

Expert Panel on National Energy Board Modernization Public Consultation Montréal, Québec – March 28-29, 2017

The Expert Panel for the Modernization of the National Energy Board met in Montréal March 28-29, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

THEME: Governance and Structure

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The Panel heard from many participants that a major overhaul of the NEB's governing legislation and structure is needed, whereas others felt the existing rules and structure are adequate, needing only to be implemented more effectively and consistently.

Several participants urged the Panel to recommend that the Energy East project review be suspended until the laws and regulations governing the NEB have been transformed, as per this modernization process, to handle the review more effectively and with greater integrity.

The Panel heard that the NEB's perceived credibility and impartiality are key to earning citizens' trust. It heard that the public currently views the NEB's integrity as compromised by its proximity to industry, calling it a "captured regulator". Public opinion polls and quotes from within and outside Québec were offered to support this claim.

The Panel also heard that the revelations surrounding former Québec Premier Jean Charest's private meeting with the NEB chairman and NEB's members to discuss the Energy East review process have been especially damaging to the public trust, partly because they have been brought to light by investigatory journalists rather than formal mechanisms. Mr. Charest was

purportedly under contract with Energy East proponent TransCanada. In the opinion of many present, this ethics breach warrants an investigation prior to creating a modernized NEB or its successor.

The Panel heard that the problem seems to lie in the non-application of existing rules on independence and impartiality. It was suggested that mechanisms be put in place to ensure that the NEB is exercising its responsibilities in a neutral, independent and transparent way. One specific suggestion offered was for Canada's Auditor General to conduct random audits on the NEB to catch and rectify potential ethical lapses.

Board and Project panel Composition

The Panel heard concern over industry affiliated appointments to the NEB, and a call for board members representing a broader range of experiences, interests and knowledge.

It was specified that participants wish to see civil society (ordinary citizen), Indigenous and local representation.

The Panel heard that the Metis Nation wants members who understand their rights and priorities. The Panel also heard of the need for members to have an understanding of how agricultural lands and forests are likely to be affected by projects, as most private landowners are agriculture and forestry producers.

Given the NEB's current quasi-judicial nature, one participant questioned whether people without a legal background should be making legally binding decisions.

Participants acknowledged the need to draw on the expertise of those with industry experience, but wondered how to ensure the NEB's independence in light of this. Some participants felt that, when in conflict, the independence of the NEB should be favored over acquiring talent with oil and gas industry knowledge.

Some participants suggested that people with industry expertise and ties should only be technical advisors and consultants rather than permanent or temporary members. One participant suggested setting a policy whereby a minimum number of years must pass before an NEB board member or employee may go work for the industry. Some participants acknowledged that such limits would need to be accompanied by a level of job security and compensation commensurate with the sacrifice they demand.

One participant pointed out the need to specify what is meant by "industry", assuming that most are referring to oil and gas. They noted that moving forward, "industry" should be understood to refer to renewable energy sources as well.

Bilingualism Requirement

The Panel heard that NEB board members and staff must have functional bilingualism, as per

the definition applied to the Supreme Court of Canada, so they can read and understand evidence as filed.

Participants expressed their conviction that proponents should also be subject to bilingualism rules, with all documentation offered in both French and English. One participant proposed that this rule apply whenever a project takes place in Quebec.

Location of NEB Headquarters

Most participants were concerned with the NEB's proximity to industry and therefore preferred to see it moved to Ottawa. In addition to decreasing the risk of industry bias, a move to Ottawa is believed to facilitate collaboration between ministries, which will be especially important in coordinating a transition away from fossil fuels.

Some participants cautioned that a move to Ottawa may result in undue political influence over the NEB, though they felt that it would be worth it if it removes the appearance of conflict of interest.

Some participants saw no problem with the NEB headquarters remaining in Calgary if decentralized satellite offices are maintained. The latter reduce the appearance of bias and are more accessible to citizens around the country. A participant with public safety expertise felt that regional offices are crucial from an emergency preparedness perspective, as they help to ensure that local culture and emergency procedures are integrated into any incident response.

Role of NEB Chair and CEO

The Panel heard that the roles of CEO and Chair should not be occupied by the same person to better reflect their different orientations.

Policy Direction

The Panel heard that the NEB's regulatory process must not be treated as a substitute for consultation on policy issues. Participants agreed that the government should be responsible for creating the policy framework in which the NEB operates. Participants said that the creation of a clearly communicated energy policy for Canada would provide a framework in which the NEB and project proponents could work more efficiently.

The Panel was told that currently, many issues arising in the hearing process are policy issues that the NEB has no authority to address. Participants supported the idea of creating a forum in which such a policy framework could be discussed, in consultation with Indigenous Peoples and the public.

One participant suggested that in determining policy, political leaders should re-examine the sustainability of Canada's production and consumption habits, considering the benefits of a more circular economy.

Indigenous Engagement Session – March 29, 2017

Board and Staff Composition and Expertise

The Panel heard that to gain the trust of Indigenous Peoples, they must be better represented in the NEB's membership and staff. One participant suggested that Indigenous Peoples form 50% of permanent board members. It was also specified that the board should have representation from Indigenous People who live on the land, rather than only Indigenous People from urban centres.

The Panel heard that the NEB selection and appointment process should be transparent and that it should involve Indigenous Peoples, ensuring that Indigenous women (represented by civil society groups) have a say. It also heard that Indigenous Peoples should have an equal role in appointing individuals to project review boards.

It was also discussed that the NEB should represent Canada's regional diversity and contain members with expertise in community development, sociology, economics, traditional knowledge, renewable energy, energy efficiency, fisheries and aquatic ecology, land ecology, climate change mitigation and adaptation and archeology.

It was stated that all parties involved in the NEB's decision-making and operations should receive comprehensive training on the history of Indigenous Peoples, treaty rights, the issues facing Indigenous women, intercultural communication, human rights and the fight against racism and discrimination.

The Panel was told that the roles of CEO and Chair of the NEB should be held by different people.

NEB Location and Residency Requirements

One participant called for all impediments to Indigenous participation in NEB governance to be removed from the NEB Act. The Panel heard that the residency requirement for board members should be eliminated, and that the NEB should not be located or funded in a way to bias its conclusions. It heard that participants feel it is much too close to the oil and gas industry, calling into question its impartiality. Some participants wished to see the NEB headquarters moved to Ottawa, though they warned against replacing industry influence with political influence.

The Panel heard from some participants that the NEB's current Calgary location is fine as long as there are changes made to its mandate and governing legislation.

Policy and Legislation

The Panel was told that participants wish to see a major overhaul of the NEB Act in order to translate the government of Canada's commitments and goals into action. It heard that the NEB

Act should include requirements for the informed consideration of Treaty rights and the application of Indigenous knowledge.

It heard that the NEB should be tasked with implementing a National Energy Framework, developed jointly by the federal government, provincial and territorial governments, and Indigenous Nations. Such a framework would be responsible for assessing what energy resource potential is available, the national demand for energy, the potential for export opportunities, energy diversification targets (including those needed to meet international climate commitments and societal expectations) and the infrastructure requirements needed to meet current and future needs.

The Panel also heard that, in setting energy policy, political representatives must consider the growing inequality among Canadians and the cost of energy to the end user.

THEME: Mandate and Future Opportunities

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Scope of Mandate

Some participants proposed to divide the NEB's current role among different government agencies. One participant specified that the NEB's role should be reduced as society shifts further away from oil and gas-related energy to focus on decommissioning pipelines.

Some participants expressed their desire to keep the NEB as a single point of contact through which proponents can fulfill all regulatory requirements throughout the project lifecycle. They believe the NEB's mandate is adequate and that dividing the review process between the NEB and another agency would make the process more cumbersome for proponents.

The Panel heard that the NEB's current project by project focus must be expanded to consider the cumulative impacts of various forms of infrastructure, and long-term national strategies based on forecasted needs, risks and opportunities. Such forecasts may span several decades as the ramifications of energy projects and climate change are too long lasting to be credibly assessed over a short time. As such, the NEB's mandate must no longer hinge on the assumption of a continuously increasing demand for fossil fuels.

The Panel heard that the NEB's mandate should fall within the context of Canada's greenhouse gas (GHG) emission targets and global commitment to the Paris Climate Agreement. The NEB should operate on the understanding that such targets were established to remedy an urgent situation. The Panel was offered the example of the United Kingdom's integration of a carbon budget into legislation. One participant expressed their desire to see the NEB mandate include the transition away from fossil fuels.

The Panel heard from one participant that her organization sees no need to expand the NEB's

mandate, but rather prefers to improve its ability to fulfil its existing mandate more effectively. Another participant wishes to see the NEB Act amended to include decision-making and monitoring authority over energy transportation by rail, road and waterways, in addition to pipelines.

The Panel heard suggestions to withdraw the NEB's project assessment mandate and give it to a new national entity akin to Québec's *Bureau d'audiences publiques sur l'environnement* (BAPE). This new office would examine projects and provide recommendations to the Governor in Council (GIC) on the basis of the information it gathers and its consultations with the public, with an emphasis placed on transitioning to greener energy sources.

The Panel heard from other participants who envision reducing the scope of the NEB's mandate in favor of sharing more power with provinces, territories, municipalities and Indigenous governments, in the spirit of cooperative federalism.

The Panel further heard that the NEB must scale and grow its capacity in proportion to any new or expanded mandate. Expanding the overall NEB mandate and increasing compliance and monitoring activities will require that the NEB maintain the organizational capacity commensurate with these expectations.

Government Institutions

The Panel heard from some participants that Canada should create a national institution with the mandate of coordinating the transition away from fossil fuel-based energy. It was noted that the province of Québec is in the process of creating such an institution and that one already exists in France. Some participants stated that the NEB does not appear to have the capacity to fulfill such a function.

It was proposed by one participant that the NEB mandate should be split between two distinct organizations, one studying fossil fuel-based projects and another studying projects based on alternative forms of energy. It was suggested that this could help reduce public cynicism.

Electrical Transmission Lines

The Panel heard that international power lines are a vital component of the Canadian and North American power grid, with net exports to the United States exceeding 50 terawatts a year.

Regarding electricity, the Panel heard a desire for a more efficient, streamlined and predictable process of regulating electricity exports and international powerlines. It was noted that regulatory requirements have not changed for many years despite changes in the electricity industry. Specifically, it heard support for the modernization and streamlining of the export permitting process.

One participant voiced their organization's support for procedural reforms that improve the

efficiency of applying for international power line permits. Procedural form and governance are interrelated, given the NEB's quasi judicial role.

A participant suggested that the NEB play a role in bilateral provincial negotiations over electrical transmission lines. What's more, one participant expressed her concern about the increased risk of corrosion caused by electrical lines crossing pipelines, adding that since there are many more kilometres of pipeline than electrical lines, when these two cross, the rules governing pipelines should take precedence. There is a risk of confusion in such situations and the NEB should be responsible for providing citizens with the appropriate information on which regulatory framework is being applied. One participant said that she had to pay to find out which standard applies to a nearby area where an electrical line and pipeline cross and called for more transparency in sharing information with the public.

Determination of Public Interest

Participants agreed that determining the Public Interest involves considering the various complex intersections of social, economic and environmental factors and that these have evolved since the NEB's creation. The Panel heard that the definition of Public Interest to be applied by the NEB should be made very explicit, so as to limit discretion in its interpretation and application.

Concern was expressed vis-à-vis the perception that so far, economic factors have outweighed all others in the NEB's deliberations. The Panel heard that in considering the Public Interest, decision-makers should consider climate change and protecting water sources higher priorities than economic factors, as life itself depends on a healthy environment. It heard that in considering socioeconomic issues, the social cost of GHG emissions from production to combustion should be included in the analysis.

In light of this, some participants voiced their belief that the approval of any further fossil fuel infrastructure would contravene the Canadian Public Interest.

The Panel heard of a tool called the Social Cost of Carbon which was developed in the United States and has been adopted by Environment and Climate Change Canada. It allows damages to be estimated based on tonnes of carbon emissions in each year.

A participant asked if, given the global shift away from fossil fuels, investing a fifth of the Canada's economy in this industry would be wise from a economic perspective.

One participant provided the following list of minimum criteria to be applied in the determination of Public Interest:

- Ecological integrity;
- Respect for ancestral and acquired rights to the land and resources;
- Respect for existing environmental and public health policies; and
- Relevance to social context and relative return on investment (comparing costs and benefits to alternative projects).

The Panel heard that such considerations reflect the government of Canada's international commitments, public statements and policy orientations.

A participant voiced their concern that this may push the imbalance the other way, neglecting important economic impacts. It was proposed that imbalances be avoided by applying a sustainable development lens to determining the Public Interest. This means considering the various interdependencies of social, environmental and economic factors. For example, many industries may be directly or indirectly affected by pipeline infrastructure or its upstream and downstream effects – fishing, tourism and construction, among others. The Panel heard that the Indigenous notion of weighing the impacts of a decision on seven generations to come could be a good guideline to adopt.

The importance of adopting a sustainable development lens was further illustrated by the cost to mental health and wellbeing of upheavals to people's living spaces, agricultural lands, jobs and risks to water and food security.

The Panel heard that the NEB's consideration of economic interests should take into account regional and local consequences, and not just the national GDP, which may hide significant financial losses at a municipal level. Pipeline owners and users benefit from inequitable tax advantages, with citizens assuming losses in the form of decreased land use, safety risks and mitigation measures, reduced tax revenues and, in some cases, social cohesion. One municipality with 25 hectares occupied by pipelines estimates losses in the order of several millions of dollars.

In considering the social component of Public Interest, a participant offered the example of Norway, which invested the royalties from energy development in solid social systems that can now support working families transitioning out of their jobs in the oil and gas industry. In contrast, working families in Alberta are finding themselves in a difficult position.

The Panel heard that the Public Interest should include consideration of provincial, territorial, municipal and Indigenous laws, as currently, when a project crosses interprovincial or international borders, federal laws eclipse them.

It was stated that broadening and specifying the definition of Public Interest in legislation would fortify the NEB's impartiality by providing less leeway to NEB board members with ties to specific interests.

Energy Information

The Panel heard that the NEB's energy information mandate should be separated from its regulatory one, as in the United States. The Panel heard that it is a conflict of interest to have the NEB responsible for forecasting energy needs and informing the public about matters of energy and climate while acting as regulator.

The Panel heard that the Energy Futures report is used not only by political decision-makers but also by civil society and scientists. Participants said that in the last Energy Futures report (2016), the published demand for oil and gas was incongruent with Canada's greenhouse gas emission targets and climate change commitments. It was further noted that it appeared to underemphasize the significant advances made in renewable energy technologies.

The Panel heard that Canada's energy information system is incomplete, incoherent and full of large gaps. Coherent, comprehensive and impartial energy information is a crucial element of sound policy making and public understanding of energy's interactions with the economy and environment. It is also needed to perform broader sustainability assessments.

The Panel heard that every project application produces copious amounts of data but, as it is considered proprietary information, it is not available to the public. A participant asked that baselines studies, impact assessments and other information be put in a database that could be accessed by researchers.

A participant shared that there are approximately five energy systems models for Canada and that most are either held by institutions and inaccessible to the public, or unintelligible for the average interested citizen. The model on which the NEB bases itself should be available to the public and should go further into the future than the NEB's current 2030 outlook. Models were cited as being important as they bring together fragments of data to increase the capacity of humans to perceive and understand the systemic consequences of a proposed course of action, allowing for more informed decisions.

The Panel heard that it is a conflict of interest to have the NEB responsible for forecasting energy needs and informing the public about matters of energy and climate while acting as regulator.

Environmental Assessment

While one participant expressed a desire to see the environmental assessment (EA) function remain with the NEB, most participants requested that it be given to a separate government body, such as the Canadian Environmental Assessment Agency (CEAA) which is more inclusive and better equipped to study biodiversity, climate change and social issues. One participant proposed that a NEB-led project review should only move forward once CEAA has given it its approval. It was noted that, unlike the NEB, CEAA's prime focus is on community impact. The Panel heard that whoever does the EA, it should encompass an assessment of long term sustainability, which would integrate upstream and downstream effects, and intergenerational and environmental justice.

Some participants favored a new agency, akin to Québec's BAPE, conducting EAs in a highly consultative manner that takes social and economic factors into account. The Panel heard that, even with the EA conducted by another agency, the NEB should still have to consider climate change and other environmental issues in its decisions. It also heard that the NEB could remain responsible for the issuance of Certificates of Public Convenience and Necessity

(CPCN), with Cabinet holding veto power.

Some participants spoke of turning the EA into a sustainability assessment that would consider upstream and downstream impacts, as well as intergenerational and environmental justice.

One participant voiced her organization's position that the NEB should keep the mandate to conduct EAs; given the organization's quasi-judicial nature, the procedural role and the adjudicative functions are interrelated.

Cumulative Effects

The Panel heard that the NEB should assess projects proposals in the context of the cumulative impacts of various forms of infrastructure, rather than the current process of evaluating each project individually. Projects should be assessed on the basis of how they fit in with long term national strategies based on forecasted needs, risks and opportunities; such forecasts may span several decades as the ramifications of energy projects and climate change are too long lasting to be credibly assessed over a short time.

Some participants believe that there should be triggers built into the NEB Act determining when a strategic environmental assessment (SEA) or class assessment is needed, as more of these types of assessment should take place. It was suggested that a body other than the NEB should be charged with conducting long term planning, involving SEA, regional assessments, engaging with Indigenous Peoples and land use planning, among others.

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Scope of Mandate

Participants shared differing views on the scope of the NEB's mandate. Some wished to see it expanded to include a focus on renewable energy sources and related storage and transportation technologies, or to see it empowered to map out future energy scenarios and trends.

Others voiced that they have lost faith in the NEB's ability to conduct broad and thorough enough EAs and that such EAs should be entrusted to the CEAA. It is believed that this will allow a larger picture to be taken into consideration, including upstream and downstream GHG emissions. It was added that Indigenous Peoples should help define what is studied in EAs.

A clearer understanding of each party's role and one centralized agency responsible for all EAs would save time and money for all. Additionally, participants believe that environmental assessments should adopt a sustainable development lens, understanding that social, cultural, economic and environmental factors are interdependent.

Some participants envision a modernized NEB acting as a center of excellence and technical expertise contributing to the implementation of a National Energy Framework, rather than acting as regulator. With its role limited to technical aspects, it could provide expert counsel to other government bodies tasked with conducting EAs and safety and emergency preparedness work.

Public Interest

The Panel heard that the NEB Act should include a clear definition of Public Interest developed jointly with Indigenous Peoples. However, it also heard that the constitutionally protected interests, rights and titles of Indigenous peoples should be evaluated outside the scope of a Public Interest determination and take precedence over it. Among the considerations that the NEB must take into account when evaluating impacts on Indigenous Peoples, one participant listed the following:

- Credibly identifying impacts to Section 35 rights
- Considering the impacts of upstream developments
- Regulating a broader range of projects: no more project splitting between various jurisdictions
- Honour of the Crown has been upheld
- Advancing reconciliation in all decisions

The Panel heard that were a National Energy Framework to be developed, as outlined above, the NEB could apply it to help determine whether a project is in the Public Interest or not. Assuming that CEAA is entrusted with the task of conducting EAs, it could assist the NEB in making its Public Interest determination.

The Panel heard that the NEB has overemphasized short term economic gains thus far. Participants cited the need to prioritize climate change and long term economic prosperity in the determination of Public Interest. They cited decisions by foreign courts and governments as examples of aligning energy decisions and climate considerations. In one case, a judge in the Netherlands ruled that the government had a legal obligation to act in the best interest of current and future generations by lowering CO₂ emissions. Participants were supportive of legislating a duty of care that would consider the rights of future generations in determining if a project is in the Public Interest. It was noted that this is reflective of a long-standing Indigenous principle of considering an action's impact on the next seven generations.

Cumulative Effects

The Panel heard that while the cumulative effects of various infrastructure projects have dire consequences on the ability of Indigenous Peoples to uphold their traditional practices and way of life, it falls outside the narrow scope of the NEB's current mandate. It was noted that even if another organization like CEAA assumes responsibility for EAs, changes will have to be made to governing legislation to ensure that cumulative effects are considered and reliably tracked. This was raised by many participants as an urgent concern and pertains not only to current uses of Indigenous territory but also future land use plans made by communities.

THEME: Decision-making Roles, Including on Major Projects

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Decision-Making Context

The Panel heard that it is important that prospective proponents know the decision-making criteria and policy framework in which they fit before embarking on a project.

It was stated that as Canada has signed the Paris Climate Agreement and acknowledges the grave risks and consequences of climate change already being felt, a new decision-making framework must be drawn from the NEB in which all decisions are viewed from the standpoint of a transition to cleaner energy sources.

Examples were provided of other countries having made decisions on the basis of climate change consequences. Austria cancelled a runway at one of its airports, a court in South Africa cancelled a coal station and US courts determined that the costs associated with carbon emissions must be taken into account alongside the gains that may result from activities generating them.

The Panel heard of a tool called the Social Cost of Carbon which was developed in the United States and has been adopted by Environment and Climate Change Canada. It allows damages to be estimated based on tonnes of carbon emissions in each year.

Decision-Making Criteria

The Panel heard that the rules governing the NEB's decision-making must be clearly enunciated as the largest hurdle for industry is regulatory uncertainty. When governments do not clearly indicate their criteria for project approval, companies invest millions of dollars upfront without the chance to predict the likely outcome of their applications.

The Panel heard a call for publicly accessible, free decision-making standards available in both official languages.

It was noted that a determination of social license currently lies outside the scope of NEB responsibility. One participant stressed the need for caution in considering a social acceptability requirement, as it is a subjective, ill-defined term. Their fear is that the decision to grant or withhold social license by a community would result in more unpredictable decisions, thereby creating a more unstable and therefore unattractive business climate. As one participant put it, the NEB should make decisions based on the rule of law and not who shouts the loudest.

Participants acknowledged the challenge faced by the NEB in bringing together many

diverse worldviews before coming to a decision. One suggestion offered was to require that proponents explain their understanding of the worldview of each community directly affected by their project in the application itself. This may help in confirming that adequate consultation has taken place.

Many participants supported the inclusion of a climate test in the NEB's decision-making criteria. Most of them believed that upstream and downstream greenhouse gas emissions should be evaluated in the context of Canada's climate change targets. One participant felt it is unfair to expect proponents to be responsible for any emissions outside the scope of their project activities; the example raised was of a construction company building a road and being held responsible to ensure that only electrical cars will ever drive on it.

Participants told the Panel that the NEB's decision-making criteria should mandate the consideration of alternative energy developments, based on impartial data provided by neutral parties. It heard that there has so far been an overreliance on industry data in justifying the need for, or opportunity presented by, a project.

The Panel heard that the NEB should ensure that proponents respect provincial and territorial laws and regulations as well as their own. A specific request was made that the NEB consider the decisions of Quebec's *Commission de protection du territoire agricole* (CPTAQ).

Decision-Making Roles

The Panel heard from one participant that all big projects should be subject to provincial and national government approval as determined by free and secret voting. It was clarified that the element of discretion is important as some politicians will surely wish to transition to the private sector following their term, and may otherwise feel pressure to approve a project to avoid dampening their employment prospects.

One participant suggested that, to help restore the balance of power between proponents and citizens, the NEB's decision-making function should take the form of an Inquiry Commission, as in civil law tradition in France, presided over by an inquisitor. He recommended to move from a quasi-judicial process to an inquisition process.

The Panel heard that the Canadian Parliament should be deciding on large projects rather than the Cabinet deciding behind closed doors.

One participant suggested that assent by local governments be a prerequisite to project approval.

Pipeline Routes

The Panel heard that there is a need for set protocols governing and limiting pipeline routes. Presently the proponent determines a corridor on time for the hearing, but they may determine the exact route later on, after a Certificate of Public Convenience and Necessity

(CPCN) has already been issued.

One participant requested that “no-go zones” be established through a concerted protocol between different levels of government. Such zones have been instituted in Australia and the United States to protect zones where spills may have particularly serious consequences, such as densely populated zones, navigable waters, sensitive environments and drinking water sources. The identification of such zones would inform pipeline integrity and security programs throughout the infrastructure’s lifespan.

Participants requested that specific pipeline routes and proposed risk mitigation tactics be identified before the hearing process so that they may be scrutinized and precautionary principles may be applied to decision-making.

Access to Information

The Panel heard that access to information on proposed projects should be a priority for the NEB. Its website should include all proponent documents in English and in French. By consulting communities at the onset, proponents can ensure that they are given access to the information of greatest concern to them.

Section 58 of the NEB Act

Participants stated that s.58 of the NEB Act should be eliminated and that the NEB should have jurisdiction on cross-border pipelines regardless of their length. This is believed to help with the problem of “sausage-links” whereby the cross-border portion of a larger pipeline is presented as a small project of its own to avoid going through the NEB’s review process that is required for a longer project regulated under s.52. Therefore, there should no longer be a difference between small pipelines under 40 kilometers and large pipelines of 40 kilometers and above. Both would be subjected to the review process under s.52.

Decision-Making Process

The Panel heard that industry would benefit from the predictability of having the “go/no-go” determination, based on a public interest determination, made earlier in the application process. It heard that the investment climate would be favored by a more transparent, inclusive, and time bound decision-making process.

Some participants impressed upon the Panel that hearings and public consultations must be time bound and restricted in scope, lest proponents invest money in developing a project application and be left in limbo. Other participants expressed concern that such limits are undemocratic.

It was noted that the Panel has heard from some that there could be two stages to decision-making. The first would consist of a determination of public interest by the government. If the determination is a positive one, the project would proceed to a second step in which the NEB would establish project conditions. Some participants supported this idea, while others took issue with such a process on the grounds that it would restrict public, local and

Indigenous government consultations to the earliest stages of an application review and that, as presented, it would not allow for parties to change their mind if more information comes to light following a stage one determination of Public Interest.

Another participant added that there should be a third, preliminary step: that of strategic regional and national environmental assessments that would predetermine whether or not projects of a certain kind or in a certain place are desirable.

One participant stated that the notion of Public Interest cannot be excised from the NEB's task of setting project conditions and therefore, the decision-making process could not be separated in such a way. To illustrate this, an example was given of a company wanting to go back on a statement it made to community members that only a certain substance would be transported by a given pipeline and of community members having to fight to have the NEB to mandate the respect of their initial claims in its project conditions.

One participant questioned if energy infrastructure should be privately owned, citing a private company's responsibility for the Lac Mégantic tragedy of 2013.

A participant suggested that while awaiting clear policy direction, prospective proponents can find predictability in the Paris Climate Agreement which indicates that it is time to transition away from oil and gas projects. The Panel heard that the NEB Act should make this explicit so that industry members know that it is the time to adapt to a new reality.

Hearings

The Panel heard that public accountability is a key component of the review process. Some participants voiced concern over the lack of oral cross-examination opportunities in the project review process. The Panel heard that written responses from proponents often lack detail and accountability.

Participants voiced a desire to see the in-person hearing process become more welcoming and inclusive, suggesting it be inspired by the BAPE in Quebec. One participant posited that the fact that the NEB has approved nearly all projects placed before it is indicative of a need for more debate to be built into the process.

The Panel heard from participants in favor of a return to pre-2012 joint review processes. They were also in favor of expanding standing rules from allowing only those "directly affected" to the pre-2012 standard of all interested persons.

A participant further suggested that the Panel consider alternatives to the intimidating quasi-judicial hearing format such as World Café, community cartography and round tables. The Panel heard that hearings should also allow for written submissions, as well as audio and video submissions, which would make the process more inclusive of those with difficulties reading or writing.

The Panel heard a call from some participants for the right to obtain a judicial review of NEB decisions at no unnecessary cost to the party seeking it.

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Decision Making Roles

The Panel heard from participants who were pleased with the idea of the NEB providing recommendations to the federal government in regard to large projects, rather than making decisions itself. Some participants requested that all of the NEB's decision-making mandate be transferred to the Crown, as they perceive that the NEB has demonstrated insufficient deference to Indigenous Peoples' assertions of territorial rights, traditional knowledge and constitutional rights. The Panel heard that if the NEB makes the final decision, it should be responsible to assess any impacts to the rights of Indigenous Peoples and the adequacy of consultation with them. If the NEB recommends a decision, it must be very clear about what assessments have or have not been conducted to arrive at this conclusion.

The Panel heard that the NEB Act should spell out a clear division of labour between the Crown and NEB as it relates to decision-making. It also heard that Canada should share decision-making jurisdiction with Indigenous communities, reflecting s.35 of the Canadian Constitution and the principle of Free, Prior and Informed Consent (FPIC) outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Participants stated that providing Indigenous Peoples with a more active and authoritative role in decision-making would result in outcomes that are safer and healthier for the Canadian population at large.

The Panel heard that the NEB should continue to be responsible for the oversight of conditions set as part of the project review process.

Decision Making Criteria

The Panel heard that project-specific decisions should be coherent with broader regional and national policies, laws and values, including the Indigenous principle of ensuring the sustainability of natural systems for the next seven generations. The Panel also heard that decisions should be made by looking at the full array of project options available, rather than looking to approve or deny each project in isolation.

One participant impressed upon the Panel the importance of facilitating the participation of Indigenous women in decision-making processes, as well as the importance of weighing a project's potential impacts on them. The Panel heard that the Government of Canada and some provinces are currently using a comparative gender analysis model to study the impacts of their projects and policies on men and women, and that the NEB Act should make such an analysis a mandatory component of the project assessment process.

The Panel heard that the NEB should require proponents to provide clear, complete and specific information before a project can be approved. Participants said that when information is left unclear or unspecified, decision-makers have been known to decide in favor of proponents, or rely too much on their word. Complaints were heard about the NEB's past failures to fact-check the information or claims put forward by proponents in their applications, leaving this role and associated costs to concerned communities.

The Panel heard that EAs must address strategic, regional and project level plans and must be led and reviewed by different levels of government and private sector actors as relevant.

The Panel heard from one participant that an archeological evaluation should form part of a project's EA. The Panel heard that a project's impacts on food security and agricultural lands should also be taken into consideration.

Decision Making Process

Participants discussed the proposal made by some to split the decision-making process into two stages. In the first, the Government of Canada would determine if the project is in the Public Interest and allowed to move ahead. In the second, the NEB would establish the project-specific technical requirements for proceeding.

Some participants agreed with establishing the Public Interest first, to provide proponents with enough predictability to justify further investment. One participant specified that the first stage could also include a determination by the government as to whether Indigenous Peoples have been adequately consulted.

However, the idea of setting time limits on when public and Indigenous interests would be considered was rejected by others. The Panel heard that each project timeline should be established by concerned parties upfront, rather than applying a universal time limit. It was stated that Indigenous Peoples require enough time to gather information, discuss it with their community members and come to a position. The Panel heard that the NEB's own processes should be more culturally sensitive and inclusive of Indigenous Peoples. Specifically, the Panel heard the current 30-day norm being woefully insufficient given the complexity of project documentation and resources available to Indigenous communities.

Pursuant to the UNDRIP and the principle of free, prior and informed consent, some participants expressed that any community whose land a project finds itself on should retain veto power and the right to bring further concerns to light at any stage of the application process. This is believed to be an embodiment of the nation-to-nation relationship the federal government has expressed interest in pursuing.

The Panel heard that within this pursuit of a nation-to-nation relationship, decision-making authorities should value and respect the decisions and findings of Indigenous Peoples' own governance bodies and project assessment processes. Some participants called for a parallel EA to be conducted by Indigenous Peoples to ensure their views, concerns and forms of

knowledge are considered appropriately. Some participants support joint decision making on proposed projects between the Government of Canada and Indigenous governments.

Participants stated that if Indigenous People are excluded from the NEB's decision-making process, there will continue to be conflicts, causing delays and unnecessary resource expenditures for all.

THEME: Compliance, Enforcement, and Ongoing Monitoring

Public Session – March 28, 2017

Collaboration with Municipalities

The Panel heard that municipalities are tasked with responding to an emergency or spill in the first six hours after it takes place and that as such, companies should work with municipalities first to determine emergency plans. The local emergency authorities concerned should be able to appraise the risks to their local environment and add to a project's emergency response criteria before a project moves forward. Currently, the NEB reviews and approves the company's emergency plan only once the project is approved and built, and the municipality is almost on its own in implementing the plan.

The Panel heard that proponents should be held to providing municipalities with the emergency mitigation and response plans. It heard that regulations exist to this effect but that the NEB has not been enforcing them. One participant told them that as the regulator, it is incumbent on the NEB to ensure that municipalities have the correct and up-to-date emergency preparedness plans for infrastructure on their land. An example was shared in which a municipality had to resort to an official access to information request to obtain from the NEB the emergency response plan for a project in their community.

The Panel heard that pipeline companies should have to give provincial and local authorities information on the composition and volume of what is being transported by a pipeline crossing their territory. Roles and responsibilities should be more clearly defined, and all parties should know the time it would take for a municipality to respond, what alternate sources of drinking water are available, what should be done with submerged petroleum and how to manage undetected flow variations.

It was remarked that current NEB regulations stipulate that companies must ensure ongoing training for firefighters, police and other organizations. However, in one example that was cited by a municipality, the proponent had not conducted a single emergency preparedness exercise in ten years.

Similarly, it is important for companies to have information on municipal resources. One illustration given was of a company headquarters in Alberta being alerted to a spill in Quebec. Rather than call 911, this company should immediately be able to retrieve the ten-

digit Quebec phone number of local emergency services.

One suggested improvement was for the NEB to convene local risk management committees comprised of industry and government representatives as well as safety experts. Such committees would specialize in hydrocarbon spills and be funded by proponents, but supervised by the government. The Panel was told that one company has begun working more closely with the *Ministère de la sécurité publique* of Québec as well as municipal authorities, which is a good practice that has improved communications between them and with citizens.

Specific Safety Concerns

The Panel heard from many of their concerns over the contamination of potable water by NEB regulated projects. Participants expressed a strong desire for more robust regulations protecting water sources. These would extend to emergency preparedness plans and ensuring that local communities are equipped with the knowledge and equipment needed to prevent the loss of drinking water as quickly as possible. A proponent possessing the equipment is not sufficient if it is half way across the country at the time of a spill. In cases where traversing water sources cannot be avoided, one participant suggested that pipelines be encased in a protective tunnel.

The example of Energy East was offered in which citizens questioned why the pipeline would go so close to the drinking water source for the city of Montreal's 3 million residents. The company told them that it was because this was not one of the NEB's criteria.

Participants requested that specific pipeline routes and proposed risk mitigation tactics be identified before the hearing process so that they may be scrutinized and precautionary principles may be applied to decision-making. The Panel heard participants question how the NEB could have assessed the level of risk posed by an application and deemed the documentation complete when modelling had not been done on potential spill outcomes for 25 of the main rivers crossed by a proposed pipeline.

Monitoring, Incident Reporting and Accountability

One participant expressed concern over his understanding that companies are not required to report leaks of under 1,500 liters to the NEB. They believe that all leaks must be reported. With regard to restoring public confidence in the NEB's enforcement of project conditions, it was suggested that reported leaks and an account of the response to them be published by another organization, along with NEB-generated reports on how well companies are complying with project conditions.

The Panel heard that in the past, when oil and gas industry employees have put their jobs on the line by notifying the NEB of spills, the regulator has not responded, waiting until the incident is revealed in the media, forcing them to act. The Panel also heard of the need to listen to ordinary citizens who have been known to report technical problems, and of the need for an efficient and timely reporting mechanism.

Further suggestions for improved monitoring included engaging Indigenous peoples as co-governors of monitoring and the creation of local monitoring committees that would ensure a link to on-the-ground conditions and interests.

The Panel heard that its recommendations should address pipeline tampering, which has grown in prevalence over the decades. This poses significant risks to perpetrators, local populations and the environment.

Enforcement

While the Panel heard from some participants that the NEB's rules and tools to ensure compliance, safety and environmental protection are sufficient, it also heard from many that the NEB is not rigorously upholding the economic, social, environmental, and safety conditions it sets on projects, expending little resources to monitor and follow-up on them.

The Panel was told that the NEB should have and use a variety of tools to establish compliance and prevent future shortcomings, both of a corrective and punitive nature, not excluding legal sanctions. Some participants suggested that an investigation be launched in to proponent transgressions and the overall culture of non-compliance. Some participants believe that oversight and security responsibilities should not be entrusted to anybody with an economic mandate, such as the NEB. It was suggested that the Auditor General should monitor compliance much more closely than it currently is. Participants said that the NEB's reliance on self-monitoring by proponents must stop.

Performance Criteria for Emergency Response and Preparedness

The Panel heard of the need to establish and enforce performance criteria for emergency preparedness and response. Such criteria must take into account that many different types of substances go through pipelines, and that the human and other resource needs in case of an incident differ and must be on standby to respond quickly when the need arises. A municipality representative present quoted an expert in saying that they do not have the equipment needed to respond quickly enough in case of emergency.

The Panel heard that as part of these performance criteria, proponents should be obliged to integrate their response plans with provincial and local procedures and not the other way around.

Public Participation in Risk Assessment and Mitigation

The Panel heard that citizens must be made aware of the energy infrastructure near them. An example was given of residents of Terrebonne believing they had a waterman in their backyard, which turned out to be a pipeline. Only once the public is fully aware of the inherent risks and proposed mitigation strategies can they be expected to pronounce themselves on a project.

Land acquisition

The Panel heard concerns about company-landowner relations. As one participant put it while citing an example of dishonest dealings, “it’s like the Wild West”. It was stated that the NEB should stop taking the proponent’s word that they have obtained permission from landowners. It was proposed that the NEB inform landowners of their rights before proponents first speak to them or submit their application. Also, to compensate for the power and resource imbalance between parties, it was suggested that landowners form collective agreements with the proponent on any given project.

Participants expressed a desire to see the norms of company conduct improve. The Panel heard that when landowners have made complaints of harassment using the NEB’s online landowner complaint form there has been no response. Participants believe that the NEB should have the power to issue punitive and corrective measures for company misconduct toward landowners as such conduct can have dire consequences on individuals and their communities.

The Panel heard that the NEB should not issue temporary access permits allowing proponents to begin work before project approval and that article 104.1 of the NEB Act is akin to expropriation and puts companies on a much stronger footing than landowners.

The Panel heard that the NEB Act should explicitly require that companies remove decommissioned pipelines from private lands. Additionally, the Panel heard that landowners should be paid yearly rent for as long as there is a pipeline affecting their lands.

Arbitration of Land Disputes

The Panel heard that Natural Resources Canada, which is currently responsible for the arbitration of land disputes between landowners and proponents, does not share enough information on past decisions with the public. As such, these decisions cannot be cited as proof of precedent.

The Panel heard that, given the abovementioned difficulty accessing information, an independent appeals tribunal could be created. The NEB would not be a suitable arbiter as it is not impartial enough in its role as regulator.

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Emergency Preparedness and Risk Mitigation

The Panel heard that pipeline leaks and spills have devastating effects on current and future generations of Indigenous Peoples. Current threats and consequences include declining water levels, loss of wildlife and contamination of traditional food sources.

The Panel heard that the NEB should adopt a precautionary principle when assessing projects, based on Indigenous Traditional Knowledge. Participants were particularly concerned with protecting waterways. It was suggested that such water protection efforts

may be inspired by environmental stewardship and watershed protection measures already being implemented by Indigenous Peoples in the regions affected.

It was stated that communities must be prepared to react to spills. The Panel heard that communities should be made aware of the composition of substances being transported by pipeline through their territory and of the related safety and emergency response measures that are required to mitigate damage.

The Panel heard a call to reform the NEB Act, the *Canadian Environmental Assessment Act* as well as the *Pipeline Safety Act* to better reflect the needs and priorities of Indigenous peoples. It is believed that Indigenous communities would be better informed if the government of Canada itself had an official role in pipeline monitoring and safety, as this would trigger the Crown's duty to consult, which mandates that Indigenous Peoples be consulted and accommodated as needed when a contemplated action may impact their rights.

The Panel heard that communities should be provided with more information on the potential risks of a project at the onset and that the regulatory process must leave room to suspend or cancel a project if a need for further studies exists.

The Panel heard that Indigenous communities must receive adequate emergency preparedness training and response tools. Participants suggested that with investments in post-secondary education and job training, Indigenous peoples could play a key role in risk mitigation, emergency preparedness, and emergency response efforts, leveraging their wealth of traditional knowledge to create safer, more responsible and more profitable projects.

Enforcement and Monitoring

Participants expressed concern over the degree to which the NEB enforces the laws, regulations and conditions placed upon proponents and their projects. It was proposed that conditions be worded less vaguely, to clarify what is expected of the proponent. Participants expressed their hope that a modernized NEB will not only have more stringent rules, but also the means to enforce them. It was suggested that there is a need for more on the ground surprise audits and that these should only be conducted by organizations at arm's length of industry.

Another idea offered to increase transparency and accountability was to track a proponent's compliance with project conditions on a public online forum. Another suggestion was to create a Compliance and Enforcement branch of the NEB that partners with Indigenous watchmen on the ground.

One participant stated that the liability limit of 1 billion dollars for spills and other incidents should be increased to better account for the damage being done to Indigenous rights for current and future generations.

Some participants shared their belief that pipelines are leaking all over the country and that Indigenous Peoples are not being engaged enough in monitoring and mitigating these risks. The Panel heard that Indigenous Peoples were not consulted on the *Pipeline Safety Act* which is now being used to prevent them from accessing the site of a pipeline to monitor its effects, and allows proponents to access Indigenous traditional territories to conduct integrity digs without triggering consultation obligations. Participants are against proponents being left to monitor themselves.

The Panel heard that participants feel that the NEB places economic interests above compliance with its own rules, citing instances in which Indigenous peoples have had to urge them to ensure that conditions and regulations are being respected. The Panel also heard that proponents are being allowed to begin digging for a project before it has been approved, already changing the landscape.

Participants would like to see plans to restore the land, air, water and other natural resources to their original state mandated by the NEB Act once a project is complete. One participant shared the importance of the continuous monitoring of impacts to treaty rights. They also proposed that proponents seek the approval of Indigenous communities before finalizing their emergency and restoration plans.

The Panel heard that the NEB should continue to be responsible for the oversight of conditions set as part of the project review process.

It was mentioned by participants that existing pipeline infrastructure should be reassessed in light of whatever changes result from the NEB modernization process and that any issues that arise should be addressed as they would be in a new project application.

THEME: Engagement With Indigenous Peoples

Public Session – March 28, 2017

The Panel heard that the NEB and proponents must behave honourably and in accordance with laws governing their relationship to Indigenous Peoples. It heard that these laws, including the NEB Act, will have to be amended in accordance with the UNDRIP, which establishes the minimum criteria for interacting respectfully with Indigenous Peoples.

Participants discussed the Crown's duty to consult Indigenous Peoples on any contemplated action that may impact their rights, as per section 35 of the Constitution. It was stated that the NEB cannot currently consult on behalf of the Crown.

The Panel heard that consultations having to do with a specific project could form part of the NEB process itself and even be conducted by the proponent. In this case, larger policy questions would still need to be consulted on by the Crown. An alternative interpretation

would allow the NEB to consult with Indigenous Peoples but would have the Crown set standards by which it could evaluate and issue a decree as to whether the duty to consult has been adequately carried out.

The Panel heard that consultations are quite onerous for many Indigenous communities and that the timelines associated to them (often 30 days) are unrealistic given their culture and the time and resources available to them.

Some participants proposed the creation of a new permanent commissioner in the Office of the Auditor General responsible for all consultations with Indigenous Peoples, and for the implementation of UNDRIP and of Truth and Reconciliation Commission recommendations. Alberta's Aboriginal Consultation Office was offered as an example.

The Panel heard that it would be helpful if the government could identify which Indigenous political bodies should be consulted by proponents. A participant then reminded the Panel that, as in other societies, Indigenous political leaders do not represent all of their community's ideas or opinions, so Indigenous individuals should also have the chance to be heard.

Indigenous Traditional Knowledge

The Panel heard that project approval and lifecycle management should integrate a wider range of approaches, especially those integrating Indigenous Traditional Knowledge, throughout NEB processes. Additionally, NEB processes could draw inspiration from Indigenous cultural and legal tools to better account for principles such as intergenerational justice and the fight against climate change.

The Panel heard that consultation will sometimes have to take place in native languages to be meaningful and complete and to fully convey the traditional knowledge and Indigenous worldviews.

Early and Continuous Engagement

The expert Panel heard that Indigenous Peoples must be engaged from the earliest stages of a project. They must be represented among those designing and implementing projects, as well as in decision-making bodies. The Panel heard that in instances where a project spans many Indigenous jurisdictions, shared decision-making could be negotiated, though it may take a long time.

The Panel heard that the NEB might include in its project conditions the need to respect local laws, including those of Indigenous Peoples. The Panel heard that everything the NEB does should contribute to relationship building, including with the Métis Nation which has historically been neglected. The Panel was asked to recommend that the NEB's governing legislation advance the protection and fulfillment of Métis rights.

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Legislation and Reconciliation

The Panel was told that currently, a deep distrust reigns over Indigenous Peoples' relations with the Crown and the NEB given their past undermining of constitutional and treaty rights. It heard that the NEB Act and operations should be modified to better support reconciliation. It was noted by one participant that reconciliation is about sharing the land, benefits and power.

The NEB Act should also reflect Canada's signing of the UNDRIP and integrate its key principle of FPIC. The Panel heard that treaty rights should be recognized and respected at every turn.

A specific legislative change requested was to eliminate section 78 of the NEB Act whereby proponents are given the means to expropriate reserve lands.

The Panel heard that the NEB and proponents' dealings with Indigenous Peoples should take place within the context of a nation-to-nation relationship, respecting Indigenous modes of governance, ways of knowing and decision-making schemes.

It was noted that some Indigenous nations have, or are elaborating, formal constitutional documents and that, where these are available, the Crown, the NEB and proponents should be conducting themselves within the norms that they dictate.

Participants said that, rather than requesting that Indigenous Peoples continually identify and justify their rights, they hope that conversely, under a modernized regulatory process, proponents will be tasked with proving how their projects will *not* infringe on Indigenous rights. One participant said that reconciliation cannot take place until Indigenous Peoples are included as equal parties in decision-making circles.

Meaningful Consultation

Participants asserted that Indigenous Peoples have the right, to be consulted in a truthful, honest, open and collaborative way that influences decisions and processes.

The Panel heard that the constitutionally mandated duty to consult cannot be delegated to the NEB, the provinces, the proponent, or any other party. It heard that this has been confirmed by the Supreme Court of Canada, but that parties are acting as though it can be. When delegated to the NEB, the potential scope of consultation and accommodation are greatly reduced, resulting in unsatisfactory outcomes. It was also noted that risk mitigation is not necessarily sufficient accommodation.

The Panel heard that the confusion surrounding the duty to consult prevents it from being carried out adequately. At times, the NEB does some of the consultation or relies on proponents to do so. It heard that this should not be the case and that the Crown itself

should be involved. Conversely, the Panel heard that the NEB Act should be modified to clarify whether the Crown's duty to consult can be delegated or not.

Participants shared that proponent consultations often place them in a difficult position. They fear that the fact that they participate in a consultation may be misused as proof of community assent to a project. On the other hand, if they cannot stop a project from moving forward, they would still like a say in how it is implemented. It was suggested that the NEB provide proponents with clear and specific guidance on each party's responsibility to consult with Indigenous Peoples and accommodate them. The Panel heard that the Indigenous Peoples affected should be the ones to decide on the appropriate accommodation.

The Panel heard that, to build credibility, guidelines should specify the need to consult with the correct representatives, such as chiefs and in some cases, associations. The Panel heard that, as the impacts of a project are different and at times graver for Indigenous women, they should be consulted in particular. It was specified that consultations should be face-to-face, without relying on letter-writing campaigns.

Participants believe that the NEB should be equipped with set criteria to test whether all consultation obligations were adequately carried out before approving a project. To those concerned about the extensiveness of consultation requirements, participants said that early and comprehensive consultation is likely to reduce the scope and length of future consultations.

Consultation Funding

The Panel heard that many Indigenous communities, such as the Metis Nation, lack the significant financial resources and in-house capacity to adequately respond to consultation requests. As such, the current average timeline of 30 days to respond is unrealistic.

Participants stated that such communities should receive funding to enable their meaningful participation. One participant specified that the need to provide funding is supported by case law as forming part of the Crown's duty to consult. Some participants put forward the idea of providing communities with multi-year funding, to build internal capacity to respond to all forthcoming requests for consultations.

The Panel heard that proponents should be prepared to assume the costs associated with the activities needed to meet their consultation threshold and maintain positive relationships with the community. However, one participant said it is not fair to expect the proponent to make up for a lack of consultation by the NEB or the Crown.

Indigenous Worldview and Traditional Knowledge

The Panel heard that the NEB, proponents and the Canadian public must understand that opposition to projects stems from an Indigenous worldview that highly values the protection of Mother Earth and of future generations. This is a uniting belief among various Indigenous Peoples who have lived on their lands for millennia in an ecosystem they have come to know

intimately.

Participants said that the NEB's current decision-making criteria do not mesh well with Indigenous knowledge and priorities, passed on by elders who are viewed by outsiders as less qualified than scientists with formal credentials. However, traditional knowledge is often very detailed and technical and provides key insights on sensitive environments, emergency mitigation and economic opportunities. As such, some participants said that it would be beneficial to integrate it to all facets of the NEB's role and responsibilities.

Others suggested that rather than striving to integrate traditional knowledge to NEB proceedings, it could form the basis of a parallel process which better reflects its particularities. An example was given of how traditional knowledge, in the form of observing black bear behaviors, had alerted Indigenous peoples to climate change before it was broadly recognized in the scientific community.

The Panel heard that, as part of the decision-making process, the Crown should continue to provide Indigenous communities with funding to collect and document traditional knowledge and to conduct research on the issues of greatest concern to them.

The Panel heard that collecting and assessing traditional knowledge cannot be done the same way as conventional knowledge. It was told that traditional knowledge keepers should not be asked to share their knowledge in a quasi-judicial setting in front of an intimidating panel, or to condense it in a short, written answer to a pointed question.

Traditional knowledge sometimes cannot be translated to English or French without losing its meaning, therefore, it is believed to be in the interest of all parties to conduct certain proceedings and meetings in native languages, with interpretation as needed.

Early and Continuous Engagement

Some participants believe that the Crown, the NEB and proponents should be pursuing consent and shared decision making, rather than consultation in a strict sense. Others said that the NEB needs to demonstrate how Indigenous rights, interests and perspectives were taken into account when coming to a decision.

The Panel heard that unless there are truly extenuating circumstances, federal processes should defer to Indigenous processes as per land claim agreements and agreements in principle.

Consultation should take place as soon as development is contemplated on Indigenous territory. Access to NEB processes and government consultations should be facilitated. The example of accessibility issues offered was of an Inuit Nation with fourteen communities accessible only by air, in which Inuktitut is the primary language spoken by all age categories. When processes are only in the official languages, or involve consulting web pages, this forms an entry barrier.

The Panel heard that Indigenous Peoples want to be involved throughout the project lifecycle, not only when a new project on their territory is being considered. Participants proposed that the NEB Act mandate the creation of lifecycle agreements between proponents and Indigenous communities. Such agreements could mandate early engagement, joint decision-making and post-construction monitoring.

A participant proposed that a government sustainability council could be created in Ottawa, with input received from all different regions of the country and consultative neighbourhood councils. Indigenous Peoples could map zones of serious consequence and share them with the council so that it could inform further pipeline routes.

A participant offered the Panel the following six hallmarks of improved Indigenous engagement:

1. Capacity funding provided corresponds to a community's needs
2. Arbitrary timelines are removed
3. Indigenous peoples are involved in scoping impact assessments and determining information sufficiency
4. What matters to Indigenous peoples is assessed: go beyond current use and biophysical impacts
5. Indigenous knowledge is respected and incorporated in project planning and NEB decision-making
6. The decisions and perspectives of Indigenous Peoples are respected

Economic Development

Participants stated that, despite what is shown in the media, Indigenous Peoples are not necessarily against economic development, nor the exploitation of resources. They said that communities are often open to talking to companies, but will simply not negotiate the loss of access to ancestral territory, or the degradation of flora and fauna.

The Panel heard that Indigenous People should receive a fair share of benefits from the projects crossing their territories in the form of shared profits, community improvement projects and procurement partnerships, among others. Participants discussed the possibility that certain Indigenous communities give their assent to a project out of desperation to resolve poor living conditions. It was posited that many would not approve projects, many of which contradict the rules imparted on them by their ancestors, were there other means of subsistence available to them.

THEME: Public Participation

Public Session – March 28, 2017

The Panel heard of the need for fair, transparent and balanced participation. The unfair turn

of events of past consultations was decried, when the loudest or most violent participants seemed to hijack proceedings at the cost of others being heard.

Criticisms were raised as to the inability of the NEB to lead and coordinate effective and meaningful citizen engagement. The expert Panel heard of the need to scale public participation opportunities overall: participants believe that the degree of public participation should be commensurate with the importance of a project. It was noted that a variety of online tools can be leveraged to collect diverse Canadian perspectives.

Concerns were raised over open houses being an insufficient means of public consultation. With no written record, it is easier for proponents to make misleading statements and not be held to account for them.

The Panel was also told that while a hearing likely wouldn't be needed, small replacement and modification projects (i.e. a valve or pump replacement) should still require some form of public consultation.

The Panel heard that there should be public participation in the EA process. In addition, beyond project-specific review processes, there needs to be a forum for public deliberations on larger energy policy issues, as well as strategic and regional environmental assessments.

The Panel heard a call from some participants for the right to obtain a judicial review of NEB decisions at no unnecessary cost to the party seeking it.

Early Engagement

The Panel heard that before submitting a project application to the NEB, companies should already have begun engaging communities and modifying their project accordingly. The Panel also heard that the NEB itself could engage the public in early informal consultations, prior to beginning the project review process, in order to identify what information the public would like to be collected and presented to them. It was put forward that online tools may be particularly helpful in the early and continuing collection of diverse Canadian perspectives.

Project Hearings

The Panel heard that the EA and all official positions on a project, including those of the federal, provincial, territorial, municipal and Indigenous governments, the proponent and civil society groups, should be published on the NEB website, to provide hearing participants the opportunity to familiarize themselves with these views and cross-examine them, as necessary.

A participant further suggested that the Panel consider alternatives to the quasi-judicial hearing format such as "world café", community cartography and round tables. The Panel heard that hearings should also allow for written submissions, as well as audio and video

submissions, which would make the process more inclusive of those with difficulties reading or writing.

Participants voiced a desire to see the in-person hearing process become more welcoming and inclusive, suggesting it be inspired by the BAPE in Quebec. The BAPE implements a two-step consultation process whereby proponents present their project and answer questions from the public as a first step, following which the public can submit comments.

The quality of participation was also stressed, noting that it must be inclusive, transparent, and culturally sensitive. One participant emphasized the importance of letting communities determine which forms of participation are best suited to them –while some may appreciate hearings, others may not. Including communities earlier on in the project review process would result in more meaningful participation.

The Panel heard that the NEB should facilitate the participation of smaller entities in hearings, to encourage more decentralized decision making, including providing more time to register and simplifying the registration form. The Panel also heard that technologies such as video or audio calls can be leveraged to enable remote participation in NEB proceedings.

The Panel heard that the NEB should allow participants interested but not deemed to be “directly affected” to submit a letter without having to pass a standing test. This was allowed prior to the 2012 legislative changes that introduced the standing test. Some participants voiced their position that only those directly affected by a project should have standing. The Panel heard that there should be no standing test and that if thousands of people truly are interested in having standing, as some parties fear, it signals the importance of a project, and that they must be heard. One participant said that all Canadians are affected by energy projects as they ultimately impact the value of our dollar and the stability of our climate.

Participant Funding

Participants told the Panel that citizen groups require sufficient participant funding to offer their variety of opinions and expertise as part of the project review process. They said that unrestricted funding would enable the study of alternative scenarios, to ensure that the NEB and federal government are making informed decisions.

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n/a

ADDITIONAL COMMENTS

- One participant expressed disappointment that there was not a specific working document produced on the issues facing land owners.
- Some participants expressed their hope that the time they invested in this consultation process will have influence over the Panel’s recommendations, and ultimately the government’s actions.