

- Discussion Paper 1 – National Energy Board Governance
- Page 1, paragraph 2 – “Board Members must not be engaged in or have investments in the hydrocarbon or electricity business.”
- Page 2, paragraph 2 – “[T]he NEB may designate any person as an inspection officer with powers to inspect, audit compliance and issue orders to protect the public and the environment.”
- **Recommendation – In order to be designated with the power to perform National Energy Board (NEB) functions, the designatee must meet the conflicts requirement set out in page 1: the designatee cannot be engaged in or have investments in the hydrocarbon or electricity business.**

- Discussion Paper 3 – *Energy Information, Reports, and Advice*
- Discussion question 6 – “What [greenhouse gasses] (GHG) data and analysis should the NEB publish regardless of who collects the data?”
- **Recommendation – The NEB should gather the data (or make sure that the data will be adequately collected by another party) about the downstream GHGs from energy exported internationally.**

- Discussion Paper 4 – *Decision-Making Roles on Projects*
- Discussion question 1(a & b) – “What principles should determine who should make the final decisions for the following projects and why:
  - a) Major international and interprovincial pipeline projects (i.e., greater than 40 km in length)
  - b) Smaller international and interprovincial pipeline projects (i.e., 40 km in length or less)?”
- Page 2: referring to projects 40km in length of less – “The NEB **may** hold a public hearing regarding such projects.”
- **Recommendation – All projects should adhere to a single system in which the NEB makes recommendations to the Governor in Council (GIC). The NEB should not make any final decisions, especially when there are no requirements to include public hearings.**

- Discussion question 2(b) – “What is the role of government policy in guiding NEB oversight and decision making
- b. How should the NEB incorporate and reflect “whole of government” policy direction, such as the new Federal Sustainable Development Strategy for Canada and Canada’s MidCentury Long-Term Low-Greenhouse Gas Development Strategy, when setting out hearing orders, lists of issues, and ultimately, recommended decisions and conditions?”
- **Recommendation – The priority needs to be the recognition of climate change, an issue that the NEB has failed to adequately consider in the past. There needs to be a requirement to consider the upstream and downstream effects (GHG emissions, ecological integrity, biodiversity, etc.). Canada has recognized climate change as an extremely important issue, both in elected government and in the courts. NEB policy needs to reflect Canada’s concern for climate change.**

- **Also, in addition to incorporating the legislation suggested in question 2(b), the NEB needs to consider international agreements to which Canada is a party (such as the Paris Agreement), as well as customary international law (such as the precautionary principle).**
- If the NEB does not consider international law and conventions, the courts will (*Baker v Canada*, [1999] 2 SCR 817).
- The precautionary principle as customary international law was supported in *Spraytech v Hudson* (2001 SCC 40)
  - If the NEB really wants to incorporate the precautionary principle, and I believe that it should, then it would have a real impact on its actions:
    - The fact that the product of the proposed Northern Gateway pipeline would sink in water and then be impossible to remove if there was a leak or spill was not shared to Indigenous communities before initial consultations.
    - The action of moving forward with consultations and assessments without such critical information would be against NEB policy if it incorporated the precautionary principal.

- Discussion question 3(a) – “What are your views with respect to the role(s) of other parties in the final decision-making process, such as Indigenous groups, provinces/territories or municipalities?
  - a) Do you see an enhanced role for some or all of these parties? If so, please describe what these roles should be for each, with a short rationale for why.”
- **Recommendation – There needs to be a far greater role for Indigenous groups. Specifically, the NEB should implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada now supports the declaration without reservation. Even though the declaration has not yet been incorporated into domestic legislation, the NEB could incorporate the declaration into its own policies.**
  - This would, of course, include free, prior, and informed consent.

- Discussion question 7 – “In determining whether an export licence should be issued, what are your views with respect to NEB’s obligation to only consider whether the exports would be a surplus to Canadian requirements?”
- **Recommendation – The NEB should also be required to be consider the upstream and downstream GHG emissions that would result if the export licence was granted. The NEB should not grant licences that would place Canada in violation of its climate change obligations (both domestic and international).**

- Discussion Paper 5 – *Determining the Canadian Public Interest*
- Discussion question 1 – “What does the ‘Canadian public interest’ mean to you?”
- The *NEB Act* s. 52(2)(e) – “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:
  - 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.”
- *Spraytech v Hudson* (2001 SCC 40, para 1) – “This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society”
  - Environmental protection is within the Canadian public interest.

- Page 2: considerations could include “Fish and fish habitat, wildlife and wildlife habitat, including species at risk”
- The Southern Resident population of Killer Whales has a *SARA (Species At Risk Act)* status of ‘Schedule 1, Endangered’.
- Killer whales are immensely popular and valued, especially on Canada’s west coast and in west coast tourism.
- Such species, such as the Killer Whale, are within the Canadian public interest by virtue of its SARA status and its cultural importance.
- **Recommendation – The NEB needs to honestly and seriously consider such Canadian public interests, and there needs to be a mechanism in place that does not allow such important issues, such as the Southern Resident Killer Whales, to being overlooked.**

- In the NEB's environmental assessment (EA) of the Kinder Morgan expansion, the panel intentionally did not consider the increase in oil tanker shipping that would occur if the pipeline was expanded. The increase in tanker shipping, an increase of seven-fold, was a known element of the pipeline. If the Kinder Morgan expansion is in fact built, the increase in shipping will be an inevitable and **direct** result of the project. There is strong evidence that such an increase would lead to the extinction of the Southern Resident Killer Whales. The panel acknowledged that the increased sea traffic would have "significant adverse effects" on the killer whale population. Even so, the panel intentionally only looked at these impacts under general public interest. By doing so, the panel did not have to follow the SARA requirements. This is important because SARA prohibits any killing or harming of an endangered species, as well as any damaging or destroying of an endangered species critical habitat. By avoiding an issue that was directly related to the pipeline, the panel ignored matters of Canadian public interest, as well as possibly opening themselves up for litigation.

- Discussion Paper 8 – *Indigenous Engagement and Consultation*
- Discussion question 5 – “How can the Government of Canada best consider and address the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples when undertaking efforts to modernize the NEB and when making decisions on whether NEB-regulated projects are in the public interest?”
- **Recommendation – As I have stated before, the NEB should go beyond considering UNDRIP and implement the declaration into its mandate.**
  - The best way to address the principles in the declaration, as well as try and remediate the incredible harms done to Indigenous communities and people, is to implement the declaration.