TAHLTAN
Central Government

Written Submissions of the Tahltan Central Government to the Expert Panel on the National Energy Board Modernization

March 31, 2017

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1. Introduction

These are the written submissions of the Tahltan Central Government ("TCG") to the Expert Panel on National Energy Board Modernization ("Expert Panel"). The TCG is the central administrative governing body for the Tahltan Nation located in Dease Lake. It represents approximately 5,000 members of the Tahltan Nation living on and off reserve.

2. Overview of the Tahltan Nation

2.1 History

The Tahltan Nation is an Athapaskan-speaking group that includes six Tahltan clans and one Sekani group. The Tahltan territory includes the Stikine River watershed and surrounding headwaters (see Figure 2.1). The Stikine River covers approximately 242,160 square kilometres (93,500 square miles) from the Coast Mountains in the west to the lower parts of the Yukon's boreal forest in the north, the Cassiar Mountains in the east, and the headwaters of the Nass and Skeena Rivers in the south. The Tahltan territory constitutes approximately 11 percent of British Columbia's land mass. At present, about one-third of the Tahltan Nation lives in the Tahltan territory, though not all are living on reserve lands.

There are three Tahltan communities today: Luwe Chon (Iskut), Tatl'ah (Dease Lake), and Tlegohin (Telegraph Creek).

The Tahltan Nation has never ceded or surrendered any of Tahltan territory. Our ancestors have proclaimed this through their actions and teachings and made it known to the world in the 1910 Declaration of the Tahltan Tribe ("1910 Declaration").

Tahltan title and rights are the collective trust of all Tahltan people and the Tahltan Nation as a whole. The membership of the Tahltan Nation is drawn primarily from two Indian band communities, each with an elected council: the Tahltan Band (based at Telegraph Creek) and the Iskut Band (based at Iskut). Common interests are dealt with by the Tahltan Central Government, which collaboratively represents all persons of Tahltan ancestry in matters related to assertion of inherent Aboriginal title, rights, interests, land, and resources in Tahltan territory. The TCG, first established in 1975 as the Association of United Tahltans and then renamed in 2015, is located in Dease Lake, British Columbia, a central point between the two communities.

The Tahltan Nation has Aboriginal title and rights, including the inherent right to self-government. This governmental role encompasses stewardship responsibilities for the entire territory and dictates the need for Tahltan Nation involvement in resource management and decision making within its territory. The Tahltan Nation, under the guidance of the 1910 Declaration and the 1987 Tahltan Tribal Council Resource Development Policy Statement ("1987 Resource Development Policy") has established tools to support recognition and assertion over Tahltan lands; these tools include comprehensive decision making for resource development activities managed by the Tahltan Heritage Resources Environmental Assessment Team.

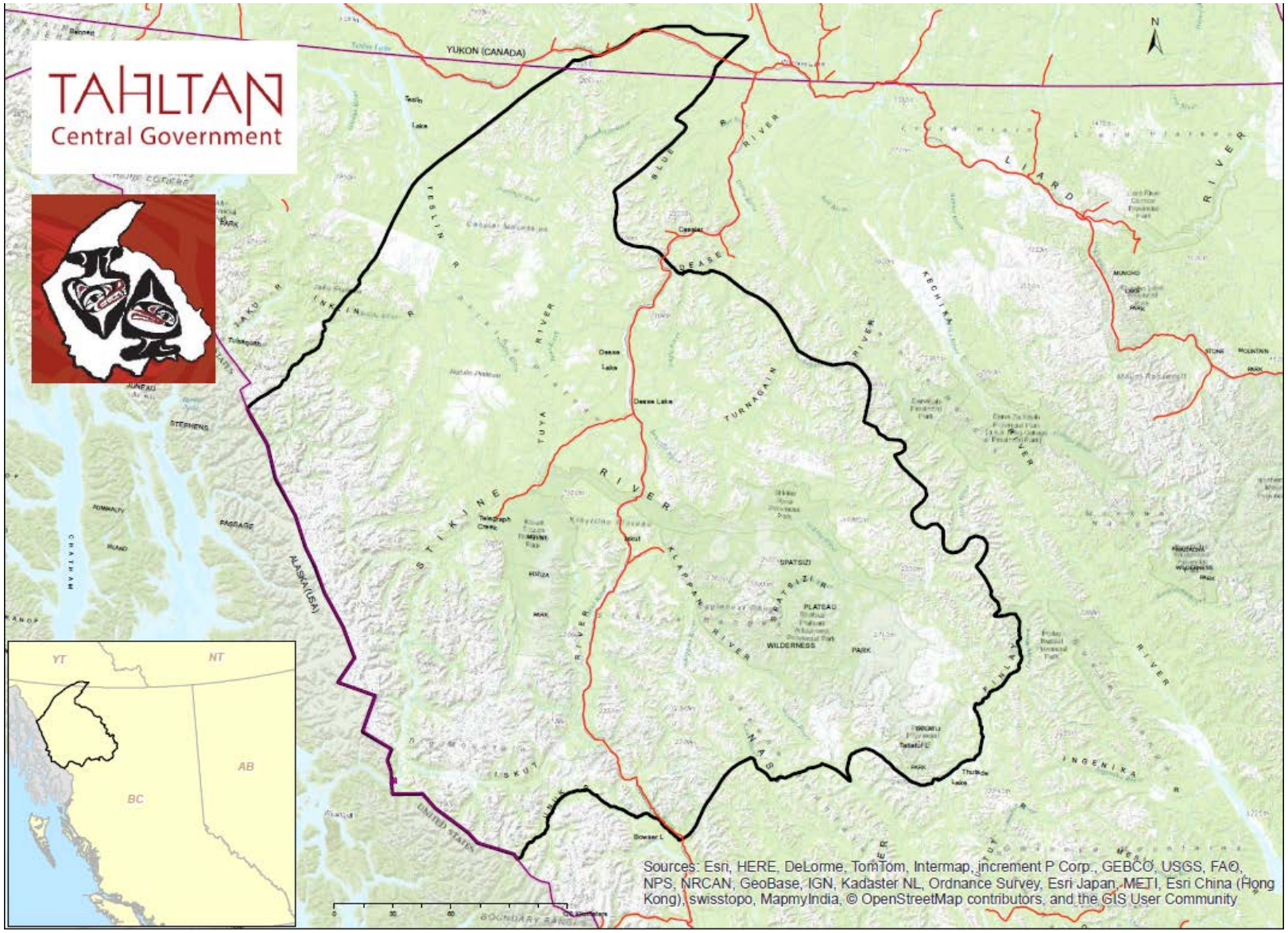

Figure 2.1: Tahltan territory

2.1.1 Tahltan Heritage Resources Environmental Assessment Team

The responsibility of the Tahltan Heritage Resources Environmental Assessment Team ("THREAT") is to support the protection of Tahltan environmental, social, cultural, heritage and economic interests that may be affected by industrial action in the Tahltan territory. THREAT's role, independent of government and industry, includes assessing potential impacts from new and existing industrial development on Tahltan territory, identifying options for avoiding or mitigating impacts, and ensuring that Tahltan people are meaningfully involved in permitting processes and project reviews.

THREAT consists of members of the Tahltan Nation who have knowledge and experience in resource development, social and cultural activity, environmental resource management, and Tahltan traditional practices. THREAT members are assigned to sub-groups where their particular expertise would be the most beneficial. Tahltan members on the various THREAT working groups have years of field and technical experience. For areas where the technical experience of the team may be deficient, the THREAT organization may contract consultants to ensure that THREAT responsibilities are being met.

2.2 Environment

Figure 2.2: Iskut River

Tahltan lands are vast (approximately 11 percent of British Columbia's land base) and include many different ecosystems supporting wildlife, fish, water, and other values of significance to the Tahltan people and their way of life (see Figure 2.2). The THREAT has supported the TCG in exercising Tahltan decision making, including decision making regarding stewardship and other Tahltan governance laws that support the sustainability of Tahltan lands. THREAT, under the careful guidance of Elders and other Tahltan people, focusses its work on Tahltan values to provide guidance and structure to project reviews. Particular values that support or form the basis of analysis in reviews include: fish and wildlife, water, and culture and heritage. These values help form the basis of risk analysis and impact assessment work that THREAT provides to the Tahltan leadership and the Tahltan Nation regarding development projects in Tahltan territory.

2.2.1 Fish and Wildlife

Fish and wildlife in particular are uniquely linked to Tahltan culture, identity, and history. Values related to fish and wildlife have been carried forward through time and remain vitally important in the present as well as for future generations (see Figure 2.3).

The Tahltan people have relied on the fish and salmon resources in Tahltan territory since time immemorial. These valuable resources have provided sustenance for generations and provided a foundation for trade with neighbouring First Nations and early European settlers.

2.2.2 Water

Water management is an important component of the THREAT mandate. Tahltan territory is blessed with some of the most abundant and high-quality water resources in the province. Across the territory, every day, Tahltans rely on water in the territory to live and maintain activities that support our way of life. Water is a distinct part of our culture as Tahltan people, and therefore we need to ensure that this valuable resource is protected now and for future generations. The value of the water resources across the territory cannot be over-estimated since water is central to the maintenance and viability of our valuable ecosystems and the spiritual and cultural linkages between them.

Figure 2.3: Fish camp

2.2.3 Culture and Heritage

Tahltan culture and heritage are described in our oral data, which offer us the voices of our ancestors. This important information provides the modern-day Tahltans with evidence and examples of Tahltan sovereignty, past and present. The interviews, the questions asked and answered, our language, the context, the knowledge, and ultimately the data of our past is beyond imagination. The knowledge provides information on all systems of sovereignty of the Tahltan Nation. Today the work of multiple generations of Tahltans is becoming the foundation and means to make informed decisions in Tahltan territory.

Tahltan people live our culture everyday from the way that we fish, tan moose or deer hides, hunt, collected plants, to the way we teach our children. Our Tahltan language is an important part of our culture and who we are; in recent years Tahltan have initiated a language revitalization program to ensure that our language remains strong for future generations.

3. Tahltan Development and Lessons for Regulatory Hearings

3.1 Land Development and Planning

> The Tahltan have an inherent responsibility, as stewards of their lands and resources, to ensure that any use or development of those lands and resources is carried out in a sustainable and responsible manner in order to preserve their ability to continue to use and occupy their territory and to protect their culture and economies.[1]

THREAT is a unique team of professionals who work hard to ensure the effective management of new industrial developments in the Tahltan traditional territory. THREAT reports to the TCG and the membership of the Tahltan Nation and provides technical support and resources to identify the potential impacts of industrial development activities to Tahltan territory and Tahltan title, rights, and interests. THREAT works in concert with government in numerous regulatory processes, including provincial and federal regulatory processes, to review new projects in the territory and ensure Tahltan knowledge is incorporated. Team members represent specific disciplines and bring their own expertise to each project.

3.2 THREAT's Previous Regulatory Involvement

THREAT has worked through both the provincial and federal regulatory processes on a number of projects in Tahltan territory, including the Northwest Transmission Line, the Red Chris mine, the Galore Creek mine, the Kerr-Sulpherets-Mitchell (KSM) mine exploration project, the Schaft Creek project, the Kutcho Creek project, the Forrest Kerr hydroelectric project, the McLymont Creek hydroelectric project, and the Arctos anthracite project (previously known as Klappan Coal).

Figure 3.1: Klappan Range

[1] Tahltan Central Council, *Draft Land and Resource Policy,* July 2004.

THREAT also participates in the review of permit applications, including applications for exploration permits for resource development projects operating in Tahltan territory. Each project brings its own unique challenges for the team, and THREAT and the Tahltan leadership work hard to meet the challenges.

THREAT has participated in several different technical working groups for each of these projects through the regulatory processes; in each of these working groups, THREAT based its review and analysis on Tahltan knowledge of Tahltan people, values, and the land to ensure that the commitments to environmental stewardship and to the Tahltan people as written in our 1910 Declaration were consistently considered and upheld.

3.3 Lessons from TCG/THREAT's Past Regulatory Involvement

Based on THREAT's participation and review of projects, it was determined that the current processes are not adequate to protect Tahltan rights and interests in perpetuity. For the most part, THREAT carried out its work on a project-to-project basis, which is not in accordance with the traditional holistic approach to management and decision making. THREAT operations are driven by the need to react to permit requests and proposal assessments, which are not designed to highlight Tahltan interests and priorities and did not address concerns related to the cumulative effects of multiple project developments.

Through the experience of managing multiple regulatory processes, it became evident that Tahltan people must be involved in strategic-level planning and decision making, since it is at this level that the key decisions that may have an effect on Tahltan title, rights, and interests are made. THREAT is an important resource for the Tahltan Nation as it provides the technical capacity to participate in the regulatory processes related to large resource projects while implementing principles found in the 1987 Resource Development Policy. Tahltan people want to make changes in the way resource development takes place in Tahltan territory, including the way Tahltans participate and take leadership roles in improving the way resource projects are developed.

Based on THREAT's experience of participating in the regulatory processes for multiple large projects, a number of opportunities for improvement have been identified:

- Have THREAT team members from different disciplines work together and effectively communicate regarding issues that relate to wildlife and other values such as water, fish, Tahltan Knowledge, and Tahltan culture.
- Undertake field visits to industrial development sites to provide recommendations regarding the monitoring of potential wildlife impacts.
- Reduce the risk of impacts from development projects by striving to increase standards for wildlife and wildlife-habitat assessment and monitor these in a consistent manner for all development projects.
- Provide information on wildlife to companies and government regulators, based on Tahltan Knowledge and the social, cultural, and heritage importance of wildlife to the Tahltan Nation. THREAT has been working to help companies and government regulators to understand the ancient, historical, current, and future importance of wildlife when assessing potential effects of resource development.

- Develop a new approach to regulatory review processes that includes early project-proposal assessment, a collaborative approach to project definition and scope for application, development of work plans for Tahltan study, and an independent assessment report, to be filed by the Tahltan government.
- Develop a cumulative effects assessment framework to be included in all regulatory processes for projects in Tahltan territory.
- Increase direct participation in the scoping, review, and field survey of potential fish-habitat compensation sites. This has been done with the intention of identifying compensation projects that are most meaningful in terms of fish-habitat restoration and Tahltan interests.

4. History and Evolution of the National Energy Board

Before presenting the main submissions and recommendations of the TCG, it would be helpful to provide some background information regarding the history and evolution of the National Energy Board ("NEB").

4.1 The Creation of the NEB

The event that initiated the creation of the NEB was the 1947 discovery of enormous oil reserves in Leduc, Alberta.[2] While natural gas had been discovered in Alberta as early as 1883, the Leduc discovery fundamentally reshaped the nature of the conversation surrounding energy development in Canada.[3] This discovery indicated that Canada had the potential to become a large energy exporter. Prior to this, debate had tended to focus on whether the known natural gas deposits were commercially viable as a global product. However, following this discovery, the primary question was, how can we best get this product to market?

The decade immediately following the discovery saw a political firestorm that has come to be known as the "Great Pipeline Debates."[4] The emotionally charged nature of these debates cannot be overstated. Indeed, they have been described as "one of the most famous confrontations in parliamentary history."[5] Parliament had to grapple with many issues: Where should pipelines be built? Should the controlling interest be publicly or privately owned? How should approval be granted? In the absence of a unified approach, questions like these were hotly contested.

Two Royal Commissions were created that sought answers to these questions. In 1957, the Royal Commission on Canada's Economic Prospects (the Gordon Commission) recommended that the government develop a comprehensive energy policy and create an energy authority to provide ongoing advice about the country's energy requirements.[6] The following year, in 1958,

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[2] Sonya Savage, *Bill C-38 and the Evolution of the National Energy Board: The Changing Role of the National Energy Board from 1959 to 2015* (2015) Canadian Institute of Resources Law Working Paper No 2016/52 at 4.
[3] *Ibid.*
[4] Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Vancouver: Douglas & McIntyre, 2000) at 13.
[5] *Ibid.*
[6] JM Hendry, "Regulatory Reform and the National Energy Board" (1982) 7 Dal LJ 235 at 241.

the Royal Commission on Energy (the Borden Commission) completed its report on matters relevant to the efficient and economical operation of interprovincial and international pipelines, including their structure and control and the regulation of prices and rates for their use.[7] As a direct result of these commissions, Parliament passed the *National Energy Board Act 1959* ("*NEBA 1959*") in July 1959.[8]

4.2 The NEB from 1959 to 2012

Parliament drafted the original *NEBA 1959* based on the two commission reports and two pieces of existing legislation, which the *NEBA* repealed. The repealed legislation included the *Pipelines Act*, which applied to the construction of international pipelines, and the *Exportation of Powers and Fluids and Importation of Gas Act*, which applied to the construction of international power lines for exportation.[9] The *NEBA 1959* did not apply to coal, nuclear energy, or electrical energy broadly (i.e., beyond construction of international power lines and export of electrical power) and neither does the current *NEBA*.[10]

In drafting the *NEBA 1959*, Parliament had to grapple with three primary questions: 1) to what extent should public opinion be taken into consideration; 2) how independent should the NEB be from Parliament; and 3) who should get the final decision?

4.2.1 Public Interest Consideration

The Borden Commission, the original text of the *NEBA 1959*, and Hansard all support the idea that the NEB was created with a broad and virtually limitless public interest mandate. The Borden Commission recommended that a national energy regulator must take into account "all matters which in its opinion are required to be considered by it in the public interest."[11] While this left some discretion for a regulator to determine what was considered part of the public interest, it specified that public interests were to be explicitly considered. This became codified in section 52 of the *NEBA 1959*.[12] In outlining different criteria that require consideration, section 52(e) provided that "any public interest that in the Board's opinion may be affected by the granting or the refusing of the application" must be considered.[13]

Furthermore, Hansard shows that many legislators had concerns that this regulator would simply be a rubber-stamping "political stooge" of the government.[14] Prime Minister John Diefenbaker responded that, in order to ensure that the board operates for the benefit of all Canadians, "it will operate beyond any suggestion of control in any way."[15] The scope of material available for

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[7] *Ibid*.
[8] Rowland J Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What does Regulatory 'Independence' Mean? Should We Pursue it?" (2013) 50 Alta L Rev 4 757 at 767.
[9] *Ibid*.
[10] *Ibid*.
[11] Canada, Royal Commission on Energy, *First Report* (Ottawa: Queen's Printer, 1958) at 21.
[12] *National Energy Board Act*, S.C. 1959, c. 46 [*NEBA 1959*], s. 59(e).
[13] *Ibid*.
[14] *House of Commons Debates*, 24th Parl., 2nd Sess., Vol. 4 (26 May 1959) at 3950.
[15] *Ibid* at 4020.

consideration was as wide as possible. Thus, the NEB was permitted to investigate and analyze any aspect of a projected decision in order to ensure the public benefit was maintained transparently.

4.2.2 Independence

In answering the second question, Parliament decided that the NEB was to be as independent as possible while still adhering to the principle of parliamentary sovereignty. The *NEBA 1959* separated members of the board from control by Parliament. Subject to any internal limits of the *NEBA 1959,* NEB members were to have exclusive control over how they conducted inquiries. One of the principal mechanisms of control was that, once appointed, members of the board would stay on for a term of seven years.[16] In addition, members could not be removed except in exceptional circumstances and only upon address from both the House of Commons and the Senate.[17] The NEB was created in this fashion to ensure that "the public interest [could] and [would] be maintained."[18]

4.2.3 Decision-Making Authority

The regime created by the *NEBA 1959* gave principal decision-making authority regarding approval or rejection of applications to the NEB as opposed to elected officials.[19] Following an inquiry by the NEB, a decision was rendered and sent to the government. There are two important aspects of this decision-making power. First, if the NEB concluded that a project was not in the public interest and should not go ahead, the project could not be revived.[20] Rejecting a project did not require approval from the Governor in Council ("GIC"). Second, if approval were granted, the GIC could still reject the project; however, the GIC could not change or modify aspects of the project after NEB approval.[21] This ensured that elected officials still retained the ability to approve or reject projects, but only if they had passed approval by the NEB.[22]

From 1959 to 2012, the *NEBA* remained largely unchanged. While there was some variance in actual practice, major reform did not begin until after the federal election in 2006.

4.3 2012 Reforms to the NEB

In 2012, the omnibus Bill C-38, also known as the *Jobs, Growth and Long-term Prosperity Act*, amended some of Canada's most important pieces of environmental protection legislation.[23] The changes to the *NEBA* were profound. The government was overt about its intention to simplify the review process. In a 2012 speech, then–Finance Minister Jim Flaherty said Bill C-38 would "help streamline the review process for [major economic] projects" and "ensure that Canada has

[16] *NEBA 1959*, *supra* note 12, s. 3(2).
[17] *Ibid.*
[18] *House of Commons Debates*, *supra* note 14 at 4021.
[19] Harrison, *supra* note 8 at 765.
[20] *Ibid* at 764.
[21] *Ibid.*
[22] *Ibid.*
[23] *Jobs, Growth, and Long-term Prosperity Act*, S.C. 2012, c. 19 [*Jobs Act*].

the infrastructure we need to move our exports to new markets."[24] The NEB was reformed in four ways.

The first and most important amendment to the *NEBA 1959* was that the NEB's authority over project approval was replaced with an advisory function. Whereas the original *NEBA* had enabled the NEB to reject a project outright (Cabinet had no authority to re-authorize or approve a project rejected by the NEB), Bill C-38 reduced the NEB's function to merely advisory. Section 52 of the original *NEBA 1959* called for the NEB to issue a "certificate" if it decided to approve a project;[25] but section 52 of the new *NEBA* said that the NEB would issue a "recommendation" to Cabinet.[26] The change in language is quite remarkable. What was once a completely independent institution with the power to approve or reject projects was reduced to nothing more than a reporting agency whose reports carried no legal weight beyond persuasiveness. Authority was totally shifted from the NEB to Cabinet.

The second important amendment to the *NEBA 1959* was that public participation in the process was limited to people who were "directly affected" or had "relevant information or expertise."[27] This was also in stark contrast to the original purpose of the NEB, which had previously exercised considerable discretion in determining who would be allowed to participate; the original statute had allowed the NEB to accept "any interested person."[28]

The third important change to the *NEBA 1959* was a narrowing the scope of factors that the NEB is allowed to consider. Prior to the 2012 amendments, section 52 of the *NEBA 1959* allowed the NEB to take into consideration "all conditions that appear to be relevant."[29] Bill C-38 changed section 52 of the *NEBA* and constrained the NEB to consider only factors "directly related to the pipeline and [deemed] to be relevant" by the NEB.[30]

Lastly, sections 52 and 58 were amended to create a new time limit for a review.[31] The limit is set by the Chair and cannot exceed 15 months.[32]

5. Recommendations for Reform

Under its Terms of Reference, this Expert Panel is tasked with making recommendations on the following six issues:

- governance
- mandate
- decision-making roles
- legislative tools for lifecycle regulation

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[24] Hon. Jim Flaherty Budget Speech, "Economic Action Plan 2012: The Budget Speech" (29 March 2012).
[25] *NEBA 1959*, *supra* note 12, s. 52.
[26] *National Energy Board Act*, R.S.C. 1985, c N-7 [*NEBA*], s. 52.
[27] *Ibid*, s. 55.2.
[28] *NEBA 1959*, *supra* note 12, s. 53.
[29] *NEBA 1959*, *supra* note 12, s. 52.
[30] *NEBA*, *supra* note 26, s. 52.
[31] *Ibid*, s. 52 & 58.
[32] *Ibid.*

- Indigenous engagement
- public participation

In the submissions that follow, the TCG provides the Panel with its analysis and recommendations on four of these issues: governance, mandate, decision making, and Indigenous engagement.

5.1 NEB's Mandate and Decision-Making Roles

Currently, two of the NEB's key mandates are to make recommendations to Cabinet regarding the pipeline approval under the "present and future public convenience and necessity" test and to conduct environmental assessments of designated projects under the NEB's jurisdiction. In the submissions that follow, the TCG provides it analysis and recommendations regarding the NEB's mandate and decision-making roles in these two areas.

5.1.1 Cost-Benefit and the Public Interest

Paragraph 52(1)(a) of the *NEBA* provides the NEB with the statutory mandate to make a "recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation" (emphasis added).

Under the *NEBA*, the NEB's directive with regard to assessing whether a pipeline is needed and in the public interest is laid out in section 52(2):

> In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:
>
> (a) the availability of oil, gas or any other commodity to the pipeline;
> (b) the existence of markets, actual or potential;
> (c) the economic feasibility of the pipeline;
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
> (e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

The NEB defines the concept of public interest as follows:

> The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social considerations that changes as society's values and preferences evolve over time.[33]

Moreover, the NEB has indicated that there is no firm set of criteria to determine public interest:

> [T]here are no firm criteria for determining the public interest that will be appropriate to every situation. Like "just and reasonable" and "public convenience and necessity", the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define these terms too precisely. Instead, it must be left to the Board to weigh the benefits and burdens of the case in front of it…
>
> … Since the public interest is dynamic, varying from one situation to another (if only because the values ascribed to the conflicting interests alter), it follows that the criteria by which the public interest is served may also change according to the circumstances. In addition, it is worthwhile to note that while the Board may be guided by past decisions, it need not be bound by them; indeed, it may be imprudent to be so bound given the dynamic nature of the public interest, and the inherent exercise of administrative discretion in the Board's decision-making process.[34]

Regardless of the precise criteria by which the NEB may evaluate public interest, the exercise is one that balances costs and benefits. However, there are fundamental questions to be considered with regard to whether or not each project should be approved: How are benefits and costs to be weighed and analyzed, especially those that are non-monetary in nature? How should conflicting evidence be dealt with? What is the scope of the costs and benefits to be critiqued? The NEB must take an active role in investigating and verifying the estimates of costs and benefits submitted by proponents as they relate to the public interest.

The primary benefits in the construction of pipelines and related projects are simple: they create jobs and increase tax revenue. Whether or not the public benefits from a pipeline is based entirely on monetary aggregates such as these. This is in direct contrast to an analysis of costs to the public, which are overwhelmingly non-monetary. In order to determine whether a project will proceed, a detailed analysis of the proponent's estimates is crucial. Often, proponents build economic models using assumptions that simply do not correspond to reality. Many proponents do so by creating an input-output model, which "essentially represents an extrapolation of existing economic relationships based on an increase in output."[35] However, proponents are free to set the parameters of such models by building in assumptions that manipulate economic data in their favour.

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[33] National Energy Board, *Strategic Plan* (April 16, 2015), online: National Energy Board <http://www.neb-one.gc.ca/bts/whwr/gvrnnc/strtgcpln-eng.html?pedisable=true>.
[34] NEB – Reasons for Decision – Emera Brunswick Pipeline Company Ltd. – GH-1-2006 (May 2007), at 10-11.
[35] James Gerber, *International Economics*, 5th ed. (Boston, MA: Addison-Wesley, 2010) at 79.

The projections submitted by Northern Gateway Pipelines Limited Partnership ("Northern Gateway") to the NEB regarding the Northern Gateway pipeline project show how an input-output model can be biased and unreliable. In 2013, Northern Gateway estimated that the project would increase Canada's gross domestic product (GDP) by CA$270 billion over 30 years while creating 62,694 person-years of employment during construction and 1,146 permanent jobs once it was complete.[36] However, these projections were premised upon key assumptions that have been subject to criticism.[37] This example makes it clear that an independent review of a project's proposed benefits is required. The appointment of unbiased economists as NEB members ensures that figures are closely scrutinized. As a key factor in determining the public benefit is economic, having a clear and concise picture of the projected economic benefits is crucial.

In contrast to a benefits analysis, an analysis of costs is exceedingly more complicated in terms of both quantity and scope. This is because the costs paid by the public are almost entirely non-monetary. In economic terms, these non-monetary costs imposed on the public are known as "externalized costs" or "market failures."[38] Market failures happen when a party that is not involved in a private contract is subjected to a cost or benefit that is not included in the original transaction.[39] While some aspects of these costs can be measured in economic terms, it is difficult to quantify the life of a marine mammal or the rights of Indigenous persons. Therefore, these costs can be virtually infinite in scope. Below, we discuss how the NEB should assess the costs associated with spill response, with greenhouse gas emissions, and with impacts on Aboriginal peoples.

5.1.2 Cost of Spill Response

One potential cost that the NEB must take into consideration when assessing a pipeline project is the cost associated with spill response. A study of pipelines shows that the question regarding the possibility of spills is not so much *if* but *when.* Indeed, between 1999 and 2010, Enbridge's pipelines spilled 804 times.[40] Put another way, they averaged *more than one spill per week.* Furthermore, a consideration of spill-response costs must distinguish between land- and sea-based spills. Two important case studies illustrate the magnitude of costs entailed by each type of spill.

The costs associated with both land- and sea-based spills are immense. In July 2010, a pipeline constructed and operated by Enbridge Inc. (line 6b) ruptured near the Kalamazoo River in Michigan, causing immense damage to its surroundings. The spill resulted in over 3.7 million litres (1 million gallons) of diluted bitumen leaking across a 48-kilometre (30-mile) stretch,

[36] Marc Lee, *Enbridge Pipe Dreams and Nightmares: The Economic Costs and Benefits of the Proposed Northern Gateway Pipeline* (2012) Canadian Centre for Policy Alternatives at 8.
[37] *Ibid.* at 4.
[38] James Gerber, *International Economics*, 5th ed. (Boston, MA: Addison-Wesley, 2010) at 50.
[39] *Ibid.*
[40] Richard Girard, *Out on the Tar Sands Mainline: Mapping Enbridge's Dirty Web of Pipelines* (2010) The Polaris Institute.

affecting private property as well as the surrounding ecosystem.[41] To date, the spill has cost over US$1.3 billion in damages, making it the costliest land-based spill in the history of the US Midwest.[42] Moreover, until the BP oil spill of 2010, the 1989 sinking of the crude-oil carrier *Exxon Valdez* in Prince William Sound, Alaska, was considered the worst anthropogenic environmental disaster ever documented.[43] The *Exxon Valdez* spill affected over 2,100 kilometres (1,300 miles) of shoreline and decimated local wildlife. At least 100,000 sea birds, 2,800 sea otters, 300 harbour seals, 247 bald eagles, and an indeterminate number of salmon and herring were killed.[44] Despite the extensive and costly cleanup, less than 10 percent of the spilled oil was recovered; as of 2012, there were still 87,000 litres (23,000 gallons) of crude oil in Alaskan sand and soil.[45]

Finally, the Northern Gateway application shows that the current approach to spill accounting is inadequate. The NEB must evaluate not only the processes by which a proponent will respond to a spill, but also whether or not these measures will be effective and in what ways the community will be affected. In 2011, Northern Gateway submitted a document entitled *General Oil Spill Response Plan* ("GOSRP") to the NEB.[46] While the GOSRP includes extensive procedural plans regarding the actual physical response to an oil spill, nowhere in the plan is there an analysis of the potential economic, social, and environmental impacts. Given the exceedingly high costs a spill would impose on the public, the NEB needs to grapple with the multi-faceted effects of a spill. Response plans must include analyses of the possible effects on various groups and industries and action plans for compensating these groups and alleviating the consequences of a spill.

5.1.3 Cost of Greenhouse Gas Emissions

Another non-monetary expense that must be addressed is the cost of greenhouse gas ("GHG") emissions. As the general consensus on the need to take dramatic action to respond to anthropogenic climate change continues to build, it is no longer an option for the NEB to exclude consideration of GHG impacts from its approval process.[47] The science behind GHGs has become crystal clear: increasing the amount of GHGs released into the atmosphere has catastrophic effects on global climate systems and immensely increases human suffering.[48] Excluding any consideration of upstream or downstream effects of GHGs places immense externalized costs on the public.

While the externalized costs of GHGs are hard to quantify, Marc Lee, an economist with the Canadian Centre for Policy Alternatives, attempts to do so in a case study of the Northern Gateway project. Lee argues that a low estimate would have the project releasing 80 million

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[41] Federal on Scene Coordinator, "FOSC Desk Report for the Enbridge Line 6b Oil Spill, Marshall, Michigan" (2016) Environmental Protection Agency at 9.
[42] *Ibid.* at 36.
[43] Elspeth Leacock, *The Exxon Valdez Oil Spill* (New York: Facts on File, 2005) at 2.
[44] *Ibid.* at 12.
[45] *Ibid.* at 13.
[46] Enbridge Northern Gateway Project, "General Oil Spill Response Plan" (March 2011).
[47] Savage, *supra* note 2 at 13.
[48] Mojib Latif, *Climate Change: The Point of No Return* (London, UK: Haus Publishing, 2009) at 4.

metric tons (Mts) of carbon dioxide into the atmosphere each year at an externalized cost of CA$50 per tonne.[49] Under these assumptions, externalized costs of CA$4 billion per year would be imposed on Canadians. A high estimate would involve 100 Mts per year and an externalized cost of CA$200 per tonne. According to this estimate, externalized costs of CA$20 billion per year would be imposed on Canadians.[50] In contrast to these costs, Lee estimates that the project would generate around CA$300 million per year in profits.[51] Lee claims that "[t]hese profits are only possible by externalizing costs onto innocent bystanders."[52] Thus, the net loss imposed on the public is staggering.

The failure to account and plan for potential impacts of GHGs was prevalent in the Trans Mountain project. During the NEB review of the project, questions submitted by intervenors ranged from spill management to aboriginal issues, and a large number of questions related to GHGs.[53] However, Trans Mountain elected to ignore these questions entirely. When intervenors filed motions before the NEB seeking orders to compel Trans Mountain to provide full and adequate answers, the NEB compelled answers to a mere 5 percent of the 2,000 questions that had been submitted.[54] Furthermore, cross-examination of the expert evidence relied upon by Trans Mountain was barred in the interests of time. These shortcomings led prominent economist Robyn Allen and former BC Hydro CEO Marc Eliesen to withdraw from the process. In an open letter, Eliesen claimed, "the public hearing [had] become a farce, and this Board a truly industry captured regulator."[55] In light of the Paris Agreement, the NEB must consider GHGs if we are to reach our targets.[56]

5.1.4 Cost of Impacts on Aboriginal Peoples

The final cost that must be accounted for is the impact on Indigenous peoples. While these impacts will vary from project to project and from group to group, they all involve potential effects on Aboriginal rights, Aboriginal title, and Treaty rights. The current approach to Aboriginal interests is focused on the process instead of the results, which means that proponents of projects are more interested in the appearance of consultation than in the accommodation of interests. Nowhere is this more evident than in *Gitxaala Nation v Canada*, the decision revoking approval for the NGP. The majority held that:

> The inadequacies [of consultation]—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada

[49] Lee, *supra* note 36 at 7.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] Daniel Tencer, "Has the National Energy Board Been 'Captured by Industry'?" *Huffington Post* (5 November 2014).
[54] *Ibid.*
[55] Marc Eliesen, "Intervenor Marc Eliesen's Withdrawal from Hearing" Letter to Sheri Young, Secretary to the National Energy Board (30 October 2014), Calgary, National Energy Board.
[56] *Paris Climate Change Agreement*, 22 April 2016, COP 22 (entered into force 5 October 2016).

> little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.[57]

The majority further held that, in the case of consultation for the Northern Gateway project, "the highest level of government directed that information vital to the assessment of the required depth of consultation … not be shared with any First Nation"[58] This is an entirely unpalatable approach to the consultation process.

The NEB must approach Indigenous issues openly and transparently—in a way that is consistent with the Crown's duty to consult and accommodate, the goal of reconciliation, and the United Nations Declaration on the Rights of Indigenous Peoples (see section 5.3 of these submissions below for further details).

In light of the federal government's commitment to implementing the recommendations of the Final Report of the Truth and Reconciliation Commission of Canada, the approach needs a fundamental restructuring.[59] Any analysis by the NEB that fails to adequately engage in a meaningful consultation process risks imposing immense externalized costs on Indigenous people, not to mention being struck down as unconstitutional.

5.1.5 Environmental Assessments

When the NEB was established in 1959, Parliament did not assign it any explicit responsibilities with respect to the natural environment; the original *NEBA 1959* did not contain any reference at all to the environment.[60] In the 1970s, the NEB began to pay attention to environmental concerns through regulations it created under subsection 39(2) of the *NEBA*.

In 1992, Parliament enacted a new piece of legislation, the *Canadian Environmental Assessment Act* ("*CEAA 1992*"), which fundamentally changed the environmental review process and requirements for major projects in Canada.[61] Oil and gas pipelines more than 75 kilometres (46 miles) in length on a new right-of-way and offshore oil and gas pipelines were now subject to comprehensive environmental studies carried out under the supervision of the Canadian Environmental Assessment Agency ("CEA Agency").[62] Pipelines that did not meet these criteria may also have been subject to screening-level assessments or panel reviews if they met the definition of "project" in the *CEAA 1992*.[63] The CEA Agency had the power to appoint the NEB as a responsible authority to ensure that an environmental assessment ("EA") was completed for a project within its jurisdiction.[64] The NEB would then have to ensure that an EA was completed as early as possible in the planning stages of the project and, in any event, prior to the NEB

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[57] *Gitxaala Nation v Canada*, 2016 FCA 187, 1 CELR (4th) 183 at para. 325 (cited to CanLii).
[58] *Ibid.* at para 305 (cited to CanLii).
[59] Liberal Party, "Truth and Reconciliation," online: Liberal Party <https://www.liberal.ca/realchange/truth-and-reconciliation-2>.
[60] *National Energy Board Act*, S.C. 1959, c. 46 as it appeared on 18 July 1959.
[61] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [CEAA 1992], as it appeared on 23 June 1992.
[62] *Ibid*, s. 21; *Comprehensive Study List Regulations*, SOR/94-638 as they appeared on 19 October 1994, paras. 14(a) & (b).
[63] CEAA 1992, *supra* note 61, s. 5 & 14.
[64] *Ibid.*, s. 2(1).

issuing any approvals under the *NEBA*.[65] The overall impact of the *CEAA 1992* on NEB projects was the addition of environmental requirements, with adherence subject to oversight by the CEA Agency.

Parliament made further changes to federal legislation in 2012 that changed the environmental requirements for projects within the NEB's jurisdiction and resulted in the NEB gaining exclusive autonomy over project reviews subject to federal EAs. The *Jobs, Growth and Long-term Prosperity Act* repealed the *CEAA 1992* and replaced it with the *Canadian Environmental Assessment Act, 2012* ("*CEAA, 2012*").[66] The *CEAA, 2012* designated the NEB as the sole federal authority responsible for administering the act for projects within NEB jurisdiction, meaning that the CEA Agency was no longer involved in these projects in any capacity.[67]

Today, under the *CEAA, 2012*, jurisdiction to conduct environmental assessment is divided among three core responsible authorities: the CEA Agency, the NEB, and the Canadian Nuclear Safety Commission. The CEA Agency, as the federal authority created for the sole purpose of ensuring environmental protection throughout the lives of projects, is better positioned than the NEB to carry out this aspect of project reviews and oversight. Consistency in federal environmental reviews and oversight would more likely be achieved if they were conducted by one agency only, and this may also result in a more fair and predictable process. Currently, however, *CEAA, 2012* requires EAs only for designated projects, which means that non-designated projects under NEB jurisdiction are not subject to any form of EA. To remedy this situation, the legislation should expand the requirement for EAs to include all NEB-regulated projects and allow lesser assessment and monitoring requirements for smaller projects with smaller anticipated environmental impacts. Likewise, the CEA Agency should be expanded to take on the additional workload of assessing and monitoring smaller projects, thereby relieving the NEB of its environmental responsibilities entirely and allowing it to focus exclusively on its core technical and advisory roles.

5.1.6 Recommendations Relating to Mandate and Decision Making

The TCG recommends:

- With respect to the determination of public interest:
    - The NEB should retain its own independent economists to scrutinize the purported economic benefits that project proponents predict for projects under review.
    - The NEB should address the multi-faceted effects of spills. The NEB should require spill response plans to include analyses of various potential economic, social, and environmental effects and action plans regarding how to compensate affected groups and how to alleviate the consequences of spills.

[65] *Ibid.*, s. 11.
[66] *Jobs Act*, *supra* note 23, s. 52 & 66.
[67] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [*CEAA, 2012*], paras. 14(4)(b) & 15(b).

- The NEB must assess the costs associated with greenhouse gas emissions, including upstream and downstream impacts.

- The NEB must address Indigenous issues openly and transparently in a way that is consistent with the Crown's duty to consult and accommodate, the goal of reconciliation, and the United Nations Declaration on the Rights of Indigenous Peoples.

- The CEA Agency should be the sole responsible authority for conducting EAs.

5.2 NEB Governance

The NEB has faced two main criticisms with regard to how it carries out its core roles.[68] The first concerns a perception that the NEB is biased in favour of industry; this bias is allegedly apparent in the way it carries out reviews of proposed projects. The second concerns allegations that the NEB is too lax in its enforcement of companies' compliance with both regulations and project approval conditions. Both areas of concern relate to the NEB's governance. In the submissions that follow, the TCG provides its analysis and recommendations in these areas.

5.2.1 Independence of the NEB

There is a perception that the NEB has a bias in favour of industry. Because the NEB is a quasi-judicial body with the powers of a court of record, it must conduct project reviews in a neutral manner and it must be seen to be neutral. If the NEB is perceived to have a bias, then it risks losing its legitimacy as an independent body capable of carrying out its mandate in the public interest.

A recent example of the NEB's actions in the course of a project review raising concerns of bias occurred prior to the hearing process for TransCanada PipeLines Limited ("TransCanada")'s Energy East project. The NEB received the Energy East project application on October 30, 2014, and released the Hearing Order on July 20, 2016.[69] In the interim, the NEB met with various individuals and groups in Quebec in early 2015 to prepare for the NEB's national engagement tour, "an initiative anchored upon improving relationships with municipalities and [Indigenous] Peoples, improving pipeline safety and environmental outcomes."[70] One of these

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[68] Some examples include Benjamin Shingler and Kalina Laframboise, "NEB cancels full week of Montreal's Energy East hearings after protest" *CBC News* (30 August 2016) online: CBC News <http://www.cbc.ca/news/canada/montreal/neb-montreal-energy-east-cancelled-1.3741645>; Mike De Souza, "Two members of regulator say a major Canadian pipeline isn't safe and want a temporary shut down" *National Observer* (24 October 2016) online: National Observer <http://www.nationalobserver.com/2016/10/24/news/two-members-regulator-say-major-canadian-pipeline-isnt-safe-and-want-temporary-shut>; Shawn McCarthy, "National regulator to replace Energy East panel following complaints" *The Globe and Mail* (9 September 2016) online: Globe and Mail <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/despite-protests-ottawa-indicates-it-wont-demand-neb-change-pipeline-panel >.

[69] *Trans Mountain Pipeline ULC Application for the Trans Mountain Expansion Project – Hearing Order* (2 April 2014), OH-001-2014, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2445615>.

[70] National Energy Board, "Energy East Hearing Panel Steps Down" News Release, (9 September 2016), online: Canada News Centre <http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1122609&crtr.tp1D=1> [NEB, "Energy East"].

meetings was with Jean Charest, the former premier of Quebec.[71] At the time of the meeting, Mr. Charest was working as a consultant for TransCanada, which he failed to disclose.[72] Two members representing the NEB at the meeting had been named, months before, as panellists for the Energy East project hearing,[73] and the Energy East project was discussed at the meeting.[74] When the fact of this meeting became public, the NEB initially denied that the Energy East project had been discussed, then it later admitted that it had been discussed, but only with respect to the process and not the substance of the application.[75]

The meeting with Mr. Charest was seen as problematic for a few reasons. First, some environmental groups who met with the NEB claimed that they had been advised ahead of the meetings that the NEB could not discuss with them issues relating to ongoing reviews, including Energy East or recently approved projects.[76] These environmental groups alleged that these meetings were proof that the NEB was biased in favour of industry.[77] Second, the fact that Mr. Charest was employed as a consultant by the proponent of a project under review at the time of his meeting with the NEB led to further concern, particularly because the attendees discussed the project.[78] For its part, TransCanada acknowledged that Mr. Charest was under contract to them at the time, but not as a lobbyist, and it stated that TransCanada did not participate in the meeting in any capacity.[79]

The controversy did not end there. When the NEB was set to commence its hearing session for the Energy East project in Montreal on the morning of August 29, 2016, protesters disrupted the proceedings, citing a conflict of interest among the panellists.[80] The next day, the NEB announced that it would adjourn the Montreal panel session until it reached a decision on two motions filed by members of the public asking for the recusal of panel members.[81] The following week, all three NEB panel members recused themselves in an attempt to preserve the integrity of the NEB and its review of the project.[82] The NEB chair and vice-chair also recused themselves from their administrative duties relating to the Energy East project, including their

[71] Mike De Souza, "Canada pipeline panel apologizes, releases records on meeting with Charest" (4 August 2016), online: National Observer <http://www.nationalobserver.com/2016/08/04/news/canada-pipeline-panel-apologizes-releases-records-meeting-charest>.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*.
[78] *Ibid*.
[79] *Ibid*.
[80] Christopher Adams, "Breaking: NEB cancels Energy East hearing in Montreal as protesters stage sit-in" (29 August 2016), online: National Observer <http://www.nationalobserver.com/2016/08/29/news/breaking-neb-cancels-energy-east-hearing-montreal-protesters-storm-room>.
[81] National Energy Board, News Release, "Suspension of Energy East Panel Sessions" (30 August 2016), online: Canada News Centre <http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1118559&crtr.tp1D=1>.
[82] NEB, "Energy East", *supra* note 70.

duties to assign a new hearing panel, and to ensure adherence with time limits under the *NEBA*.[83] The NEB appointed a new hearing panel for the project in January 2017.[84]

5.2.2 Compliance Enforcement

There are allegations that the NEB is too lax in its enforcement of proponents' compliance with both regulations and project approval conditions. This concern is linked to the previous concern as weak enforcement may relate to inappropriately close relationships between the NEB and industry members. Weak enforcement leads to the perception that the NEB is more concerned with the interests of industry than with those of the public, which would be a violation of its mandate, and this perception interferes with the NEB's ability to gain the public's trust. Three occurrences partially validate this concern and lead to the conclusion that the NEB could improve its management of compliance.

First, in 2012, a whistle-blower alerted the NEB to issues of regulatory non-compliance by a former employer—issues of which the NEB was not previously aware. In a letter to TransCanada posted to the NEB's website on October 11, 2012, the NEB acknowledged that many of the whistle-blower's allegations had been verified during the course of a follow-up investigation.[85] The NEB determined that the non-compliances did not result in any immediate threats, but it informed TransCanada that it would be moving forward with a scheduled audit of the company's Integrity Management Program, which should have detected the problems but had failed to do so.[86] The NEB released the audit report in February 2014, which found TransCanada to be non-compliant in four of nine sub-elements investigated.[87] The NEB directed TransCanada to submit a Corrective Action Plan to address the findings of the audit and stated that it would continue to monitor and assess TransCanada's corrective actions until they were fully implemented.[88]

In this case, since the NEB had already scheduled an audit for TransCanada, it may have discovered the problems identified by the whistle-blower during this audit. However, it is also possible that the issues would not have been found without the whistle-blower's intervention. Also, even if the regularly scheduled audit did identify the problems, TransCanada would have continued to operate in non-compliance of the regulations for the interim. In the audit report, the NEB recognized "that even with a solid regulatory framework, it cannot be everywhere at every

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[83] *Ibid*.
[84] The Canadian Press, "NEB confirms review panel for Energy East pipeline proposal" (10 January 2017), online: Globe and Mail <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/neb-confirms-review-panel-for-energy-east-pipeline-proposal/article33561483/>.
[85] Letter from Sheri Young, Secretary of the Board, to Dan King, VP, Engineering and Asset Reliability, TransCanada PipeLines Limited (11 October 2012) Calgary, National Energy Board.
[86] *Ibid*.
[87] Canada, National Energy Board, *National Energy Board* Onshore Pipeline Regulations, 1999 *(OPR-99) Final Audit Report for Integrity Management Programs, File Number OF-Surv-OpAud-T211-2012-2013 01, TransCanada PipeLines Limited and National Energy Board-Regulated Subsidiaries (TransCanada)* (Calgary: NEB, February 2014).
[88] *Ibid.* at 3.

moment," and it encouraged employees to continue to bring any concerns not addressed by their employers to the attention of the NEB.[89]

In 2014 and 2015, a second whistle-blower from TransCanada brought additional concerns regarding alleged regulatory non-compliance in TransCanada's construction and maintenance practices to the NEB.[90] The NEB conducted an investigation and concluded that only six of the 16 allegations were partially substantiated; by the time the NEB had issued its report, TransCanada had taken necessary corrective actions.[91] The whistle-blower then launched a complaint with the Association of Professional Engineers and Geoscientists of Alberta (APEGA) over the way that the NEB had conducted its investigation into TransCanada.[92] Following a thorough investigation, APEGA "concluded that there was insufficient evidence of either unskilled practice or unprofessional conduct by the APEGA members."[93] Although this was a positive finding for the NEB, it should be noted that the investigation and its conclusions applied only to NEB staff who were regulated by APEGA.

In both whistle-blower instances, the NEB may have discovered the regulatory non-compliances through its regular processes. However, there remains a risk that some issues of non-compliance, if not addressed immediately, could result in the release of contaminants that could threaten human and environmental health and safety. In both cases, more frequent or thorough audits by the NEB could perhaps have prevented the whistle-blowers from feeling the need to come forward by allowing them to trust that the regulator would ensure that any non-compliance would be addressed promptly.

The results of an Auditor General's audit, reported in the fall of 2015, provide a second indication that the NEB could be stronger in its role of overseeing compliance.[94] Among other things, the audit examined whether the NEB was verifying that regulated companies were complying with pipeline approval conditions and regulations. The report concluded that the NEB was not adequately tracking companies' compliance with pipeline approval conditions. Although the NEB had improved its follow-up on instances of non-compliance with regulations since the Auditor General's previous audit, there was still room for improvement. The information management systems used by the NEB to track this information were found to lack integration and to be outdated and inefficient. The report also concluded that the NEB had improved public access to information on companies' compliance with regulations, but not on their compliance with approval conditions. The report also noted a chronic problem with recruiting and retaining qualified staff, which was linked to the NEB's compliance oversight shortfalls. The report made a number of recommendations to continue improvement of the

[89] *Ibid.* at 17.
[90] Canada, National Energy Board, *Investigation under Section 12 of the* National Energy Board Act *in the Matter of: Allegations raised against TransCanada PipeLines Limited* (Calgary: NEB, October 2015).
[91] *Ibid.* at 1.
[92] Association of Professional Engineers and Geoscientists of Alberta, "APEGA Announces Results of Investigations" News Release (15 July 2015), online: Association of Professional Engineers and Geoscientists of Alberta <https://www.apega.ca/assets/news-releases/neb-employee-investigation-results.pdf>.
[93] *Ibid*.
[94] Canada, Office of the Auditor General of Canada, *Reports of the Commissioner of the Environment and Sustainable Development, Report 2: Oversight of Federally Regulated Pipelines* (Ottawa: OAG, Fall 2015).

NEB's compliance oversight and to increase public access to information about companies' compliance.

A third recent occurrence that indicates that the NEB may need to strengthen its enforcement of companies' compliance with regulations and approval conditions is the NEB's issuance of a safety order to Trans-Northern Pipelines Inc. ("TNPI") on September 20, 2016.[95] The problem with this particular safety order is that it replaces and consolidates three prior safety orders issued in 2009 and 2010 in response to numerous pipeline releases and overpressure incidents, and with which TNPI failed to satisfactorily comply.[96] Rather than shut down the pipeline until TNPI made changes to comply with the regulations, as urged by two dissenting NEB members,[97] the NEB allowed TNPI to continue to operate despite ongoing safety risks and a six-year record of non-compliance. This decision raises questions about whether the NEB was placing the interests of TNPI ahead of those of the public.

5.2.3 Recommendations Relating to Governance

The TCG recommends that NEB do the following:

- Ensure that NEB members who are involved in general public engagement are not the same members appointed to hearing panels for projects under review.

- Avoid public speculation about private meetings by routinely publishing a public record of the parties whom the NEB is meeting with, when, and for what purpose.

- Avoid any discussion about proposed projects by NEB members who are appointed to hearing panels outside of the public forums of the hearings themselves.

- Make significant improvements by implementing the recommendations in the Auditor General's fall 2015 report discussed above, including ensuring that the public has timely access to relevant information.

5.3 Indigenous Engagement[98]

Like the EA process, the NEB process needs to be repurposed and redesigned to build relationships, structures, processes, understandings, and agreements between Indigenous and Crown governments that will ensure collaboration, alignment, and effectiveness in reaching consensus-based decisions. This means refocusing on positive and collaborative Aboriginal and Crown relationships that respect Aboriginal rights and title and Treaty rights.

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[95] Letter from Sheri Young, Secretary of the Board, to John Ferris, President and CEO, Trans-Northern Pipelines Inc. (20 September 2016), Calgary, National Energy Board.
[96] *Ibid.* at 1.
[97] *Ibid.*, Appendix A at 1.
[98] We are grateful to the Coastal First Nations - Great Bear Initiative Society for allowing us to adopt parts of their submissions regarding reconciliation and NEB processes, which appear in this part of our submissions.

This approach to reconciliation is consistent with the federal government's commitment to establishing a renewed, nation-to-nation relationship with Aboriginal peoples based on recognition of rights, respect, co-operation, and partnership and to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). First Nations have their own laws and are decision makers according to their own authority and their own representative institutions. The Government of Canada requires modern legislative tools that respect and acknowledge First Nations' authorities, including Aboriginal rights and title and Treaty rights.

5.3.1 UNDRIP

UNDRIP is an international instrument adopted by the United Nations in 2007 that provides a set of standards for the treatment of indigenous peoples by the state. In May 2016, Canada officially removed its objector status to UNDRIP and announced its intention to fully adopt and implement UNDRIP.

One of the cornerstones of UNDRIP is the concept of "free, prior and informed consent" ("FPIC").[99] While FPIC is interwoven throughout UNDRIP, Article 32 is particularly relevant in the context of resource development and EA:

> Article 32
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

There are four elements to FPIC:

- "Free" means that consent must be given voluntarily and in the absence of coercion, intimidation, or manipulation.
- "Prior" means consent must be sought sufficiently in advance of the authorization or activities that may impact Aboriginal interests.
- "Informed" means that the information to be delivered to potentially affected Indigenous communities must be objective, complete, accessible, clear, consistent, accurate, constant, and transparent.

[99] United Nations Declaration on the Rights of Indigenous Peoples, Art. 10, 11, 19, 28, 29 & 32.

- "Consent" refers to the collective decision of the affected rights-holders to give or withhold approval of an authorization or activity that may impinge on their interests.

In Canada, UNDRIP must be understood within the context of the Constitutional protection under section 35 and of the jurisprudence surrounding Honour of the Crown, the duty to consult and accommodate, and justifiable infringement of Aboriginal rights and title.

In federal EA, implementation of UNDRIP in Canadian law would involve, at minimum, adherence to the following pillars:

- Respect: Canada must respect the rights and title of Aboriginal peoples by meaningfully engaging with them before, throughout, and after the EA process.

- Shared or Joint Decision Making: Canada must reconcile Aboriginal rights and title with the assertion of Crown sovereignty through shared or joint decision making in EA regimes.

- FPIC: Canada must aim to seek free, prior, and informed consent from affected Aboriginal peoples as a primary objective before making any decisions before, within, and after the EA process that may impact Aboriginal interests.

These pillars are crucial to ensuring that the NEB's regulatory processes and natural resource development decisions avoid the controversies and adversarial litigation between the Crown and Aboriginal peoples that have been associated with major development projects across Canada. One of the best ways to achieve the objective of FPIC, and to ensure that projects do not become mired in controversy or legal conflict, is to enable more collaboration between the Crown and Aboriginal peoples in the EA process. The Crown must engage with affected Aboriginal groups before, throughout, and after the EA process.

In Tahltan territory, since THREAT first commenced operations in 2005, the volume and pace of proposed development activities has grown significantly. Within the current regulatory context, it is challenging—if not impossible—for THREAT to complete full technical assessments and provide for meaningful community involvement while remaining mindful of the potential impacts of many of these projects on Tahltan rights and title.

Going forward, the NEB's regulatory processes in Tahltan territory must take place on a government-to-government basis that recognizes TCG's jurisdiction over the territory and engages in a constructive manner with THREAT as TCG's delegated representative.

THREAT is in the process of reviewing and updating its processes and operations to further involve the community in making strategic decisions, staying mindful of its duty to ensure the long-term protection of Tahltan title, rights, and interests.

FIPC, in our view, provides a clear, just, and flexible approach for proponents, the Crown, and the Tahltan to navigate toward the ultimate goal of reconciliation.

5.3.2 Implementing UNDRIP and Reconciliation

To implement UNDRIP and work toward reconciliation, it is critical that First Nations are respected and engaged in a government-to-government manner in NEB processes. Potentially affected First Nations need to be involved at all stages of decision making in all regulatory review processes related to a proposed project, including NEB processes and the EA process. This involvement should begin from the determination of a project's location and scope and continue to the final decision on whether a project should be approved. Affected First Nations must be part of decisions regarding how the NEB will review a proposed project. For example, they must be included in decisions regarding whether a review will be by way of a hearing, and if so, they should be involved in decisions regarding the type of hearing, to ensure that Aboriginal perspectives are taken into account. Affected First Nations must also be part of decisions regarding the terms of reference for the NEB's regulatory review and all final recommendations and decisions.

In the case of affected First Nations that have proven Aboriginal rights or title or Treaty rights—or that have strong claims of Aboriginal rights or Title—and that could be affected by a proposed project, there should be separate bi-lateral discussions between the Crown and those First Nations to address their specific concerns in the context of NEB, EA, and other regulatory processes for that project.

The objective at each stage of the process should be to obtain the consent of potentially affected First Nations on each decision point in every regulatory process relating to a given project, including both NEB and EA processes. Legislation requires a statutory statement expressing that the Crown's preference is to approve projects where First Nations consent is evident—whether it is in an NEB, EA, or other regulatory context. In cases where consent is not obtained, dispute-resolution processes should be utilized.

Dispute resolution can initially be undertaken at the political level, with First Nation leaders and ministerial representatives. If political engagement does not resolve the issue, formal dispute-resolution processes such as mediation could be undertaken. In the event that some First Nations consent and others do not, there should be an opportunity for First Nations to file "majority" and "minority" reports so that the NEB has all perspectives on the issues.

Canada needs to fulfill its duties under section 35 of the *Constitution Act, 1982* to consult and accommodate throughout all regulatory processes, including NEB processes. In addition to fulfilling these obligations, there should be legislated collaborative decision-making requirements to avoid infringement on Aboriginal rights and title and Treaty rights.

Ultimately, it is essential that both federal and First Nation decision-making authorities are respected. The federal government may decide to approve a project, whereas First Nation governments may decide to reject it. Neither government should have the authority to fetter the other's discretion. In some cases, the parties may have to "agree to disagree." In those circumstances, litigation may be the outcome, but the entire process, with its focus on collaboration at every stage, will be designed to make this the exception rather than the rule. This is the same approach that we advocated for in the context of EA reform.

5.3.3 Recommendations Relating to Aboriginal Peoples

The TCG recommends the following:

- The *NEBA* should be amended to contain in its purpose section express reference to a commitment to UNDRIP. Such an express reference would ensure that the *NEBA* is interpreted and implemented in a way consistent with Canada's obligation under UNDRIP. Moreover, the purpose section shall contain express language indicating that an important aim of an EA is to acquire free, prior, and informed consent from affected Aboriginal peoples.

- Potentially affected First Nations should be involved at all stages of decision making in NEB processes.

- There should be bi-lateral discussions between the Crown and those First Nations that have proven Aboriginal rights or title or Treaty rights, or that have strong claims of Aboriginal rights or title, and that could be affected by a proposed project, in order to address their specific concerns for a project under NEB review.

- The *NEBA* should be amended to express that the Crown's preference is to approve projects under NEB review where First Nations consent is evident. In cases where consent is not obtained, dispute-resolution processes should be utilized. Such dispute-resolution mechanisms can range from political discussions to formal dispute-resolution processes or an opportunity for First Nations to file "majority" and "minority" reports so that the NEB has all perspectives on the issues.

- The *NEBA* should be amended to include collaborative decision-making requirements to avoid infringement on Aboriginal rights and title and Treaty rights.