



City of Burnaby's Recommendations on the Review of the National Energy Board's Structure, Role and Mandate under the *National Energy Board Act*

Introduction

The City of Burnaby ("Burnaby") provides this written submission on recommendations for the modernization of the *National Energy Board Act* (the "NEB Act") to complement the oral presentation to be given to the Expert Panel on February 8, 2017.

This submission highlights some of the main problems Burnaby has experienced with the National Energy Board (the "NEB" or the "Board") review process and provides recommendations for reform following the guidance provided in the discussion papers. Given that the impacts of major pipeline projects are often concentrated at the local level, it is no longer appropriate that the NEB Act is silent on the role and rights of municipalities in the review, approval and regulation of pipeline projects. Municipal governments are the governments closest to the people and are often best positioned to understand local issues – these local issues are the issues that need to be better addressed in pipeline reviews in order to generate public confidence in the review process. Burnaby is of the view that the NEB Act needs to be modernized to ensure that municipal concerns are thoroughly considered and accommodated, and that municipal government decision-making is respected in Board reviews.

Further, Burnaby is of the view that the role of the Board should be confined to adjudicating on technical energy matters, and that joint reviews of pipeline projects with the Canadian Environmental Assessment Agency, with an obligation to consider municipal interests and regional views, should be instituted in order to achieve a more balanced assessment process.

Governance and Structure of the National Energy Board

Panel Composition, Expertise and Regional Representation

Burnaby's experience with the Trans Mountain Expansion Project NEB hearings illustrated the problem with having a panel without the necessary diversity of expertise to review large pipeline projects. The NEB Act needs to be completely revamped in terms of the requirements for Board members to ensure that they have the diversified experience necessary to assess the broad public interests that are at stake in the review of pipeline projects.¹

Currently, the nine permanent Board members are appointed through a political process by the Governor in Council on the recommendation of the Minister of Natural Resources with no guidance in

¹ Discussions Paper: National Energy Board Governance, online: http://www.neb-modernization.ca/system/documents/attachments/341a6b12c2494a817478690c0378f089195d027b/000/005/201/original/Discussion_Paper-Governance_EN.pdf?1484584651

the NEB Act as to the required diversity of expertise or regional representation.² The NEB Act merely provides general requirements for membership including that Board members are to be Canadian citizens or permanent residents, and must not currently be engaged in or have investments in the hydrocarbon or electricity business.³ A panel of members is then assigned to review individual projects by the Chairperson of the Board.⁴ This is not sufficient guidance.

Without sufficient guidance provided in the NEB Act, the NEB members have been primarily appointed through a political process for their energy-industry expertise with little familiarity – and little interest – in local concerns. Although they purport to represent the public interest, the appointment process and their daily work, along with their primary base in Calgary, suggest a focus on the energy industry, and a susceptibility to industry capture.

The mandate letter from Prime Minister Justin Trudeau to the Minister of Natural Resources recognized the problem with the lack of diversity of the NEB and emphasized the need to:

[m]odernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.⁵

Prior to 2012, the norm on a major project was appointment of a “joint panel”, with a dual concern for mandates under the NEB Act and *Canadian Environmental and Assessment Act* (“CEAA”), and with members appointed with environmental or credible public interest backgrounds. In amending the NEB Act, a return to a more diverse, more public focused joint panel is to be encouraged, with credible community and regional composition.

Burnaby recommends that the NEB Act be amended to include clear requirements in relation to the diversity of expertise and regional representation required in appointees to the Board. The NEB Act should mandate that the Board be composed of a certain number of members with municipal expertise, community development expertise, environmental expertise and Indigenous expertise. The members with energy expertise should be confined to reviewing the more technical aspects of the Project, while the members with broader expertise concerning the public interests at stake should consider whether the particular project is in the wider interest of all Canadians.

Further, there needs to be guidance built into the NEB Act about the composition of each joint review panel assigned to review particular projects. One requirement should be that for major projects transecting municipalities there must be at least one member of the panel that has experience in municipal issues, and one member of the panel that has experience in regional issues. Where the project impacts are concentrated in a particular region, it is critical that there is a panel member with expertise in that region to inform the views of the panel.

Location of the Board

Along with diversifying the expertise of the NEB, it is integral that the NEB and its members not be solely based in Calgary. In order to ensure that regional viewpoints and perspectives are captured, the NEB should have regional offices with members based in those offices throughout the country. To

² NEB Act, s. 3

³ NEB Act, s. 4

⁴ NEB Act, s. 6(2)

⁵ Letter from the Honourable Justin Trudeau, Prime Minister of Canada to the Honourable James Carr, Minister of Natural Resources re: Mandate, online: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

only have the NEB and its members located in Calgary reinforces the notion that the NEB is only designed to serve the interests of the pipeline proponents in Alberta, without regard for the broader public interest of Canadians.

Decision-Making Roles on Projects

National Energy Policy

The NEB Act currently does not incorporate a larger strategy or planning process – in advance of the Board review of specific projects.⁶ The process under the NEB Act is currently entirely proponent-driven and is not guided by a broader national energy strategy that clarifies expected policy outcomes. The NEB assesses individual applications submitted by proponents in a vacuum, without first considering alternative projects, or the broader national interest.

The determination of whether there is a need for additional pipeline capacity in Canada is a matter of national interest. A proper pipeline review process needs to take into account at the outset a broader national energy strategy determined by the elected federal, provincial and municipal governments, and how individual projects fit within that broader strategy, including the ongoing transition to a low carbon economy in light of Canada's climate change commitments. If there is a determination that there is a need for increased pipeline capacity, then a proper planning process would involve all levels of government, and key stakeholders, in a discussion on location and route of a potential pipeline, with the aim of determining the route and location with the lowest potential impacts and lowest potential risks. Individual proponents would then be able to submit applications in line with the broad national energy strategy.

As the application process currently stands, individual proponents are able to apply for the projects that satisfy their needs, regardless of other potential projects and regardless of the preferred direction of government – with the potential for a glut of pipeline capacity without the concomitant demand and public interest justification. This market-driven approach does not encourage responsible development or serve the national interest of all Canadians.

Routing through Municipalities

Where major projects such as pipelines must be routed through municipalities, the NEB Act should provide that the proponent has a duty to design the routing of the project in a manner that accommodates all reasonable municipal concerns. The NEB Act should require the proponent to demonstrate that the project has been designed in conjunction with the municipality and that the municipality approves the routing options.

Currently, the initial process for determining and applying for a particular route for a pipeline is entirely within the hands of the proponent. This unilateral process results in unnecessary conflict with municipalities, and often results in the least costly route to the proponent being proposed, rather than the route that is in the public interest. On the issue of site-specific routing, municipalities should play a decision-making role early on in the process to ensure that the project is designed in a manner that minimizes impacts to the local community.

⁶ Discussion Paper: Decision-making Roles on Projects, online: http://www.neb-modernization.ca/system/documents/attachments/697e64d2c31596812ca63b98ea88a06d77e53e7a/000/005/333/original/Discussion_Paper-Decision_Making_Roles_EN.pdf?1484939236

In this regard, there needs to be further guidance placed on the broad powers given to pipeline companies under s. 73 of the NEB Act for setting the route for major pipeline projects and for carrying out studies for that route. Pipeline companies should have to make every effort to accommodate reasonable municipal concerns and municipal bylaws in setting the routes for pipeline projects and carrying out studies for the same. Where agreement cannot be reached with the municipality on routing options, the NEB Act should provide that proponents must set out all measures that they have undertaken to accommodate reasonable municipal concerns and justify why those concerns cannot be accommodated in the application for the project. In relation to areas that have been restricted in use or protected by municipal bylaws or otherwise, (for example conservation areas or park lands), the NEB Act should provide for a special approval process that pipeline companies have to undertake in order to route a pipeline through those areas. Finally, where invasive work is required on municipal lands, the proponent must get the consent of the municipality to undertake the work, and if the municipality does not consent, the proponent must apply to the NEB for permission to undertake the work.

Further, there should be guidance in the NEB Act for the procedure for accessing municipal lands, as there is guidance for Crown lands.⁷ As municipalities are a level of government, access to their lands should be guided by legislation and not at the discretion of proponents. If the municipality objects to access, the NEB Act should provide for a hearing process through which the proponent can apply for access to the NEB.

Compliance with Municipal Bylaws

In the 21st Century, municipalities should be recognized as a third order of government, with significant democratic powers, and with a primary role in respect of regulating projects within their boundaries. The NEB Act should recognize that effective regulation requires cooperation between the interlocking and overlapping jurisdictions.

A factor that should be addressed in the NEB Act, and should be considered in the public interest determination, is compliance with municipal bylaws. The NEB Act is currently silent on the obligations of proponents to comply with bylaws in constructing and operating pipeline projects. Although bylaw disputes properly belong within provincial jurisdiction⁸, the NEB Act should explicitly provide that municipal bylaws must be complied with, except where they would render the project inoperative. Where a proponent proposes a project contrary to local bylaws, the proponent must be made to provide evidence as to why compliance with the bylaw would render the project inoperative, and to any feasible alternatives that would comply with the bylaw.

Mandate and Regulatory Framework

The NEB currently has sole responsibility for reviewing certain pipeline projects and carrying out the environmental assessment.⁹ The vesting of sole responsibility in the NEB for reviewing pipeline projects was the result of legislative amendments in 2012 aimed at streamlining the review process. This streamlining has come at the expense of a thorough and balanced analysis of environmental and local concerns.

⁷ NEB Act, s. 77

⁸ *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54

⁹ NEB Act, s. 52(3)

The expanded mandate of the NEB to allow it to undertake the environmental assessment for pipeline projects is an inappropriate extension of the NEB's jurisdiction that goes beyond its core focus – the energy industry.¹⁰ Burnaby recommends that the NEB Act be amended so that the NEB is divested of the responsibility of carrying out the environmental assessment for pipeline projects and is confined to dealing with the technical energy matters for which it has expertise, not with environmental or local issues. The NEB Act should provide for the appointment of a joint review panel to undertake the review of pipelines, which also require an environmental assessment. Requirements as to the panel's composition should be expressly set out in the NEB Act and CEAA, and include that members have the necessary expertise in environmental and municipal issues. The ultimate recommendation by the panel should be the product of the balancing of the NEB's assessment of the energy matters with the consideration of the factors under CEAA and the impacts and risks to local communities.

Determining the Canadian Public Interest

Currently, the NEB Act is extremely discretionary in relation to what the NEB must consider in relation to the recommendation on the issuance of certificates of public convenience and necessity for pipeline projects.¹¹ In fact the NEB Act does not set out any factors that the NEB must consider; the NEB Act only sets out factors in s. 52(2) of the NEB Act that the NEB “may” consider, including “any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application”.¹²

Burnaby's experience with the Trans Mountain Expansion Project is that the highly discretionary provisions in the NEB Act do not provide enough guidance on the factors that the NEB must consider in its review of pipeline projects. In the review of the Trans Mountain Expansion Project, this resulted in an over emphasis on the economic benefits of pipeline projects, at the expense of the consideration of environmental concerns, negative economic impacts to economies unrelated to the energy industry, and community risks and impacts.

Burnaby recommends that the NEB Act be amended to include a list of factors that must be considered in the NEB's (or joint panel's) public interest determination, including the following:

- (a) **Municipal risks, impacts and costs:** The concerns of and costs to local communities are often disregarded or ignored when the emphasis is placed on the national interest or economic importance of a project. This is despite the fact that the burden of the risks and impacts of major projects is often concentrated at the local level. It is integral that the NEB Act mandates that the risks, impacts and costs to municipalities are considered in the public interest determination.
- (b) **Alternate locations for the Project:** The NEB Act currently does not provide for the consideration of alternate locations of projects. The CEAA provides for a consideration of alternate means that are technically and economically feasible under s. 19(1)(g), but the NEB Act is silent in this regard. The NEB Act should mandate that alternate locations for projects must be considered and assessed in the public interest determination in order to

¹⁰ Discussion Paper: Mandate and Regulatory Framework, online: http://www.neb-modernization.ca/system/documents/attachments/e95149e9a07e6a150f9c1b344a33a5fbdcc48a3e/000/005/299/original/Discussion_Paper-NEB_Mandate_EN_FINAL.pdf?1484775564

¹¹ Discussion Paper: Determining the Canadian Public Interest, online: http://www.neb-modernization.ca/system/documents/attachments/a8852da2d2acd9a66b0b54224ee016b86c5070f7/000/005/198/original/Discussion_Paper-Public_Interest_EN.pdf?1484584581

¹² NEB Act, s. 52(1)

ensure that the project location with the least risks and impacts to the environment and surrounding communities is chosen.

- (c) **Alternate Projects:** a proper review process should not access the ‘need’ for a particular project in a vacuum, without considering other proposed projects that could satisfy the same need. For example, in a proper review process, the need for the Trans Mountain Expansion Project would be assessed with regard to both the Energy East Project and Keystone XL Pipeline Project. Alternate projects should be a factor considered in the public interest determination.

It cannot be left to the NEB panel to decide what factors are considered or emphasized in project reviews. This broad discretion in the hands of the NEB as to what “public interest may be affected” is unwarranted. Clear factors must be developed to ensure uniform and fair reviews and to allow for proper oversight by the courts.

Municipal Costs

The NEB Act provides a mechanism for compensation for the use of municipal lands. However, the NEB Act does not address the additional costs that are downloaded to municipalities, including the costs of emergency services, infrastructure conflicts after construction, development costs and servicing costs etc. These ongoing costs that arise from pipelines routed through municipalities should be a project cost, allocated to users and considered within the scope of the project. The NEB Act should provide for a mechanism by which municipalities are compensated for these additional costs.

National Energy Board Hearings

Currently, the NEB is the master of its own procedure and, under the NEB Act, can decide what steps have to be taken in relation to the hearing and review of pipeline projects. Thus, what constitutes a “public hearing” can vary from project to project.

In Burnaby’s experience with the Trans Mountain Expansion Project, this meant that for a major project with a lot of participants and high public interest, the NEB could provide for a simplified, and inevitably less rigorous, review process in order to review the project within the legislated timeline, which was driven by proponent requirements. This resulted in an unjustifiable situation where for the tolling hearing for the Trans Mountain Expansion Project there was cross-examination of the evidence, but for the main hearing on whether the Project was in the public interest there was no cross-examination.

Burnaby recommends that guidance be placed in the NEB Act for the steps that must be taken for a “public hearing” for a project, and those steps must include participation of any interested person, sufficient timelines to review evidence, the proper testing of evidence through cross-examination, and oral argument. Further, the legislated timeline (i.e. 15 months) for the review of projects should be abolished to allow for hearings to be tailored to the complexity of the application and the amount of public interest in the application. Finally, public hearings should be held for all applications for the construction and operation of pipelines, which includes expansions or expansions in capacity of existing lines.

Municipal Participation

The NEB Act does not currently provide a specific role for municipal governments in the approval process for pipeline projects. Municipal governments have to apply for intervenor status under the NEB Act to participate in a hearing like any other individual.¹³

Municipal governments should be given party status in the review of pipelines that are proposed to be routed through their municipality. The municipalities should have the same rights as the proponent throughout the hearing. The municipalities should also be engaged early on in the process, prior to the application being submitted; for example, on the issue of routing discussed above, to ensure that the project is designed in conjunction with the municipality.

Public Participation

Burnaby's experience with the NEB hearing for the Trans Mountain Expansion Project is that the current test for participation of the public in an NEB hearing under the NEB Act is overly restrictive and prevents a great number of affected members of the public from being able to have their voices heard in relation to projects that will impact their communities.¹⁴

The current test under the NEB Act for allowing people to participate in a hearing provides that only the representations of those people that are 1) directly affected by the granting or refusing of the application or 2) have relevant information or expertise may participate in a hearing will be heard.¹⁵ Thus, anyone who wants to make a submission regarding an application must first establish, to the satisfaction of the NEB, that they fit within either (1) or (2).

The current test for participation under the NEB Act came in with the 2012 amendments to the NEB Act. Prior to those amendments, participation in major pipeline reviews was much broader and allowed anyone who was interested to make submissions to the panel. A return to a broader test for participation is needed to ensure that the voices of all the citizens are heard.

¹³ Discussion Paper: Public Participation, online: http://www.neb-modernization.ca/system/documents/attachments/5a3a926d759d0c25d7785c556c1d461d0b9e772c/000/005/302/original/Discussion_Paper-Public_Participation_EN.pdf?1484767783

¹⁴ Discussion Paper: Public Participation, online: http://www.neb-modernization.ca/system/documents/attachments/5a3a926d759d0c25d7785c556c1d461d0b9e772c/000/005/302/original/Discussion_Paper-Public_Participation_EN.pdf?1484767783

¹⁵ NEB Act, s. 55.2