



TRANSITION INITIATIVE KENORA

Moving Beyond Fossil Fuels

Transition Initiative Kenora
Comments on National Energy Board Modernization
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Transition Initiative Kenora is an environmental non-profit working with local people, government, and community groups to build the skills necessary to transition our economy to clean, renewable energy and to deal with climate change.

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Good morning Panel Members, fellow presenters and guests. My name is Teika Newton and I am the executive director of Transition Initiative Kenora, a community environmental non-profit operating in Kenora, Ontario in nearby Treaty 3 territory. I thank you for the opportunity to stand here on Treaty 1 lands, to share with you some of my thoughts related to the National Energy Board and its much-needed reform.

I will begin by telling you a bit about my organization and our experiences with the National Energy Board before moving on to remarks about recommended reforms.

My organization works primarily on climate and energy issues from the local to national levels, as well as watershed protection.

My experience with the National Energy Board comes mainly by way of participating in the review of TransCanada's Energy East pipeline project. I have also met with the Board Chair and other NEB personnel during the 2015 national outreach and engagement tour. Many of the comments I will share today are the same I gave to Mr. Watson and his colleagues two years ago.

For the Energy East review, my organization was granted intervenor status and with the support of our legal counsel at Ecojustice, we have been active participants in the hearing process. In particular, we have been very vocal about issues related to procedural transparency, accountability and fairness. We have filed letters with the Board highlighting funding insufficiency for project reviews and encouraging the Board to broaden opportunities for public participation.^{1,2,3} We have advocated to government and to the Board to refrain from pursuing this and other recent project reviews under the current, flawed legislation and instead to pause project reviews pending the completion of the legislative reforms currently underway.⁴

In August 2016, we filed a Notice of Motion with the NEB, calling for the recusal of two Energy East review panelists on the grounds that their participation was tainted with a reasonable apprehension of bias stemming from a private meeting held with a lobbyist for the project proponent early in the review process.⁵ That motion subsequently led to the recusal of the entire project review panel, as well as the recusal of the Board Chair and Vice-Chair from administrative duties related to the Energy East review.

We filed a further motion last month indicating that the legal consequences of a panel's recusal due to the reasonable apprehension of bias was that the proceedings over which they had

¹ TIK Letter to NEB Re: Completeness Determination. 18 Dec 2015. <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2897429>

² TIK Letter to NEB: Reporting of broken Application to Participate website. 3 Mar 2015. <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2696413>

³ TIK Letter to NEB: Reply to Applicants comments on procedure. 12 Jul 2016. <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3117858>

⁴ Ecojustice & TIK. *In Pipelines We Trust?* The Hill Times, 13 Feb 2017. <https://www.hilltimes.com/2017/02/13/in-pipelines-we-trust/95019>

⁵ TIK Notice of Motion for Members Gauthier and Mercier to recuse themselves from the Energy East Panel. 22 Aug 2016. <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3027605>

presided must be declared void and a new proceeding established.⁶ Days later, the Board concurred with our view and declared the Energy East proceedings void. A new process is slated to begin this year.

Already we have witnessed the haphazard application of the NEB's discretionary decision-making authority – for example, in the application of the “directly affected” screening of participants, or in the choices of what to include or exclude from the list of issues for project review, or whether to allow oral testimony or cross-examination of evidence. The constrained timeline for review may not leave adequate time for appropriate and comprehensive consultation with indigenous communities. In following other project reviews, we have seen that the NEB does not systematically hold project proponents to account in providing timely – or indeed any – responses to intervenors' information requests.

In sum, our experiences in dealing with the National Energy Board to date have given our organization an impression of a regulator in disarray. While we have found NEB staff, on the whole, to be professional and responsive, the legislative framework under which the Board operates produces a review process that is at best restricted, cumbersome, and lacking due diligence, and at worst a breeding ground for duplicity and collusion between the regulator and the industry it oversees.

These are the problems that exist today. But for the rest of my deputation, I wish to speak to what the NEB could and should be.

The National Energy Board arose out of a 1958 recommendations from the Royal Commission on Energy.⁷ Given the country's vast energy resources, as well as the nation's increasing need for energy for its growing industrial requirements, the Commission was to investigate questions relating to sources of energy and energy policy in Canada. Commissioners were tasked with assuring the most effective use of energy resources in the public interest – a term that, then, as now, was left undefined.

The National Energy Board (NEB) was devised by the Commissioners to fulfill a number of roles related to the transportation and trade of oil and gas and other energy commodities. Among its mandated tasks, the new NEB was to oversee the granting of energy export and import licenses, interprovincial pipeline and powerline transmission licenses, the issuance of certificates of public convenience for the construction of oil and gas pipelines, as well as to study and to recommend to the Governor in Council policies designed to assure to the people of Canada the best use of the energy and sources of energy in Canada.

This mandate was predicated on Canada being in a phase of tremendous industrial growth. It was the post-war era. Canada's population was rapidly rising, and Canada aspired to grow its economic power through resource development, manufacturing and industrialization. All of this growth demanded energy – lots of it, and at cheap prices.

⁶ TIK Notice of Motion Proceeding void as consequence of reasonable apprehension of bias. 10 Jan 2017. <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3117858>

⁷ Privy Council Office. 1958. *First Report of the Royal Commission on Energy*. Government of Canada. <http://publications.gc.ca/site/eng/472648/publication.html>

Today, the energy landscape has shifted. Canada's domestic energy demands are declining. Even the NEB's current reference case, which fails to account for the kinds of energy conservation measures necessary to meet climate change policy obligations, forecasts that Canada's long term energy production will outpace our domestic energy use over the coming decades.

Our once cheap sources of conventional crude oil are dwindling, and Canada has turned to mining more marginal resources like oil sands bitumen, that have a lower energy return on investment and demand enormous upfront capital investments whose cost recovery time horizons are decades long.

Climate change, though, has become a reality – an urgent reality that demands action today, not decades in the future. In 2017, addressing climate change means addressing our energy systems. Energy policy and climate policy are one and the same.

Canada is leading with crucial climate policies that have subnational, national, and international significance. Our nation is a signatory to the Paris Agreement. We have also developed our own Pan-Canadian Framework on Climate Change and Clean Growth. Provinces and municipalities are leading with aggressive policies and programs aimed at driving down carbon emissions and consumer energy demands, while we work to boost our electricity sector in preparation for one of the most major energy transitions that is just getting underway: the move from an economy based on carbon-intensive fossil fuel energy to one based on electricity and clean energy.

Meanwhile, our national energy policies are lagging. The National Energy Board has come under fire and intense public scrutiny in recent years for its controversial methods and decisions around pipeline approvals and regulation. While the Board is bound to act within the limits of its enabling legislation, experience is demonstrating that legislation to be severely flawed and in need of reform, resulting in a process that works well for no one.

The tensions that exist for the NEB, however, are more than just an artifact of a broken regulatory regime in need of legislative tweaking. Rather, there is a larger energy policy problem in Canada. We lack two crucial elements necessary for functional energy policy development and implementation.

First, we lack a public policy development forum in which Canadians, government, and the energy sector can work to address the urgency of climate change while mapping out a responsible energy system that will serve the social, economic, health, and environmental needs of Canadians and the rest of the world. Consultation on the various environmental law reforms now taking place, including this one, are a good first step, but Canadians have long been frustrated in their attempts to have their voices and concerns heard, recognized and addressed. Mistrust, skepticism and corrosive cynicism predominate the public view of the NEB, and until a responsive public forum is developed for holding such discussions, the NEB will continue to be the lightning rod for public frustration.

Second, and more importantly, we have no strategic plan for the long-term trajectory of Canada's energy landscape. The Pan-Canadian Framework on Climate Change and Clean Growth is an important first step, but so far the NEB is not explicitly bound by its policies. With the suite of current environmental legislative reforms underway, Canada has an opportunity to develop a strategic environmental assessment process that would include goals, targets, evaluative methods with milestones, and in the case of curbing emissions through climate policy, increasing ambition over time. Applying such a strategic EA process to the NEB could include legislating a mandate to perform fundamental regulatory review tasks like economic needs analyses within the context of a carbon-emissions reduction plan that becomes more stringent over time.

Related to strategic needs analyses is the notion of what serves the "public interest". In practice, the "public interest" is currently established through a cost-benefit analysis wherein economy and environment exist in perpetual tension. Under a strategic planning framework, however, energy regulatory legislation could be amended to eliminate vague or undefined language around the "public interest" in favour of tests based on rigorous, defined planning goals: is a project moving Canada toward its long term planning goals or away from them?

To remain relevant through the coming decades, the mandate of the NEB itself must also shift. When the NEB was established, it was chiefly occupied with regulating the growth of Canada's fossil fuel transportation infrastructure. Today and into the future, as Canada addresses climate change, the NEB is unlikely to have a continued role in overseeing such expansion. Its regulatory functions will be less focused on approving new or replacement pipelines, and more on decommissioning old lines as they reach their end-of-life expectancies or are phased out according to strategic emissions reduction plans.

To satisfy this role, greater consideration needs to be given to ensuring adequate resources exist to cover the costs and requirements of decommissioning projects and remediating lands and waters affected by pipelines. It is not enough that regulated companies be required to provide a letter of credit or surety bond to pay for abandonment; actual funds that accrue over time to keep pace with inflation must be held in trust for this purpose. Furthermore, full lifecycle costs including decommissioning, abandonment, and remediation must be included within project costs at the time of project application review.

In addition to regulating oil and gas pipelines and powerlines, the NEB's other main role is in studying and recommending the best use of the energy and sources of energy in Canada. Data management and reporting is one area where the NEB could significantly expand in coming years. For example, while reflecting Canada's international climate change obligations and targets, the NEB's energy forecasting mandate could be expanded to include much more emphasis on renewable energy sources. It could also become a body for advising on best policy practices to regulate interprovincial electricity transmission. The NEB could also have an enhanced role in public energy education, providing data, educational resources, accessible reports, and public engagement projects and activities aimed at improving Canadians' energy literacy.

I will close by echoing the same sentiments I delivered to Peter Watson and the National Engagement Tour group in 2015. The weight and seriousness of the flaws in current NEB

processes is so profound that minor modifications will not have a significant impact on regaining the public trust that has been badly eroded in recent years. A formidable restructuring task lays ahead, one that will likely require substantial changes to the legislative authority under which the NEB operates, if it is to successfully overhaul and rebuild its processes to a standard that is acceptable, useful, and credible for all participants.