Squamish Nation

Written Submission to the National Energy Board Act Review Panel

March, 2017

Introduction

The *National Energy Board Act* (the "NEB Act") does not address the rights of First Nations in the review, approval and regulation of energy projects, and does not recognize First Nations' role and responsibility as a government to their people and as stewards of their lands. This is despite the fact that projects reviewed and in some cases approved by the National Energy Board (the "NEB" of the "Board") have the potential to have significant impacts on the lands, waters and resources upon which First Nations depend.

From the perspective of the Squamish Nation ("Squamish" or the "Nation"), the NEB Act and review process may be attempting to address impacts on First Nations and the environment, but falls well short of adequately doing so, particularly in relation to the impacts on Aboriginal rights and title. First Nations have not been included in decision-making nor has the review process meaningfully contributed to fulfilling the federal government's legal duty to consult and accommodate First Nations.

The federal government has fully endorsed the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP), which includes the standard of free, prior, and informed consent. This standard is not reflected in the NEB Act. The modernization of the NEB Act, along with the review of the legislation governing environmental assessment processes, provides a critical opportunity to address the deficiencies in the legislation and review process, and to embrace the promises in UNDRIP in domestic legislation.

Squamish is of the view that the NEB should not undertake the responsibility of the environmental assessment for pipeline projects, and its role should be confined to reviewing the more technical aspects of energy projects. In saying that, Squamish has similar concerns about the environmental assessment process under the *Canadian Environmental Assessment Act* ("CEAA" or the "Act"), and its failure to capture the Aboriginal perspective. In reaction to these unresolved concerns, Squamish developed and implemented its own environmental assessment process (the "Squamish Process") independent of the CEAA process. Recognition of the jurisdiction of other First Nations to undertake similar processes is recommended.

Our submission highlights some of the major flaws in the NEB process that Squamish has experienced and provides recommendations for reform that would enable First Nations to play a role in the review process that is commensurate with their responsibility as a level of government, that would ensure that the impacts to First Nations are properly assessed and adequately accommodated, and that would enable collaborative decision-making on projects that impact First Nations. The submission is guided by the discussion papers, but also goes beyond those papers to address issues concerning the broader constitutional obligations to First Nations.

Important Context

At the outset, we want to make clear to the Review Panel what this review of the NEB Act is about for the Nation, and we believe for all First Nations in Canada. It is about getting to consent. Our submission is not to advocate for the tweaking of a flawed assessment process to allow for the better inclusion of traditional knowledge, but is about restructuring the process so that First Nations can play a meaningful role in decision-making within their territory. We

acknowledge that the concept of consent is difficult to distill into legislation. Does consent mean that a First Nation has a veto? In some cases, maybe. In other cases, maybe not.[1] However, this does not mean that this critical concept can be ignored by this Review Panel.

What is clear is that First Nations have a right, an inherent and constitutional right, to make a decision on a project. So we think what we are really talking about, when we look at consent in the context of reconciliation, is building a true government to government relationship where First Nations and other levels of government collaboratively develop governance structures and processes to make consensus based decisions on natural resource projects. This consensus based decision-making must be built into the legislation. However, before you can build such structures and processes into the legislation you need to find out from First Nations what consent means to them. The federal government cannot make that determination unilaterally. We hope that our submission helps you understand what consent means to the Squamish Nation in the context of the NEB Act and the environmental assessment process for pipeline projects.

Deficiencies in the National Energy Board Process and Recommendations for Reform

Issue: First Nations are not engaged early enough in the process to have their interests included in decision-making on a project

The process under the NEB Act is currently entirely proponent driven, with proponents deciding what is applied, where it is located and how it is developed with little to no collaboration with First Nations. While there is an obligation for proponents to consult with First Nations in the NEB Filing Manual, this obligation has proved entirely unsatisfactory and usually amounts to the proponent merely sharing a fully developed application with affected First Nations just prior to the application being submitted to the NEB, with no opportunity for meaningful First Nation input. There are no requirements in the NEB Act or Filing Manual that a proponent needs to collaborate on the development of projects with First Nations, and design projects in a manner that respects First Nations' values.

First Nations are governments with land management objectives and land designations in place to protect values of importance to the First Nation. These objectives and designations need to be recognized and respected in the design of projects to ensure that proposed projects respect the rights and interests of First Nations. In failing to collaborate with an affected First Nation prior to submitting a project proposal, a proponent takes the risk of a First Nation taking an immediate adversarial position against the proposal. If the NEB then accepts the proposal of the proponent for review, the parameters of the project become set without any meaningful involvement of the First Nation, closing off potentially effective means of accommodating the First Nation.

First Nations want to be engaged in relation to decision-making on major resource projects at a government-to-government level. The federal government, along with proponents, should be engaged with the First Nation before a project begins the review process. During this early engagement, the First Nation and the federal government should be discussing whether a proposed project should proceed to a formal assessment or not based on information produced by

[1] Roshan Danesh wrote an article in the Globe and Mail on this issue: "Rhetoric matters when discussing First Nations' role in resource decisions" available at: https://beta.theglobeandmail.com/news/british-columbia/rhetoric-matters-when-discussing-first-nations-role-in-resource-decisions/article33293082/?ref=http://www.theglobeandmail.com&cmpid=rss1&utm_source=dlvr.it&utm_medium=twitter&service=mobile

the First Nation, such as land and marine use plans, traditional use studies, socio-economic studies, and cumulative effects assessments. If a First Nation has not done the work to create such plans, studies and assessments, the federal government and/or the project proponent should be fully funding the work in order to obtain the information for the First Nation to fully participate in the development of the project and to undertake an initial assessment of the project. This strategic level planning work should be done prior to a project entering into the review process and if this is not possible stoppages in the review process should be built in to allow for this information to be considered in the assessment.

Squamish's experience with the NEB review process for the Trans Mountain Expansion Project is an example of how not involving First Nations in the design of projects, particularly on key decisions such as project location and routing, results in First Nations taking an oppositional stance against the project, and undermines First Nations' confidence in the legitimacy of the review process. In that case the proponent unilaterally designed the routing for the pipeline, and did not respond to requests from the Nation for information on alternate routes that would have fewer impacts on values of importance to the Nation.

Squamish recommends that the NEB Act and Filing Manual explicitly set out requirements for proponents to collaborate with First Nations whose traditional territories will be impacted by the proposed projects. Where a project is proposed to be routed through the First Nation's territory, the proponent should have to obtain the approval of the First Nation for the location, route options, and design to be proposed. Where the proponent cannot obtain the approval of the First Nation, the proponent should be required to put evidence before the Board of reasonable efforts to accommodate the concerns, values and land management objectives of the First Nation on setting the location, route and design for the project, and be made to justify why there were no feasible alternatives that would accommodate the First Nations concerns.

Issue: First Nations are not involved in assessing impacts on their Aboriginal interests

First Nations want to be involved in gathering and assessing the information important to their communities in order to determine the significance of the impacts of proposed projects on their Aboriginal rights and title. This involves First Nations developing values to be assessed, gathering information specific to those values, and developing an assessment methodology that reflects a First Nation's perspective in order to come to conclusions on the significance of impacts of proposed projects. The NEB Act currently does not provide for the involvement of First Nations in assessing the impacts of proposed projects on their rights and title in a meaningful way.

The NEB process does not access impacts on a spatial or temporal scale that is relevant to First Nations' way of life. The project area and scope of the review are often determined without First Nation input, and without regard for how First Nations use their territory. A First Nation may view its territory in a more holistic way and potential impacts may occur to the practice of rights that are beyond the arbitrarily designated project area boundary. Further, the assessment process often focuses on project impacts on the current environment, rather than on a pre-industrial baseline that acknowledges that a First Nation's territory and resources have been subject to the cumulative impacts of exploration and degradation since the assertion of British sovereignty.

In Squamish's experience, the NEB's focus is too narrow, favouring biophysical components that can be readily measured without input of the affected First Nation communities and often ignoring cultural values that are harder to measure. In part, this is due to a habitual practice by proponents, and reviewing bodies, of reducing impacts to rights and title to the sum of biophysical measurements. For example, concluding that if there are still enough fish in the territory as a whole, the right to fish is not significantly impacted. This approach is a gross over-simplification and fails to account for the importance of access to particular places for the practice of rights and for the maintenance of culture. Squamish practices are location specific, dependent on access to certain parts of their territory, and have been passed down from generation to generation. Interruption of those practices can be devastating to Squamish culture.

The information in an NEB review process is also often unilaterally gathered by proponents with little input from First Nations. For the large linear pipeline projects, such as the Trans Mountain Expansion Project, proponents carry out generic assessments for all First Nations to be impacted by the project, and make conclusions on the ability to mitigate those impacts using generic measures focused solely on biophysical components – again ignoring cultural values. The total reliance on the assessments undertaken by the proponent as the foundation for the NEB review, with little time and opportunity for First Nations to provide meaningful input, is a key factor that undermines the utility and integrity of the review process from the Squamish perspective.

Squamish recommends that the NEB Act be amended to provide the opportunity for First Nations to be recognized as jurisdictions capable of carrying out their own assessment of proposed projects. The NEB Act should provide that the responsible authority for making the decision with respect to the project must offer to consult and cooperate with respect to the assessment of the project with any jurisdiction.[2] The definition of a jurisdiction in the NEB Act would then include First Nations.

Once the recognition of First Nations as a jurisdiction capable of carrying out an assessment is established, the Nation and the NEB can work out what is best assessed by a First Nation, such as Squamish, and what is best assessed by other bodies and how to coordinate decisions made by each jurisdiction. Providing for this process under the NEB Act will provide certainty for proponents participating in the process, and allow for proposed projects to be assessed in a manner that accords with a First Nation's values.

Squamish has developed its own environmental assessment process, which has recently been successfully employed with respect to the Woodfibre LNG Project. The Squamish Process attempts to coordinate and harmonize the assessments between the reviewing body and First Nations to work towards an integrated and collaborative model for project decision-making that respects and accounts for impacts to values of importance to Squamish. The benefit of the Squamish Process is that it takes First Nations out of the oppositional role played in environmental assessment processes, and allows them to have access to the information that they need to properly review proposed projects in accordance with their values. This results in

[2] Section 18 of CEAA provides a process by which jurisdictions are able to be recognized and a requirement for consultation and cooperation with that jurisdiction by the responsible authority. The definition of jurisdiction under CEAA should similarly include First Nations to allow for First Nations to carry out coordinated assessments for projects caught by those Acts. Squamish's submission to the CEAA review panel included this recommendation.

projects that are developed in a collaborative manner that respect rights and title, and that are less likely to result in protracted litigation.

For First Nations that choose not to undertake their own assessment of projects, the NEB Act should provide for a more accessible process by which First Nations can participate in the review of projects and a more effective mechanism for incorporating First Nation values into the decision on proposed projects. As a starting point, First Nations should be engaged prior to the project application being submitted, as discussed above. For projects that are routed through a First Nation's territory, those First Nations should be granted full party status in any review with full rights to participate. First Nations should further be provided with sufficient time and funding to gather information with respect to the project and test the information put forward by the proponent. Lack of time and funding are two of the major hurdles that have restricted First Nation participation in the review process. Further, procedural safeguards need to be included in the NEB Act to ensure that proponents have an obligation to cooperate and collaborate with First Nations, and to carry out assessments of the impacts of the project on the unique facts and circumstances of each First Nation to be impacted by the project.

Overall, the NEB process needs to be more collaborative, and less adversarial. The current NEB review process is counterintuitive to the intended ethos of reconciliation. The NEB Act needs to be amended to foster a more collaborative process where First Nations play an active role in overseeing the development of pipeline projects within their territory from the pre-application stage through to monitoring.

Issue: The National Energy Board does not have the expertise to consider Aboriginal interests

The NEB is comprised of up to nine permanent Board Members who are appointed through a political process by the Governor in Council (GIC) on recommendation of the Minister of Natural Resources.[3] There are no specific eligibility requirements concerning the necessary expertise to be a member of the NEB, which has resulted in members being appointed for their energy expertise, largely from the energy industry.

Further, as a result of the legislative amendments in 2012, the NEB now has the sole responsibility for reviewing pipeline projects under the NEB Act and carrying out the environmental assessment. Prior to 2012, joint panels were appointed with mandates under the NEB Act and the CEAA and with members with more diversified expertise.

The problem with having members appointed from the energy industry is that the focus of the review inevitably is on the benefits to the energy industry, with little regard for the costs to First Nations and to the environment. The current NEB members do not have the necessary expertise to assess impacts on Aboriginal interests and carry out the environmental assessment for projects.

[3] Discussion Paper 1: National Energy Board Governance, online: http://www.neb-modernization.ca/system/documents/attachments/341a6b12e2494a817478690c0378f089195d027b/000/005/201/original/Discussion_Paper-Governance_EN.pdf?1484584651

Squamish recommends that the NEB be confined to reviewing the technical energy matters for which it has expertise, and that the broad public interest of such projects be considered by a joint panel with broader expertise, including in Aboriginal issues and environmental issues, and one that recognizes the inherent right of First Nations to make their own determinations as a level of government. The NEB Act further should be amended to set out clear criteria for the appointments to joint panels to review major projects, and those panels must include a member with expertise in Aboriginal issues.

Without a panel member focused on the concerns of First Nations, those concerns have largely been ignored or subsumed into the environmental assessment based on the erroneous assumption that First Nations interests are the sum of biophysical measurements, ignoring impacts to cultural values. Squamish does not separate culture from nature – these two concepts are intrinsically linked for Squamish people. The review process for energy projects needs to account for the impacts to the unique cultural values and interests of First Nations, and cannot do so unless the process is designed in a manner that facilitates those values and interests being put forward, and the reviewing panel has the necessary expertise to properly consider potential impacts to those values and interests and any means of accommodation.

Issue: Impacts to Aboriginal interests need to be considered in the public interest determination

The NEB Act is currently silent on the issues that must be considered in making decisions on pipeline projects. 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".

The NEB Act leaves too much discretion in the hands of the Board with respect to the matters that must be considered in the review of projects. The NEB Act should be amended to set out a list of factors the must be considered in the NEB's (or a joint panel's) public interest decision with respect to a proposed project. Those should include the following:

(a) **Impacts to Aboriginal Interests**: the NEB Act is currently silent on how the impacts to Aboriginal interests should be factored into the project decision. This is wholly unacceptable, particularly in light of the federal government's adoption of UNDRIP. The NEB Act should require that impacts to the unique rights and interests of each First Nation to be affected by the proposed project are considered in the public interest determination. Depending on whether First Nations opt to undertake their own assessment or not, those impacts will be assessed either before the panel, or in the independent reviews of particular First Nations.

(b) **Cumulative Impacts**: a proper assessment of impacts to Aboriginal interests and to the environment needs to take into account the pre-industrial baseline, as well as the existing cumulative impacts to a First Nations way of life as a result of Crown authorized industrial developments. The NEB Act currently does not provide any guidance on how the existing cumulative impacts of industrial developments are to be factored into the assessment of proposed projects. This gap is particularly significant in terms of First

> Nations because if a project is proposed to be located near and have impacts on, for example, one of the last places a First Nation can safely access salmon – the significance of the impact is heightened. The NEB Act needs to recognize the premise that each new incursion serves only to narrow further the habitat left to First Nations in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last.[4]

Proper guidance needs to be placed in the NEB Act in order to ensure that decisions on projects are made in accordance with the honor of the Crown and constitutional obligations, and to ensure that projects reviews are based on transparent factors. Leaving the NEB to "balance" the factors that it perceives to be in the public interest in the Trans Mountain Expansion Project review, resulted in an over emphasis on the economic benefits to the energy sector, with no regard payed to the impacts of the Project on individual First Nations, and multiple challenges to the legitimacy of the process. The NEB must be provided with clear guidance on the factors to be considered in the public interest determination to allow for a fair review process with proper oversight by the courts.

Issue: Decisions need to be based on independent scientific evidence

A further problem that Squamish has experienced with the NEB process is the lack of impartial expert evidence. The proponents undertake studies for the application with little to no oversight by the NEB. The NEB Act should provide for the impartial appointment of joint experts by consensus from approved consultation firms that provide credible, scientifically rigorous assessments of the project. This will ensure that project reviews are independent and thorough. Relying solely on the self-serving assessments of proponents undermines the integrity of the review process.

Issue: First Nations need to be engaged as decision-makers

Under the NEB Act, the decision on a proposed project is currently ultimately made by the NEB or by the GIC on the recommendation of the NEB, depending on the nature of the project. The NEB Act does not provide a process for shared decision-making on projects with First Nations. The NEB review process that informs these decisions allows for First Nations to participate in commenting on potential project impacts, but does not provide First Nations with the ability to make substantive decisions about a project, including on whether the impacts of the project to the First Nation's rights and title have been adequately avoided, mitigated or accommodated.

First Nations require a greater decision-making role for if, and how, a project may proceed. Both domestic and international law have highlighted the need to get Indigenous peoples consent for projects that have the potential to impact on their interests. In order to promote reconciliation, and incorporate the concept of consent into the review process, there needs to be a requirement for government to government engagement built into the legislation with the aim of making consensus based decisions on proposed projects.

[4] See *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at paras. 65-67 for a discussion of the nature of the harm resulting from cumulative incursions in a First Nations territory.

Depending on the nature of the decision, whether it is made by the NEB or the GIC, the point of government to government engagement will differ. However, in both cases, the NEB Act should provide for a point at which First Nations should be engaged with respect to their decision on the project. The ultimate decision on a proposed project should be a decision that is based on consensus, one which incorporates both the structured scientific review by a panel and the one undertaken by a First Nation, with the conditions for the project being a product of this shared decision-making process. If the parties are not able to achieve consensus, the NEB Act should provide for a dispute resolution mechanism.

Issue: Lack of Funding

The lack of funding provided to First Nations to participate in the NEB review process is a major limiting factor in First Nations meaningfully participating and putting forward their concerns. In Squamish's experience, the funding provided by the NEB participant funding program does not cover anywhere near what it costs for First Nations to participate in the quasi-judicial NEB review process, which in most cases requires the retention of lawyers and experts. Proponents do offer capacity funding in some instances, but this is not regulated or required, and often comes with obligations or deliverables imposed by the proponent.

Making the review process less formal, and more conducive to First Nation collaboration will go some way to alleviating this financial burden. However, First Nations must still be provided with sufficient funding to enable them to engage with the project proposal, undertake scientific assessments of the impacts, and gather information to understand how the project will potentially impact their rights and title. The NEB Act should include a requirement that First Nations are provided with sufficient capacity funding to enable full and meaningful participation in the project review. The amount of funding this may entail will inevitably depend on the scale of the project proposed, but the standard of sufficient funding for full and meaningful participation should be required. The obligation to provide funding should also be extended to the proponent.

For First Nations undertaking their own environmental assessment process, funding should be provided by the government to facilitate these processes and to build capacity. First Nations should be provided with the funding and other resources to develop proper planning tools to undertake an assessment, such as land use planning and marine use planning. With these tools in place, undertaking an assessment becomes more efficient as interests and values are already identified, making it easier to determine what project design changes may be required to avoid or reduce impacts on these interests and values at the earliest stages of the process.

Conclusion

It is imperative that the NEB Act, and environmental assessment processes more generally, comply with UNDRIP and move Canada toward the concept of consent, and eventually reconciliation. Squamish is of the view that the rights, role and responsibility of First Nations in conducting the review and environmental assessment of pipeline projects need to be clarified.

The recommendations of Squamish summarized below provide guidance on how First Nations can be engaged at a government to government level, and how consensus based decisions on

natural resource projects can produce better projects that avoid harm to values of importance to First Nations:

1. The federal government must recognize the existence of First Nations inherent and constitutional right to govern the lands and resources in their territory. This has to be the foundation of any assessment process.

2. First Nations must be engaged early in the process, prior to submission of the application, so that the project is designed in a manner that respects First Nation values. Where a project is proposed to be routed through the First Nation's territory, the proponent should have to obtain the approval of the First Nation for the location, route options, and design to be proposed. Where the proponent cannot obtain the approval of the First Nation, the proponent should be required to put evidence before the Board of reasonable efforts to accommodate the concerns, values and land management objectives of the First Nation on setting the location, route and design for the project, and be made to justify why there were no feasible alternatives that would accommodate the First Nation's concerns.

3. Amend the NEB Act to provide the opportunity for First Nations to be recognized as jurisdictions capable of carrying out their own assessment of proposed projects. The NEB Act should provide that the responsible authority for making the decision with respect to the project must offer to consult and cooperate with respect to the assessment of the project with any jurisdiction. The definition of a jurisdiction in the NEB Act would then include First Nations. The NEB already has cooperative arrangements with CEAA through substituted processes, coordinated processes, and equivalency agreements, which could also be done with First Nations that have the capacity and desire to conduct an independent environmental assessment. Coordinating the environmental assessment processes under the NEB Act provides guidance to project proponents to enter into the First Nation environmental assessment process rather than the First Nation using the threat of litigation to leverage participation.

4. Not all First Nations will have the capacity or desire to conduct an independent assessment process. The NEB Act should be amended to provide for a more accessible process by which First Nations can participate in the review of projects and a more effective mechanism for incorporating First Nation values into the decision on proposed projects. A collaborative assessment process should be developed that includes a consensus based decision-making model for those First Nations that do not want to conduct an independent assessment. Procedural safeguards need to be included in the NEB Act to ensure that proponents have an obligation to cooperate and collaborate with First Nations, and to carry out assessments of the impacts of the project on the unique facts and circumstances of each First Nation to be potentially affected by the project.

5. Depending on the nature of the decision, whether it is made by the NEB or the GIC, the point of government to government engagement will differ. However, in both cases, the NEB Act should provide for a point at which First Nations should be engaged with respect to their decision on the project. The ultimate decision on a proposed project should be a decision that is based on consensus, one which incorporates both the

structured scientific review by a panel and the one undertaken by a First Nation, with the conditions for the project being a product of this shared decision-making process.

6. Even with a cooperative and collaborative approach to assessments, there will be circumstances where First Nations and the NEB (or joint panel) will not agree. A consensus based decision-making model with a dispute resolution mechanism in place should be developed as part of the collaborative, harmonized, and coordinated First Nation assessment process.

7. Make mandatory a government to government process outside of the NEB process to address higher level issues that the NEB does not have a mandate to discuss or resolve. Squamish has entered into government to government agreements with the province of BC, which have included agreement on revenue sharing and other benefits related to a project. The federal government should follow suit and negotiate with First Nations a fair share of the revenue the federal government will receive from the development of a project, among other benefits specific to a project.

8. Provide First Nations with funding and other resources to develop proper planning tools, such as First Nations land use planning, marine use planning, and cumulative effects assessments. With these tools in place, it makes an assessment more efficient in terms of identifying interests and values and what design changes may be required to avoid or reduce impacts on these interests and values at the earliest stages of the process.

9. To address the lack of capacity to fully participate in a collaborative assessment process, or to conduct a harmonized or coordinated First Nation led process, the NEB Act should include a requirement that First Nations are provided with sufficient capacity funding to enable full and meaningful participation in the project review. The amount of funding this may entail will inevitably depend on the scale of the project proposed, but the standard of sufficient funding for full and meaningful participation should be required.

10. The NEB must be confined to reviewing the technical energy matters for which it has expertise, and that the broad public interest of such projects be considered by a joint panel with broader expertise, including in Aboriginal issues and environmental issues, and one that recognizes the inherent right of First Nations to make their own determinations as a level of government. The NEB Act further should be amended to set out clear criteria for the appointments to joint panels to review major projects, and those panels must include a member with expertise in Aboriginal issues.

11. The NEB Act should be amended to set out a list of factors that must be considered in the NEB's (or a joint panel's) public interest decision with respect to a proposed project. Those factors should include impacts to Aboriginal interests and cumulative impacts.

12. The NEB Act should provide for the impartial appointment of joint experts by consensus from approved consultation firms that provide credible scientifically rigorous assessments of the project. This will ensure that reviews are independent and thorough.