communication, and that the legal traditions of many nations include important ceremonial practices and other activities that are intrinsic to decision-making. A water ceremony, for example, is not something one does before the “real” work begins, it is part of how communities have governed themselves since time immemorial. Indigenous people encouraged us, and the government to relate to Indigenous peoples on their own terms, in their own ways, and in their own places. A longhouse set alongside a river is not the same as an urban boardroom encased in glass and concrete, and in some instances the longhouse might well be a better place for Indigenous and non-Indigenous people alike to talk and to think critically about protecting the environment and achieving consensus.

Indigenous people form a rich tapestry from coast to coast to coast, representing a wide variety of background, languages, and cultures. What may be an ideal process for a Mi'kmaq community in New Brunswick might be completely unacceptable to a Cree community in Northern Ontario, and we should not be surprised at this. Guidelines and standards are excellent tools, but at the same time we should not allow guidelines to become a rigid, cookie cutter approach that is meant to fit every community, everywhere. When nations come together, they define the conditions of their own collaboration, and so it should be between each Indigenous nation and Canada within a broadly agreed to framework.

RECOMMENDATION

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.

Expert Panel Note: We are aware of the logistical difficulties of including a variety of Indigenous languages, or hosting proceedings outside of major population centres (our own Panel's engagement sessions were predominantly held in large cities). These considerations notwithstanding, we feel there is a better middle ground to be reached, and that government and industry will benefit immensely from increased engagement, just as much as might Indigenous peoples. The benefits of engagement flow in both directions.

Other Considerations Related to Indigenous Peoples

This section has focused on some major findings and recommendations vis-à-vis Canada's relationships with Indigenous peoples. However, we have been purposeful in our design of not including every finding and recommendation affecting Indigenous peoples in this single section. Why? Because these relationships, and living the goals of reconciliation, underpin virtually every aspect of the energy transmission infrastructure regulatory system. Therefore, we have captured throughout the report recommendations to improve the representation of the CETC Board and Hearing Commissioners, to place Indigenous knowledge on an equal footing with Western science, to conduct formal consultation at the strategic and licensing phases of project renewal, building better fora for ongoing engagement, and formal collaboration with Indigenous communities to improve monitoring.

We would also reiterate that we understand all of our recommendations respecting Indigenous peoples to live within the evolving context defined by governments, Indigenous organizations, and ongoing jurisprudence.

3. Governance & Decision-Making

Our Panel reviewed the decision-making authorities within the current approval system, as well as how the NEB is governed. We asked participants in engagement sessions question such as: who should make final decisions on which types of projects? What timelines are reasonable for project review and approval? Where should the NEB headquarters be located? What are the right requirements for Board members? How should the NEB be governed? Our findings and recommendations based on these topics of inquiry are organized into the following sub-categories:

- 3.1 Governor in Council Role In Strategic-Level Major Project Approvals
- 3.2 Authority for Granting of Licences and Imposition of Conditions
- 3.3 Governance of the Commission, Governance of the Board
- 3.4 Essential Competencies of Hearing Commissioners and Directors

In discussing decision-making roles in particular, it is important to note that all of our analysis and recommendations here include full expression of nation-to-nation decision-making relationships between Canada and Indigenous peoples, as noted in Theme 2.1

3.1 Governor in Council Role In Strategic-Level Major Project Decisions

As echoed in the Theme 1: Mandate, we heard from Canadians who told us that the overall determination of whether a proposed major project is in the national interest should not be undertaken by today's National Energy Board. In this regard we heard mixed suggestions about how such decision-making should be conducted. A majority of respondents told us that the Governor in Council (i.e. Cabinet, in lay terms) should make the final determination of whether a project aligns with the national interest. We also heard that the Governor in Council is the desired decision maker because it is elected and directly accountable to Canadians. Some even extended this notion to suggest that major project approvals be voted on in Parliament.

On the other hand, some parties suggested that major project reviews should be de-politicized, not decided upon by the Governor in Council, but left to a tribunal of independent experts. Many who espoused this view suggested that the current NEB, with its perceived closeness to, if not bias in favour of the industry it regulates, cannot perform this role. Others suggested that the NEB is well positioned to take these decisions, and does so efficiently.

An independent body, using only evidence-based criteria is an alluring prospect, but through our deliberations we concluded that this notion would inevitably lead to questions of that body's independence and competence whenever it made a decision with which any stakeholder had a significant disagreement, because there are no pre-determined criteria or set of rules that can satisfactorily adjudicate the types of tough decisions involved in major project approvals. We arrived at the inescapable conclusion that the Governor in Council must make the ultimate determination of whether or not a project is in the national interest after Indigenous Consultation and public engagement. Indigenous participants also told us that a Governor in Council decision-making role is important for them as a safety valve to provide an opportunity for political intervention if their rights are unduly infringed upon. Such Governor in Council

decisions would be the first phase of a two phased approach to the review of all major projects, followed by a Joint Panel Hearing on licensing and environmental assessment.

It is important to note, however, that we heard major concerns about the current role played by the Governor in Council (including approval of all projects over 40km in length) not because of any intrinsic legitimacy issue, but because Cabinet decisions are opaque, shrouded as they are in the tradition of Cabinet Confidence. This leaves those who have commented on project proposals in the dark as to what weight was accorded their input, or whether it was even considered at all. This situation is aggravated today by the fact that the Governor in Council approves all aspects of a major project, from its strategic relevance, all the way down to the technical details of a project.

We also heard that the current timelines of 15 months for regulatory review and 3 months for Governor in Council review are unrealistic for large, complex projects. Too much is expected within too ambitious a timeframe, forcing either rushed decisions and limited public engagement, or timeline extensions that reduce predictability for project proponents.

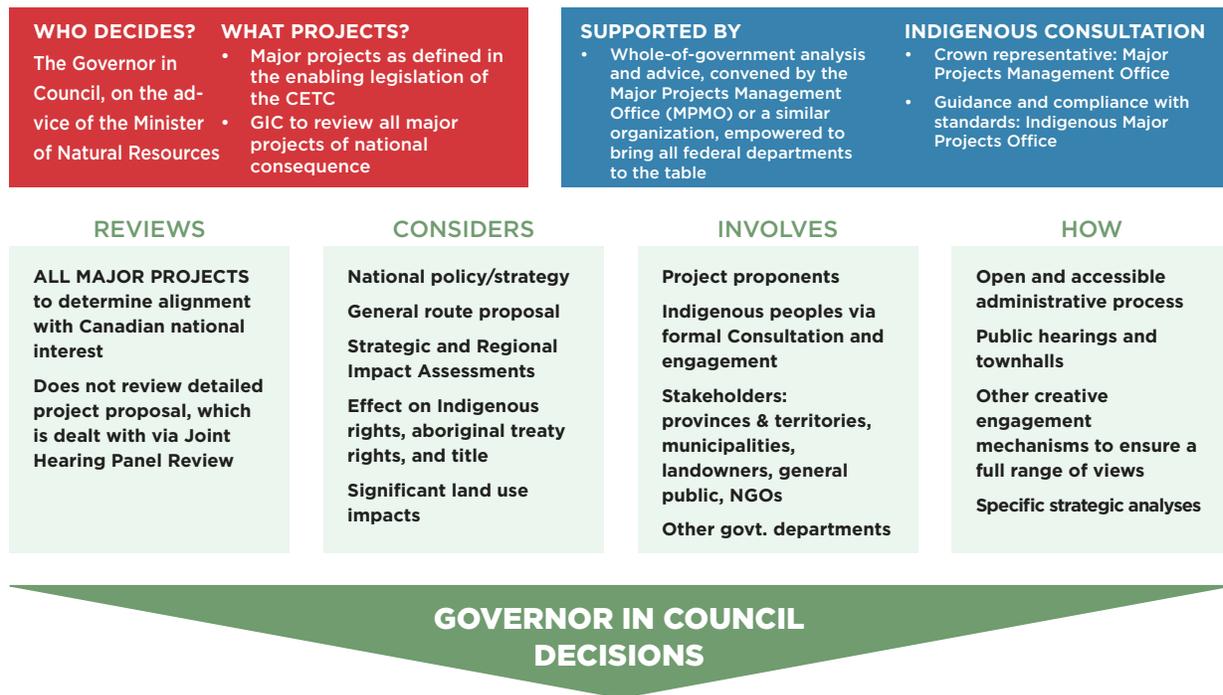
RECOMMENDATION

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.

Expert Panel Note: We envision the Minister of Natural resources providing a public recommendation to the Governor in Council, based on advice from government officials including the Major Projects Management Office, and informed by Consultation with Indigenous peoples and engagement with all stakeholders. A public recommendation would ensure transparency and allow all parties to see how their views and interests have been considered. Furthermore, we acknowledge that Cabinet Confidence is an established feature of our decision-making process. Nonetheless, we encourage the government to provide a rationale, to the extent possible, for its decisions, particularly in instances where Cabinet goes in a different direction than the recommendation provided to it. We understand the desire for greater transparency of decision-making, and believe that these reforms, coupled with the fact that any final regulatory decision would be supported with a full rationale, address the concerns of opacity in the current decision-making process. We expect the determination of national interest be an administrative process, whereas licensing review would be a quasi-judicial process while incorporating a range of more flexible approaches.

Figure 2

DETERMINATION OF ALIGNMENT WITH NATIONAL INTEREST



Determines whether or not project is in national interest **GOVERNOR IN COUNCIL AUTHORITY**
 If NATIONAL INTEREST DETERMINATION, project subject to full Joint Hearing Panel Review, including Environmental Assessment **UNDER CETC and CEA AGENCY AUTHORITY**
 If project is not in the national interest it does not proceed

3.2 Authority for Granting of a Licence and Imposition of Conditions

We heard concerns about how the NEB of today, as a quasi-judicial body and master of its own procedures, upholding fundamental principles of natural justice, runs its hearing processes associated with major projects. Participants detailed intimidating, overly formal processes that seemed to them to be stacked in favour of the players with resources to hire experts and lawyers. We heard these concerns, and hope to have addressed them in Theme 4: Public Participation.

We also heard serious concerns about the perceived independence of the Board. We deal with this concern directly further on in this section, however we wish to make clear here that we take questions about the Board’s independence from the industry it regulates very seriously, and we have framed our thinking about its future role in decision-making on the premise that the government can and will enact reforms to ensure and demonstrate that Canada’s energy infrastructure regulator is, and is seen to be, a credible, independent body held to the highest standards of good governance and accountable decision-making.

With these considerations in mind, we feel it appropriate and beneficial that the Canadian Energy Transmission Commission continue the current NEB role as a quasi-judicial body with authority to render licensing decisions on energy infrastructure projects and energy exports and

imports; later in this section we will deal specifically with how to improve performance within a quasi-judicial process.

We envision the successful performance of this decision-making phase to be measured by the degree to which it engenders trust, and the degree to which licensed activities meet rigorous safety, security, and environmental standards, as well as measurement against global performance benchmarks, and not simply whether it rejects a certain number of projects.

As noted in the section describing Our Vision, above, we see in this second phase of major project reviews an extremely rigorous examination of the detailed technical plans, and environmental and social risks and mitigation strategies that make up a project proposal. We see the same degree of Indigenous consultation and stakeholder engagement cascading from the very inception of Canadian energy strategy, through to national interest determination, to detailed project review. The subject matter at hand may differ, but the process is fundamentally the same. We envision Environmental Assessment – under CEA Agency authority - fully integrated into Joint Hearing processes, and not as a separate process to be bolted on to project reviews. This comprehensive project review will determine whether a project can go forward, and under what conditions, so as to minimize risk and deliver safe and secure outcomes for Canadians. We see this phase evaluating proposed routes, incorporating specific measures to accommodate Indigenous peoples, testing the emissions of the project itself (not the upstream and downstream components dealt with in the earlier decision making phase), and much more. We also note that parties would retain leave to appeal decisions under CETC authority to the Federal Court.

Finally, we know that not every regulated project or activity is a major project that requires Governor in Council approval. Today Section 58(1) of the NEB Act gives the NEB broad powers to waive provisions for certain projects, including the very need for a permit itself, so as not to have to send every single regulatory decision to Cabinet for approval. We understand the context, but feel that this power is far too blunt an instrument to address a relatively simple issue. It is reasonable that not every project would be subjected to a full determination of alignment with national interest by the Governor in Council. It is also reasonable that the legislation be amended to define criteria that would allow the CETC to authorize smaller-scale projects, without a preliminary review by Cabinet, but also without allowing the regulator to arbitrarily suspend its own conditions and processes.

Our vision is one where every regulated activity is reviewed and approved in a way commensurate with its scale and risk. This means that the Governor in Council should determine whether major projects are in the National Interest before licensing hearings, the CETC-CEA Agency Joint Panels should review major and other significant projects, and finally that mechanisms be put in place to allow the CETC to review lower risk regulated activities, provided that clear criteria are in place to define these classes of regulated activity.

A tiered system of reviews, as described above, does not in any way mean that lower risk projects should be rubber stamped, or that their environmental impacts should not be considered. Quite the opposite, regulatory review and assessment of environmental impact should always be required for any regulated activity, but via processes that match the scale of the activity in question.

RECOMMENDATION

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.

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.

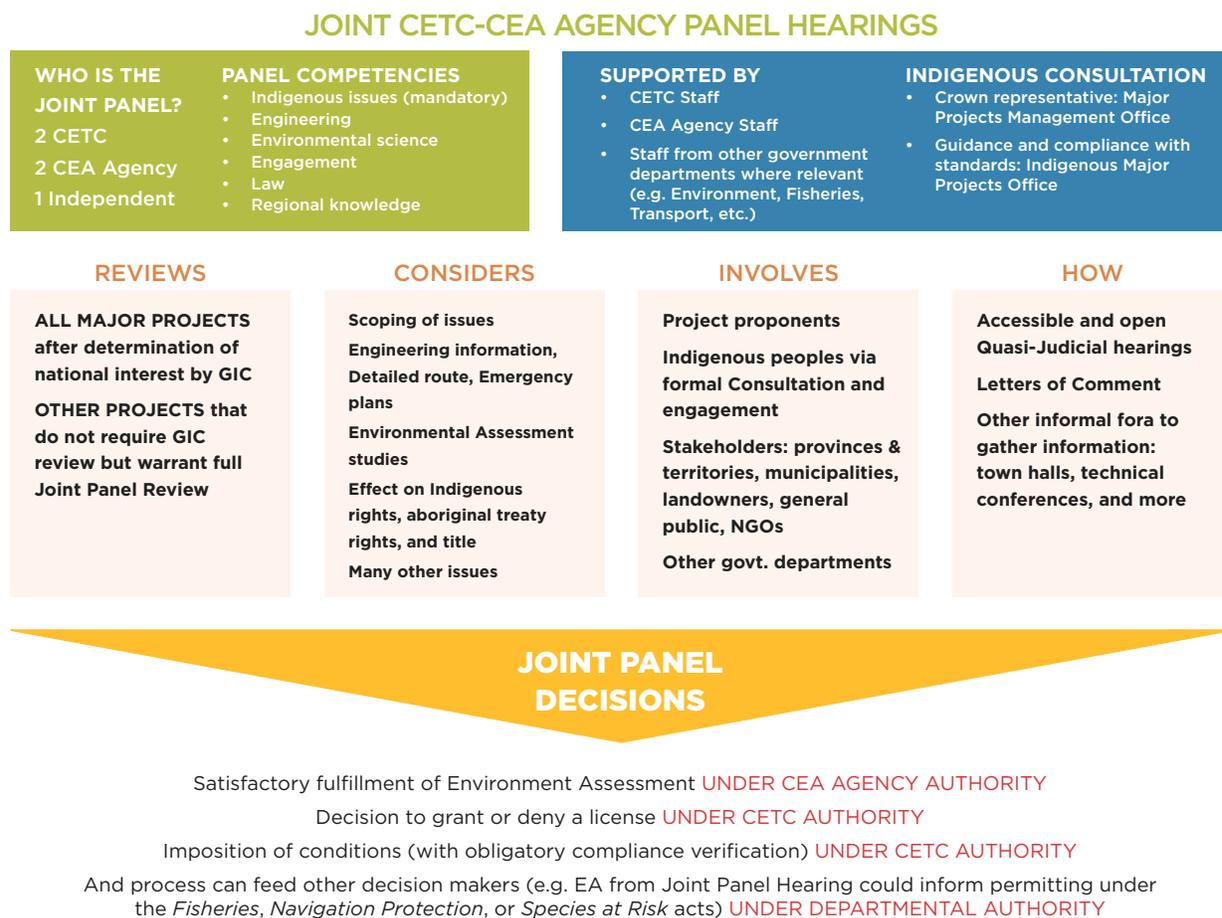
3.2.3 Moreover we recommend that processes and authorities for export/import permits and electric transmission line reviews be harmonized, to the greatest extent possible, with those pertaining to pipelines, to afford all review processes the same level of transparency and integrity. This recommendation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

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.

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.

Expert Panel Note: Our vision of an independent CETC with full authority over final project approval and conditions depends on other key reforms recommended in this report, including enhanced Consultation with Indigenous peoples, better public engagement, and ensuring that policy questions are resolved earlier and separately. This design explicitly avoids the regulator being involved in determinations of national interest, which must be publicly decided in a distinct phase, with distinct accountability. We acknowledge the need for flexibility and efficiency in the expeditious review of small matters; there may be room for a single Hearing Commissioner review of routine activities, or possible delegation to staff, but only if clear criteria are in place and overseen by the CETC Board of Directors.

Figure 3



3.3 Governance of the Commission, Governance of the Board

In reviewing and assessing the governance of the current NEB, respondents expressed fundamental confusion about and dissatisfaction with how the NEB is governed, starting with the very concept and name of the “Board” itself. This is not a trivial consideration, and we have seen how the terms employed sow misunderstanding of how the NEB functions. Most corporations and government entities with a “Board” are governed by a board of directors responsible for setting strategic direction and conducting broad oversight of the organization’s operations. These types of organizations are managed on a day-to-day basis by a Chief Executive Officer or equivalent, responsible for implementing the vision and strategy of the board of directors.

In contrast, the NEB has a Board which performs some of the functions of a traditional board of directors, but without formal accountability for governance except for the Chair, but the Board also represents the pool of Board members who may sit on hearing panels overseeing projects. What’s more, the Chief Executive Officer of the NEB (the organization) is also the Chair of its Board. This creates an unenviable situation whereby the very people who oversee the NEB’s performance are the same people who make its major decisions as members of hearing panels. What’s more, this arrangement generates the contorted linguistic situation of having to distinguish between the National Energy Board, and the National Energy Board’s Board.

We also heard major reservations about specific sections of the NEB Act: Section 6(2.2) and 6(2.3) which allows the CEO of the NEB to form a hearing panel of fewer than the usual three members, and to act as the hearing panel his/herself if deemed necessary in the interest of expediency or other emergency. Canadians told us that they could imagine very few scenarios under which such arbitrary powers would ever truly be required, and that their very existence seems to invite misuse and generate suspicion.

In addition to governance questions, we heard some concerns about the current funding model of the National Energy Board. The NEB recovers costs from the industry it regulates, so that taxpayers do not bear the burden of regulating energy transmission infrastructure. Monies recovered from industry in this manner go into the federal fiscal framework, and are in turn used to fund the operations of the NEB. Some Canadians told us that this funding system looked to them as though industry is directly funding the regulator, and that the regulator is therefore compromised or indebted to industry as the source of its operating funding. We understand the issue, and recognize that the mechanics of how monies move around the federal budget can be difficult to understand at the best of times. We also fully support a model which obliges companies, not Canadians, to pay for the cost of regulating the industry.

RECOMMENDATION

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.

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.

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.

Expert Panel Note: a Board of Directors, independent of the management or regulatory functions of an organization, increases strategic oversight and accountability. Moreover, a Board of Directors is freer to work with stakeholders to shape the future of the organization, as they have no role in rendering licensing decisions.

3.4 Essential Competencies of Hearing Commissioners and Directors

The constitution of the current NEB Board was one of the most discussed issues over the course of our public engagement sessions. We heard that many Canadians simply do not trust the NEB's ability to render impartial decisions, and that perhaps the single greatest reason for this lack of trust is the constitution of the Board. Specifically, there is a strong perception that the Board (particularly its permanent members) vastly over-represents oil and gas industry experience, at

the expense of a wealth of other backgrounds that may have an important bearing on CETC decision-making.

We heard that Canadians expect a wider range of knowledge and experience represented on hearing panels, covering such topics as knowledge of infrastructure operations and energy systems, Indigenous traditional knowledge and worldview, engineering, engagement, environmental science including climate science, rules of procedure, economics, gender issues and equality, law, relevant regional knowledge, inter-governmental considerations, municipal issues, landowner perspectives, and more. Participants stressed to us that they view the impartiality and fairness of the regulator as, in many respect, a direct function of the diversity and representativeness of the people making decisions.

We wish to point out that many Indigenous groups and individuals made a special point of highlighting the importance of Indigenous representation at the decision-making level. An essential part of making real steps toward seeking Indigenous consent is the equal consideration of Indigenous knowledge and ways of knowing, alongside - not as an adjunct to - Western scientific approaches. Indigenous people told us that for too long they have felt as though their understanding and contributions to decision-making processes are viewed as a supplement to “real” knowledge, or as a pro forma exercise in listening without hearing in order to check a box on a consultation form. Some of this can be explained and addressed by process reforms (discussed in Theme 3.4), but there remains a fundamental and important gap of understanding that can be bridged only by involving as decision-makers, people who understand the Indigenous worldview and practices that underlie traditional knowledge, ceremonies, the role of elders, and other important concepts. In this way Indigenous representation on CETC hearing panels is the polar opposite of tokenism; it is essential to bring the extremely valuable knowledge and lessons of Indigenous peoples to the decision-making table.

Our Panel also heard a broad expression of interest in direct representation on hearing committees. That is that various constituencies would send delegates to the CETC table, and not just that Commissioners would be broadly representative of different backgrounds and experiences. We heard that some Canadians expect their governments to be directly represented, some their Indigenous nation, and some their language. Some participants suggested that various political organizations should elect Commissioners directly, or that organizations of all sorts should be allotted slots to fill as they choose.

We considered these suggestions in detail, and respect the ideas at issue. In considering the implications, however, we determined that direct regional, sectoral, national, and other representations are inferior to a trustee model that represents a diverse array of competencies and experiences. A delegate model would require scores of Hearing Commissioners, and no five person panel could hope to directly represent the variety of constituencies involved in a major project. Moreover, there are no accepted political practices for determining in advance which parties and groups should have direct representation, and direct representation of this type on a quasi-judicial basis could even contravene the principle of natural justice that no person shall judge a matter in which they have a direct interest. More importantly, we believe that direct representation of this type would set the stage for adversarial, high conflict processes that would move us further away from useful compromise and consensus building. This is not to say that the

engagement of interested parties is not desirable, and this issue is addressed directly in Theme 4: Public Participation.

With respect to the substantive inclusion of Indigenous knowledge and worldviews, we heard that there are many barriers to be overcome. In addition to ensuring experience with Indigenous issues on both the Board of Directors and amongst Hearing Commissioners, we also see an opportunity for innovation in the creation of an Elders External Advisory Council that would help the CETC to better understand Indigenous issues, to review its own practices through an Indigenous lens, and guide its engagement with Indigenous peoples.

We envision a larger pool of Hearing Commissioners - with a more diverse set of competencies and experiences - appointed to fixed terms and available to perform decision-making roles as required. This would likely mean that Hearing Commissioners not involved in a major project review would serve on some degree of a part-time basis.

We heard intense and near unanimous criticism of the current requirement that Board members reside in the Calgary area. Canadians told us that this stipulation limits the representativeness of the Board (and serves to narrow the pool of likely candidates to further select from those with an industry background) and does not reflect the modern era wherein people regularly employ alternative working arrangements that do not require them to be in any particular physical space in order to do their jobs. Some engagement session participants also expressed concern that the Calgary residency requirement and the very fact of the NEB's location in the heart of the industry reinforces an industry orientation for the regulator, bred by the natural affinities of proximity. Conversely, other participants told us that having the regulator located in the centre of industry is efficient and allows for more effective sharing of information and best practices, as well as the cultivation of strong working relationships in the service of effective regulation.

Many participants pointed to the fact - beyond the requirement that Board members live in Calgary - that the NEB itself is headquartered in Calgary as problematic for them. They told us that this fact set the stage for undue influence, as it places the regulator in a social environment that can erode its independence. We considered this view carefully and discussed the proper location of the future CETC. After much deliberation we concluded that recommending that government move the entire organization to Ottawa (or somewhere else) would be ineffective, for two reasons. One, such a move would be extremely disruptive for the organization, and could even have the perverse effect of focusing its management on the logistics of a large move, and not real reform. Second, and more importantly, we feel that the entire package of reforms proposed in our report satisfactorily addresses this concern in a far more substantive way than an address change ever could.

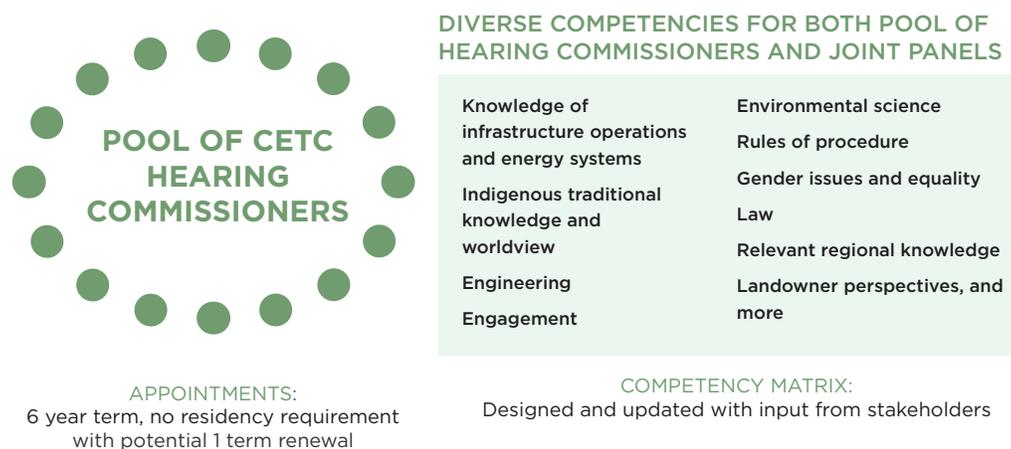
We do agree entirely that Canada's energy transmission infrastructure regulator needs a stronger connection to the seat of the federal government. Therefore, we propose that the office of the Board of Directors be based in Ottawa, along with a CETC office devoted to governmental coordination. We further envision future investments in staff and resources related to electricity transmission being based in Ottawa, so that as this side of the regulatory business grows, as we expect it to, more of the CETC will be based in the capital. Finally, as the role of energy

information provision migrates to the new Canadian Energy Information Agency, it would be prudent to locate that Agency - as well as NEB staff today performing this function - proximate to partners in Statistics Canada, Natural Resources, and Environment and Climate Change Canada, to the extent possible.

Our vision calls for an independent Board of Directors (with an office based in Ottawa) and Hearing Commissioners who may reside anywhere in Canada, each appointed according to a transparent competency model. We call for greatly increased Indigenous involvement, and much more meaningful engagement with all stakeholders on the essential competencies for these governance and decision maker appointments. We feel that these changes will address concerns of the regulator being too close to industry.

Lastly, we heard concerns about conflict of interest on the part of board members (and by extension the Hearing Commissioners of our proposed model) and staff. In particular, Canadians told us that they expect strong cooling-off and post-employment provisions, to ensure that members of regulated industry cannot move to and from the regulator in ways that appear to potentially affect decision making. Moreover, we heard a strong desire for visible consequences and accountability in instances of real or apparent conflict of interest on the part of the regulator.

Figure 7



RECOMMENDATION

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.

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.

Expert Panel Note: We envision a larger pool of Hearing Commissioners than the current, more limited, number of permanent and temporary (a distinction lacking significant difference as far as we can see) Board members, so that the larger cross section of competencies might be represented. Naturally individual Hearing Commissioners will bring multiple competencies to the table. Practically speaking, we envision six year terms with staggered appointments to ensure a smooth succession of Commissioners, roughly one third turnover every two years. Hearing Commissioners not sitting on a Joint Panel or other hearing could engage on regional issues and stay abreast of emerging issues, and exercise other decision-making authorities (such as adjudication of landowner compensation). In the service of this vision we can also foresee five, rather than three, person hearing panels for major projects

4. Public Participation

In soliciting comment on the public participation aspects of today’s energy infrastructure regulatory system, we asked Canadians: who should be able to comment on projects? In what format or forum? What changes should be made to hearing processes to encourage public engagement? What support would be required by those wishing to engage in the regulatory system? What about engagement outside of project approvals, on the entire regulated lifecycle of infrastructure?

Our findings and recommendations under this theme are as follows:

- 4.1 Who Can Comment and How?
- 4.2 Making Quasi-Judicial Hearings Fit People, Not the Other Way Around
- 4.3 Enabling a More Effective Public Voice
- 4.4 Engagement Throughout the Lifecycle to Drive Continuous Improvement
- 4.5 Modern Public Outreach and Accessibility

The sections and recommendations that follow provide specific reforms to public participation processes. In the interest of clarity, we have also provided here a picture of an overall goal: that every interested party be able to have a real say in every major aspect of the CETC’s business (see Figure 8). This includes everything from major project hearings, licensing reviews, ongoing operations, and even the management of the CETC itself. We see this being accomplished via a range of inclusive and accessible venues, including formal hearings, town halls, technical conferences and committees, issue-specific inquiries, Regional Multi-Stakeholder Committees and more.

Figure 8



Expert Panel Note: Including Municipalities

This section deals with the topic of public participation generally, and applies to a broad class of groups and individuals, including environmental organizations, academia, community groups, landowners, and any other interested party. Many of these groups are already in the traditional constituency of the energy regulator, but we heard from a specific group whose concerns and interests may be under-represented in the current model: municipalities.

From coast to coast we heard that municipalities desire a more prominent role at the table, and more consideration in decisions that affect their jurisdiction and areas of responsibility. We have noted this issue here specifically because of the unique role played by municipalities: they are landowners, they maintain networks of infrastructure that abuts energy infrastructure, they are responsible for a large part of emergency planning and, in many cases, municipal first responders are the first on site in the wake of a disaster, and because of these many obligations municipalities bear costs and liabilities that other players may not.

This is in no way to suggest that the concerns of municipal governments are more important than those of any other stakeholder. We note this simply to emphasize that here is a practical example of a need and desire for more participation in CETC decision-making on the part of a group of stakeholders whose interests may, in the past, have been under served. We encourage the CETC to consider municipal issues in all of its operations, and to consider targeted engagement with municipalities when updating regulatory policy and frameworks that affect them.

4.1 Who Can Comment and How?

At every engagement session in all the regions of Canada, participants talked about the issue of standing and the many problems and frustrations caused by current limits and definitions in this regard (it is worth noting that discussion on this issue was focused overwhelmingly on project reviews, not oversight of ongoing operations, though many of the same principles hold). We heard that today those who wish to be a party to a NEB hearing must first pass a standing test, which determines whether that party (group or individual) is affected by the proposed project, to a threshold that merits their inclusion in the decision-making process. Today the NEB is obliged to include those who are deemed “directly affected” and may consider the inclusion of others who have either expertise or information with a bearing on the issue at hand. While this may seem to be a reasonable criterion, if only for the practical reason of preventing hearing rooms filled with thousands of people, its application has caused an intense amount of discord, and has led many to question the overall legitimacy of hearing panels themselves.

Whether a party is “directly affected” by a proposed project can be extremely subjective and controversial. One might reasonably suggest that the definition should include everyone within a certain distance of the actual project. On the other hand, one can credibly argue that if a potential catastrophic spill from a pipeline poses a material risk to the drinking water supply of a city like, say, Winnipeg, then that city’s residents are indeed “directly affected” by the proposal, whether they actually live proximate to the infrastructure or not.

This issue is particularly critical for Indigenous peoples, and speaks to the fundamentally different conceptions of land use and ownership that inform Indigenous and Western worldviews. We heard from Indigenous communities who feared the risk of being determined not to be “directly affected” because their community’s living spaces were not sufficiently proximate to a proposed project. We wish to clarify that Indigenous interest extends over the entire territory wherein Indigenous peoples may exercise their rights to hunt, trap, fish, and harvest from the land. That an Indigenous community or person is located in a particular physical space tells us nothing about where that community or person might exercise their Constitutional rights, and does not constitute a forfeiture of their interest in the health and sustainability of their historical territory.

The subject of standing is connected to many aspects of how hearing panels operate, and we have provided further direction on this topic below. However, we heard such a volume of comment on one particular aspect of the process that we feel it necessary to comment on it specifically. The issue is the ability of interested parties to file Letters of Comment with the regulator. In the past anyone who wished could send such a letter to the regulator, and have their comments duly considered thereby. Recent changes, however, did away with this practice – making it such that anyone submitting any comment must first pass a standing test – and participants told us repeatedly that being barred from simply sending a letter to a regulator feels designed to make the public feel excluded and unwelcome.

We wish to note that we are sympathetic to the view we heard expressed that regulatory processes that allow anyone and everyone to participate fully run the risk of becoming unmanageable (for example, a well-organized group might conceivably mobilize thousands of individuals to flood hearings and disrupt the process). We feel strongly, however, that processes and practices can be designed and adapted to permit mass participation while respecting the integrity of the inclusive hearing process. Moreover, we expect that allowing a wider array of participation - particularly Letters of Comment - and clearer decision rationales will allow Canadians to feel as though they have been heard, thereby further reducing the need for parties to appear directly in hearings, for example.

And, as noted in 4.2, below, not all public engagement must be effected via a formal, quasi-judicial hearing process. A Hearing Panel has discretion to design other, potentially more accessible processes in order to inform their decisions. Town-hall style meetings and technical conferences are but a few examples.

RECOMMENDATION

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).

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.

Expert Panel Notes: We feel strongly that every Canadian has a right to be and feel heard. This does not mean that thousands of people have the right to make hours-long speeches, and no one expects this. We see a reasonable balancing between allowing input and the practical and logistical limitations on processes. Through our own experience we have seen how this can work, with open dialogue sessions, presentations with time limits to allow everyone a chance to speak, and the ability of every interested party to submit written materials. Compared to administrative processes, quasi-judicial processes have a higher bar to pass in terms of process integrity, but we believe that far greater public participation is certainly within reach.

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

We heard from numerous groups and individuals in all the regions of Canada who have participated in NEB hearings, and we heard concerns about how hearings are run, and how participants feel when they take part.

The NEB is a quasi-judicial body. This means that it has power of adjudication within its jurisdiction. The NEB engages stakeholders, listens to various viewpoints, and so on, but ultimately this engagement is in the service of formal, legal, decision-making regarding energy transmission infrastructure projects and imposed conditions. Therefore, as a quasi-judicial body, NEB processes and procedures are held to a higher standard than, for example, more informal government engagement processes. We heard feedback on the NEB's processes, and some parties suggested that the NEB's mandate should be changed to one of an administrative, rather than quasi-judicial body. In our judgment, this viewpoint was informed, to a large extent by *how* the NEB discharges its quasi-judicial role, rather than implicit failings of quasi-judicial processes in general.

Specifically, we heard that today's hearings are overly rigid and legalistic, to a degree that limits the depth and quality of engagement with the public and Indigenous peoples. The broad perception shared with our Panel was that hearing proceedings are designed for lawyers and specialists, and that average citizens are not on a level playing field. Canadians told us that the design and conduct of hearings made them feel as though they were out of their depth. We even heard experiences of speaking at hearings before panel members who took no notes, made no eye contact, asked no questions, and gave no outward sign of listening at all. This is, of course, not a structural consideration, but part of the overall narrative we heard on the hearing experience. We also heard of hearings being physically closed to observers and guarded by police officers, motivated by concerns over protests, disruption, and the safety of all parties. We, of course, defer to police and security experts to make safety decisions as they see fit, but we expect all regulatory hearings of any kind to be open to the public to the greatest extent possible, and expect any modern regulator to redouble its efforts to ensure open engagement, and not to close its doors in the face of protests. This is about the engagement culture of the regulator, more than its rules and procedures, and speaks to how we expect Hearing Commissioners to act in the field.

These issues are often compounded for Indigenous peoples, where participation in a formal, legalistic, and adversarial hearing process places significant limits on the quality and scope of their participation or the ability to build relationships. Indigenous elders are keepers of important knowledge about their communities, their traditions, and their lands, and we heard repeatedly that this type of knowledge should be considered in hearings. However, Indigenous people told us clearly that if participation means having an elder – whose facility with English or French

might be limited – sit on a stand and be cross-examined by an industry lawyer who insists that she or he back up traditional knowledge with scientific studies in the Western tradition, then those communities will simply abstain from participation to spare elders the humiliation of participation in a process that is not designed to truly listen to them. We have touched on this subject in Theme 2, and this is a practical example of what we mean when we talk about engaging with Indigenous peoples on their own terms. We should note that current processes do allow for Indigenous peoples to present oral tradition evidence during hearings, but concerns remain.

The practice and process of cross examination elicited significant discussion. Canadians told us that a right to test and cross examine evidence and experts put forth by project proponents is a fundamental feature of a sound hearing process. Today the regulator can choose to conduct oral or written hearings, or both. What we heard is that written hearings are difficult and unsatisfying for many parties, who may not receive full answers, and generally feel as though their opportunity to test evidence is limited.

It is reasonable that intervenors expect to meaningfully cross-examine project proponents, but so too is an expectation on the part of project proponents that they might test and cross-examine counter-evidence during hearings (notwithstanding exclusions and conditions for Indigenous peoples). This issue points to a broader idea about solving some of the problems with hearings today, i.e. that participants might wish to, and should be able to sort themselves into different classes of participation. Some parties may wish to submit written opinions. Some parties may wish to make a statement for the consideration of Hearing Commissioners. And some parties may wish to formally enter evidence into the record and defend that evidence. We see a future where interested parties can make their own determinations about the extent to which they would like to participate, and the responsibilities they bear in so doing.

Finally we wish to comment on the ultimate purpose of public engagement for modern regulators. We have talked about the importance how Canadians feel as hearing participants, and the critical issue of satisfying every participant's desire to be heard. We believe in these values, but wish to clarify that our conception of public engagement is not simply a process of making participants feel good about their role. Regulators make better decisions when they have a full range of opinions, options, and advice from as diverse a pool as possible. Quality public engagement, then, is not a feel good exercise; it has a direct bearing on ensuring the best possible results in the interests of safety, environmental protection, and economic benefits.

RECOMMENDATION

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.

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.

Expert Panel Notes: We believe that the quasi-judicial role and powers are appropriate in light of the CETC's mission and mandate. However, we encourage the government not to accept the idea that a quasi-judicial process must be a rigid and inhuman one. There is great room for creativity and innovation while still respecting the overall purpose and standards of the decision-making process, and respecting the rules of natural justice. We particularly encourage the legal community associated with all sides to support and help realize this goal of modernized, more inclusive proceedings. Circle Courts in Saskatchewan are one example of how to exercise quasi-judicial authority in creative ways that are more inclusive and less intimidating. The US Federal Energy Regulatory Commission conducts both formal quasi-judicial and informal engagement activities during project reviews, and this could be a useful model.

4.3 Enabling a More Effective Public Voice

The format and tone of CETC hearings are important, and is dealt with in detail in Theme 4.2, above. In addition to the concerns noted there, we also heard a specific issue with respect to the effective limits of meaningful public participation, particularly on legal and technical issues.

Our vision for CETC project reviews is one focusing on traditional knowledge, technical details, comprehensive Environmental Assessment, and sound science. Many of these considerations are within deep fields of technical expertise. It is one thing to permit the public to access project proposal documents, to comment on studies, and even to fund groups or individuals to do so. Engagement session participants told us though, that access and even resources are not always sufficient to ensure meaningful engagement. Participants shared with us Catch-22-esque example of receiving thousands of dollars in participant funding, which on its face is a sound practice. However, we heard that participants often felt they had to choose between spending the bulk of their funding on either legal representation (so that they could navigate the process effectively) or scientific study (so that they would have something to contribute) but not both. Moreover, we had a sense from many participants that the sheer scale and scope of project proposals and environmental assessment - which can run into the thousands of pages - can be overwhelming for the uninitiated.

In addition, we heard that some groups with shared interests will coordinate their activities to avoid duplication and maximize resources. We applaud this practice. It remains the case, though, that multiple parties interested in a particular project review might well duplicate their own efforts in conducting similar reviews of evidence, or seeking legal advice on similar issues.

A tempting remedy for such a scenario might be to simply throw money at it. Our Panel did not have the time or resources to assess, on a detailed level, whether current levels of funding for participants are adequate. This is certainly a question worth reviewing on a regular basis, and we would encourage the government to do so, and to do so transparently. However, we have endeavoured to suggest broader solutions that may operate within current resource allocations.

We heard from Canadians the idea of a Public Intervenor to both inform participants of the mechanics of hearing processes, and most importantly to directly represent the interests and views of interested parties if they wish. Working voluntarily through a Public Intervenor groups or individuals could ensure that their perspectives are represented effectively, and could even direct the conduct of studies and other evidence to bear on project reviews.

RECOMMENDATION

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.

Expert Panel Notes: We recognize that not all parties would either need or desire such an Office, and we envision its use to be on a purely voluntary basis. In addition, we see this as another tool in helping to enable and manage mass participation, and in advancing the use of alternative dispute resolution. Where many participants feel their points of view can be represented by a Public Intervenor, there is less demand for each of those parties to have an individual say during a hearing, if they so choose.

4.4 Engagement Throughout the Lifecycle to Drive Continuous Improvement

As we have noted elsewhere in this report, a majority of the comments we heard and documents we reviewed focused on the review and decision-making of not just projects, but major projects. This is not surprising, of course, given the major projects recently and currently under review, and the widespread public attention these projects have received. While we understand this focus, through the process of our review we have come to better understand the importance of the rest of the current NEB's mandate and activities; in many respects major project reviews represent only the tip of the iceberg and a fraction of the time that approved infrastructure will actually be in operation and subject to regulation, with many important tasks conducted within what we call Î-kanatak askiy Operations.

The simple fact of the matter is that a project approval and licence is actually just the beginning of a many decade process including construction, operation, maintenance, and ultimately decommissioning. This represents an incredible amount and variety of regulated activity which merits stakeholder engagement and oversight just as much as a project review might. Engagement session participants told us that they wanted to have a better sense of the whole picture of regulated energy infrastructure and activities, and that they wanted to have regular points of input and engagement that are not tied to explicit major decisions, per se.

We feel that Regional Multi-Stakeholder Committees (i.e. for the Atlantic, Prairies, etc.) meeting on a regular basis with a mandate to review and discuss every aspect of the CETC's operations and throughout the lifecycle of regulated infrastructure would be a major step forward in delivering ongoing public engagement. These Stakeholder Committees would be convened by the regulator, consist of all interested parties, and - critically - would also include industry. Through these committees the various parties could work together to understand what is happening, what risks are present or emerging, what actions can be taken, and can ensure that lessons learned loop back and inform future project design and reviews, to achieve a safer, more secure infrastructure system.

Examples of Issues Regional Multi-Stakeholder Committees Could Examine

- What do emergency response plans look like for a region or community? Are there gaps?
- What is the state of compliance with standards and licence conditions? Are there patterns of non-compliance in the region?
- What actions have been undertaken to address non-compliance?
- Where is existing and planned infrastructure physically located? Are there emergent risks as communities expand and land use changes?
- What effects are regulated operations having on communities?

This gets at a major feature of any modern, high-performing regulator: continuous improvement in the pursuit of regulatory excellence and outstanding results. We believe that a forum like this would allow for greater collaboration in the pursuit of common goals - safety, security, environmental protection - shared by all parties, and that government, industry, Indigenous peoples, and civil society groups together form a group greater than the sum of its parts. We should be clear, the purpose of Multi-Stakeholder Committees is to improve the operation of the regulatory system, not to host policy debates or discuss project design questions. This does not mean, though, that Multi-Stakeholder Committees would be unduly limited in the scope of the issues they might consider. Quite the opposite, we can envision these groups opening discussion and calling for action on a range of topics, from the components of emergency preparedness plans to the effect of construction activities on Indigenous communities, and in particular Indigenous women.

RECOMMENDATION

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).

Expert Panel Notes: We have recommended that these Committees be established at the regional level for two reasons. First, to permit Committees to have time sufficient to discuss the issues in question; we feel that a national table of this nature would be simply too big to manage effectively while still allowing all parties to have a say. Second, we heard a clear expression of interest in having more information about regulated activities at a regional, if not local, level. Different communities are affected by energy transmission in different ways, and have concerns unique to them that require attention.

4.5 Modern Public Outreach and Accessibility

We heard a great deal about processes and structures for actively engaging Canadians in CETC decision making, and the first four components of this Public Participation theme deal with aspects of this issue. We would be remiss, however, if we did not also speak to more basic issues of simply accessing information, and interacting with the regulator to better understand how to become involved in decision making in the first place.

The primary face of all modern organizations is the internet, either on the web or via social media. Canadians told us that the experience of interacting with the NEB online leaves much to be desired. We heard that information is hard to find, and is often available only in summary

format, omitting the detail that would allow real analysis and understanding. In addition, members of the public told us how difficult it can be to navigate through the many documents that make up a project filing. From maps that are sliced into a dozen separate images, to thousand page documents split into many, many individual files that must be downloaded separately, the overall user experience for many is not a good one.

We acknowledge, however, that creating and maintaining modern, user-friendly online interfaces is not easy or inexpensive for any organization, much less for governments, with the many added standards to which they must adhere. The NEB has taken real steps already to improve in this area. It has an interactive pipeline map, and an online Safety and Environmental Performance Dashboard. In fact, the NEB launched a new pipeline system portal during the period of our review. These tools are examples of the type of online presence we expect to see in the future, and we encourage the NEB to continue in this direction.

Canadians also told us that a major component of accessibility is plain language: that documents intended to convey general information to the public be written and presented in such a way that non-specialists can readily understand it. This would not apply, of course, to technical papers and other such materials intended for specialist audiences, but plain language summaries of such documents are important.

We also heard from many Canadians who wish to have clearer points of human contact with the regulator. Many participants expressed a desire for the NEB to establish regional or local offices throughout Canada, so that members of the public have a place to go to ask questions, learn about regulated activities in their area, and more. We agree entirely with the spirit of this idea, but we know that the future of government interaction with citizens is online, not just via bricks and mortar. Not just because physical offices are so expensive (they are) but because they are not inclusive. Even a dozen new offices would leave far too many Canadians out of the loop.

For this reason we envision an enhanced public outreach office, available to all Canadians, and whose mandate would include outreach to explain regulated activities, bringing citizens to Regional Multi-Stakeholder Tables, and helping Canadians navigate regulatory processes.

RECOMMENDATION

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.

Expert Panel Notes: great websites can be extremely expensive, and take years to properly design and deploy (and such design projects run a high risk of failure, irrespective of the resources invested). We suggest an incremental approach that identifies and addresses user-driven priorities for improvement. This type of incremental progress might feel slow and ponderous to some, but this approach generally delivers better outcomes than massive IM/IT overhaul projects. At any rate, a modernized regulator needs to ensure sufficient resources and capacity to deliver effective online information and services.

5. Î-kanatak Askiy Operations (*Keeping the land pure*)

We looked at all current National Energy Board operations – i.e. everything the NEB does that isn't a project review. In our discussions with Canadians we asked about emergency preparedness plans, compliance tools and responses, how monitoring is done or could be improved, whether the right safety and security standards are in place, and more.

Our findings and recommendations are grouped into the following categories:

- 5.1 Standards and Best Practices
- 5.2 Proactive: Monitoring and Preparedness
- 5.3 Reactive: Emergency Response and Compliance
- 5.4 Continuous Improvement

As a general comment, we wish to emphasize the importance of this topic. Many Canadians with whom we spoke are not just interested or concerned about emergency preparedness, safety risks, and compliance. They are afraid. Afraid that a serious failure will endanger themselves, their families, and their communities. We understand that these are not just abstract concerns; a modernized regulatory system must understand, prioritize, and address risks in order to ensure that Canadians are and feel more secure. We would also like to underscore a need for transparency within every phase of regulatory operations, so that Canadians can really see and understand what is happening.

This section is organized in the way that we have represented the cycle of CETC operations, as per Figure 4:

Figure 4



REGIONAL MULTI-STAKEHOLDER COMMITTEES

HOSTED BY: CETC and including industry, regional governments, Indigenous peoples, academia, landowner and community groups, environmental organizations

MANDATE: Inform all stakeholders of CETC plans and activities, identify concerns, recommend and review studies on specific issues, provide advice to the CETC on risks and priorities

SCOPE: Any issue within the purview of the CETC, excluding ongoing project reviews; includes emergency plans, socio-economic effects on communities, safety standards, and much more

5.1 Standards and Best Practices

Canada's energy transmission infrastructure regulator establishes the absolute standards in regulations and licence conditions that licensed operators must meet in order to operate regulated pipelines and electric transmission lines. These standards establish a floor for safe and secure operations. At the same time as setting standards, modern regulators work with industry to identify and promulgate best practices that push overall system performance well above the regulatory floor. We see the CETC performing both of these roles.

In our conversations with Canadians we heard a high level of concern that the energy transmission industry is “self-regulated” and we wish to speak to this point directly. Industry has a vital role to play in monitoring system performance (as discussed in section 5.2, below), and in helping to identify best practices. We have not seen evidence that industry is setting current regulatory standards. Government has and does play a strong role in setting and enforcing standards, independent of industry. However, as currently constituted in legislation, the system appears to offer industry players broad latitude to implement standards through company-specific management systems. We heard concerns that without sufficient regulatory oversight, monitoring and audits, the implementation of standards could be done in ways that may fall short of regulatory intent. We believe that the NEB does have the necessary tools at its disposal, but needs to be more clear about how it assesses risks and ensures compliance. Additionally, the new legislation should ensure that the CETC report annually on regulatory outcomes.

With respect to the content of current standards for infrastructure operations, we heard two principal concerns: adequacy of standards to protect water, and questions around guaranteeing that industry is meaningfully held liable for damages resulting from incidents.

Canadians from every region expressed serious concern about water. Pipelines are adjacent to and cross many of the waterways in which we fish, and travel, and swim, and from where we draw our drinking water. Indigenous peoples in particular stressed that care for water is a fundamental obligation for everyone, as without safe and clean water all life is threatened. We heard from Canadians that they are concerned about, or even fearful of, the potential of a catastrophic release of fossil fuels into our rivers and lakes, and that they have doubts about the protections current in place. Some suggested prohibitions on water crossings, or technical standards (like doubled-walled pipes) for all pipelines over and around water. Our Panel could not investigate the technical and engineering details required to make a determination in this regard, but the issue of water protection is so critical that it deserves to be addressed publicly.

Finally, we heard questions about the liability of infrastructure operators, and the mechanisms in place to hold them to account in the unfortunate event of a release into the environment. It should be noted that we heard some confusion about how the rules work today. Some participants understood the current practice of requiring companies to be liable for a minimum of \$1 billion available to pay for immediate spill response to be a *limit* on liability, and were understandably disturbed by this interpretation. However, companies are fully liable for any and all damages resulting from spills or other incidents when they are at fault; and for companies operating major oil pipelines, up to \$1 billion regardless of fault. Others told us that the total costs of a major spill could be so great as to push an operator into bankruptcy and leave the public on the hook for the cleanup bill. Again, it was not our mandate to conduct a detailed

analysis of whether the public is adequately protected against sudden operator bankruptcies, or the likely costs of spill response. We can say, though, that the current system is poorly understood by many, and would benefit from further explanation. Moreover, pipeline safety provisions and specifically the liability amount should be reviewed on a regular basis, updated as required, and explained and justified transparently.

RECOMMENDATION

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.

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.

Expert Panel Notes: these recommendations speak directly to building greater engagement, and thereby trust in the regulator. We found clear evidence that many find some of the standards within the current system difficult to identify or understand, and that this erodes confidence in the entirety of the system. In the future our model sees the proactive identification of scientific and technical advancement to ensure that standards are continuously advanced and improved.

5.2 Proactive: Monitoring and Preparedness

Monitoring and emergency preparedness is a major part of ongoing operations, and we heard from Canadians who wish to play a greater role in these important processes. Monitoring of a complex and highly technical system relies on a combination of government inspections, industry monitoring, Indigenous monitoring, and reporting from the public where issues may be observed. We can understand how some parties may view monitoring as the exclusive role of the regulator – i.e. that only government designated inspectors should monitor the performance of regulated systems – but we believe that a modern system can and should be composed of a range of players, without any delegation of ultimate authority or responsibility on the part of the regulator. Today industry operates vast and hugely expensive monitoring systems to oversee all aspects of their operations, and while no system is perfect, we see no reason for the CETC not to leverage this capacity, just as many environmental statutes are designed to oblige industry reporting of emissions, rather than creating an entire system of direct government monitoring. This means strong CETC verification of industry reporting, but not that government should own and operate its own separate remote sensing network.

There is, however, untapped potential to further improve the integrity of the entire monitoring network by greatly increasing transparency throughout the system, and by expanding the role of Indigenous peoples and all citizens. Indigenous peoples are present on many of the lands through which energy transmission infrastructure runs, and have knowledge about the lands, plants, and animals present that can help identify and address issues early, before they become major problems. Many Indigenous peoples told us that they would like to play a bigger, formal role in monitoring infrastructure safety and security, and we see this as a win-win opportunity for all involved.

We also heard extensive discussion about emergency preparedness. For many Canadians energy infrastructure is a distant concern, something that exists far away, and affects remote areas. We heard from people who live near pipelines, tank farms, and other infrastructure; to them emergency preparedness is not an abstract idea, but a real question of “what happens to me and my family if there is a disaster?”. Many of the people we spoke with don’t know the answer to that question, and are afraid of the potential for serious harm in their communities. This is not an academic question, as the rail disaster in Lac-Mégantic so tragically emphasized.

We also heard questions and concerns about the practical ability of industry operators to respond to emergencies in a timely manner, particularly emergencies in remote areas where specialized equipment and trained staff may be hundreds of kilometres away. Many Canadians expressed to us doubts about the capacity to stop a catastrophe in progress, in time to make a difference.

We do not mean to suggest that emergency plans are or are not adequate. This is a question for detailed study in hundreds of communities. We can say, however, that Canadians – including municipalities and first responders – expressed a clear desire to be more involved in emergency planning, to see what those plans consist of, and to have somewhere to go if they believe that changes are in order.

RECOMMENDATION

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.

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.

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.

Expert Panel Notes: emergency preparedness depends on a complex web of interactions between governments at all levels, and including citizens, fire services, health care infrastructure, and more. This is an example of how federal leadership can be brought to bear to convene a multitude of parties to achieve better outcomes across jurisdictions, as noted in section 1.3. We also note that training for first responders may be a need area, to ensure that all first responders are well prepared to respond to an emergency.

5.3 Reactive: Emergency Response and Compliance

We heard from Canadians about their expectations when there is a systems failure and there is an emergency to address, and when compliance action is taken by the regulator to address issues and assess penalties. Compared to many of the other issues we reviewed, views on emergency response and compliance action were simple, clear, and unanimous: Canadians expect fast and effective responses to emergencies, and wish to see the polluter pays principle fully implemented in compliance actions.

Discussion on this subject focused on information. We heard that many Canadians find it difficult to assess whether emergency responses compliance actions are effective, or adequate, because they lack even the basic information to inform such views. We should be clear that we do not mean in-depth analyses, or years-long studies. Rather, Canadians want to see information like: Where have there been incidents? What was the effect? What was the cause? What was done to address the problem and repair damage? What penalties or other actions were taken against those responsible? These are questions that any citizen has a right to ask, and which we believe can be answered clearly, in ways that every Canadian can understand and use to draw their own conclusions about the regulatory system. Information is critical for enabling the kind of engagement by all stakeholders that we envision.

Many other regulators already do this sort of reporting as a normal course of their business, including reporting on compliance outcomes. The CETC has several useful and simple models from which to draw, and already publishes some such information, but can improve in terms of comprehensiveness and accessibility to non-specialists.

RECOMMENDATION

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.

Expert Panel Notes: there is, of course, an even larger discussion to be had about whether emergency and compliance outcomes are acceptable. This is important discussion that will be enabled by clearer information, shared with everyone.

5.4 Continuous Improvement

Lastly, for this section, we wish to take a higher level view of one of the most important characteristics of any high performing, modern regulator: continuous improvement, driven by collaboration with all partners and stakeholders.

In our travels across the country, and in the many written submissions that we received and reviewed in detail, we heard innumerable great ideas about how to improve virtually every aspect of the energy transmission infrastructure system, and had the honour to meet with Canadians from various places and backgrounds who want to spend their time and energy to make that system better. There are many differing opinions on key subjects, but also many points of common ground, not least of which is a universally shared desire for safety, security, and environmental protection.

A Panel such as ours cannot possibly do justice to or include every single good idea it hears in its report, without it being hundreds of pages long. This is particularly so for small – but often very impactful – process or operational suggestions that merit full consideration. We have tried in our report to address both the most significant current irritants, and the systemic features that will drive better outcomes in the future. However, there remains an important role in ensuring that this spirit of reform and improvement is not lost after a one-time overhaul of the things we have here identified.

We therefore wish to encourage and reinforce the type of honest, continuous improvement that drives all great organizations within the future CETC. We envision the Regional Multi-Stakeholder Committees we have recommended above as key drivers of an ongoing examination of every facet of the CETC's operations, from systemic issues to tiny process improvements, with a comprehensive group of partners and stakeholders at the table. We look to the leaders of today and tomorrow to embrace this spirit and work collaboratively to continue improving every aspect of a system oriented around learning and improving. We further envision Multi-Stakeholder Committees empowered to conduct detailed inquiries into specific subjects, as required.

RECOMMENDATION

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.

Expert Panel Notes: we believe that working in this spirit, and welcoming the participation of all parties with contributions to make, the CETC can continually sharpen its performance and make reforms necessary to remain a leader in its field.

6. Respect for Landowners

In our engagement sessions with Canadians we asked some general questions about private land acquisition processes and outcomes. We heard from many landowners who helped us to understand the importance of several questions like: how and when can project proponents enter private land? What role do Land Agents play in the system, and how are they governed? What are the dispute resolution processes? How does compensation work?

Our findings and recommendations in this area fall into two categories:

6.1 Ombudsman and Dispute Resolution

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

6.1 Ombudsman and Dispute Resolution

Our discussions with Canadians focused largely on strategic issues, policy questions, intergovernmental coordination, and other such issues. However, we also heard from people who are perhaps the most directly affected by energy transmission infrastructure: the individual landowners on whose property projects are actually constructed and operated.

Pipelines and transmission lines run through privately held lands all over Canada, creating a vast network of relationships between landowners and pipeline operators. One engagement session participant described this as entering into a decades-long joint custody arrangement, and we think this metaphor is apt. Companies and landowners must agree, at the outset, on compensation for lands, and then – over the entire life of that infrastructure – must work together as the company enters the land to conduct monitoring and maintenance, and as the landowner must work safely around the pipeline, particularly with heavy agricultural equipment. This involves ongoing relationships and the balancing of rights and interests amongst the parties.

We heard that many landowners feel like a minor partner in these relationships, and that their rights and concerns are considered secondary to those of industry. Landowners may not have all the information they need (on fundamental questions like when can a company enter my land, and under what circumstances?), and may not have access to legal or financial advice as they negotiate agreements with companies, and this leaves many in the position of feeling bowled over by big corporations. We also heard that once agreements are in place some landowners have experienced challenges with ensuring proper notification before an operator enters their land for maintenance or other activities.

In cases where landowners and companies cannot agree, they can have their disagreement adjudicated (today the adjudication function for compensation is performed by an independent panel appointment by the Minister of Natural Resources). We heard several stories of the adjudication process taking years to complete, wasting time, money, and the emotional energy of landowners who just want a decision. One farmer told us that he greatly regretted ever hiring a lawyer or trying to get a better deal, because the process was so onerous and lengthy that it wasn't worth it.

We should note that in many cases landowners have multiple pieces of regulated infrastructure on their property, much of it provincially regulated. This is a good example of an area where coordination between federal and provincial governments is important.

We observed that the current system provides participation funding for intervenors in the context of project reviews. However, there is no such funding available for landowners who may require legal or financial advice before entering in to agreements with companies.

Overall we heard a desire for a clearer, simpler system, which can make decisions and resolve disputes more efficiently, and where companies communicate more effectively with landowners when exercising their right to enter lands.

We envision all detailed project reviews to have the most detailed route possible, so that all concerned can understand likely impacts at that time. This would occur at the latter stages of the project review to enable a final round of comments.

To avoid any ambiguity, we wish to specify here that our model retains the current process of Detailed Route Hearings for landowners and project proponents who cannot come to an agreement.

RECOMMENDATION

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.

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.

Expert Panel Notes: some landowners have the benefit of local landowners associations who can help them understand their rights, the relevant processes, and best practices. Such associations are a good guide to much of what a future Ombudsman might do, and are worthy of study. We note that the NEB's current Land Matters Group, which has been in place for several years, is a good starting point as well, and has developed a number of best practices.

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

In addition to the big picture issues noted in section 6.1, above, we heard more specific feedback about the way that land acquisition happens today, specifically interactions between land agents and landowners, as well as compensation processes and outcomes.

When a company wishes to acquire a right of way for an infrastructure project it does so via a land agent, who acts on the company's behalf in informing landowners of their interest and in conducting negotiations. We could not conduct a detailed inquiry into the practices of land agents in all the regions of Canada, but we did hear from landowners whose experiences with land agents left them feeling pressured to sign agreements immediately, without having had time to understand or analyse the content of those agreements. We also heard from Canadians who told us about excellent land agents, who listen and work with landowners to achieve fair deals agreeable to all parties. Not surprisingly, then, there seem to be some land agents whose conduct lowers the quality and esteem of the profession in general, and we feel this situation warrants action in the form of higher standards for how land agents must interact with landowners (buttressed by the availability of an Ombudsman, as described above).

We believe that land agents should be bound by a more strict code of ethics and guidelines that would include better provision of information to landowners about their rights, how processes work, how they can appeal if they are dissatisfied, and longer cooling off periods between the provision of information and when agreements can be signed.

Compensation for landowners is a further area that elicited significant comment during our discussions with Canadians. Here again it is impossible for us to make any finding as to whether levels of compensation are adequate or not, and this is not the principal issue. Canadians told us that today compensation agreements are subject to confidentiality clauses that can feel overly limiting (one landowner told us that he wasn't sure if he could share this information with his own children or his financial advisor). We heard concerns as well that many landowners would prefer annual rents to lump sum payments, but feel that such arrangements are not allowed or somehow frowned upon. Others suggested that compensation should extend to neighbours, whose property value is directly affected by the presence of a pipeline, for example.

In short, there are many questions and concerns about how, exactly, the compensation process works, and what standards and guidelines apply. Our Panel was exposed to a small cross-section of the issues and we can see already that clarity and a closer look would be beneficial. Overall we feel this area should be guided by a simple principle: that all parties work toward seeking the consent of landowners to the greatest extent possible.

RECOMMENDATION

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.

Expert Panel Notes: this is another area that would benefit from federal-provincial coordination, as land acquisition processes are relevant for both federally and provincially regulated infrastructure, and land agents operate in both spheres. There exists an opportunity for federal leadership in harmonizing, to the extent possible, conditions for how land agents operate and best practices like plain language easements, and so on.

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ANNEX I: Recommendations

ANNEX II: Legislative and Regulatory Review

ANNEX III: Expert Panel Terms of Reference

ANNEX IV: Discussion Papers

ANNEX V: Expert Panel Engagement Process

ANNEX VI: Summaries of Public and Indigenous Engagement Sessions

Saskatoon, SK

Toronto, ON

Vancouver, BC

Winnipeg, MB

National Capital Region (Ottawa, ON – Gatineau, QC)

Edmonton, AB

Yellowknife, NT

Fort St. John, BC

Saint John, NB

Montreal, QC

ANNEX VII: What We Heard: Your Voice on NEB Modernization

ANNEX VIII: Expert Panel Member Biographies

