

# Presentation to the NEB Modernization Panel

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**Presented by:**

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## Section One: Recommendations

### The NEB and Environmental Protection

1. The National Energy Board should not be a Responsible Authority under the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52), and thus should not conduct federal environmental assessments.
  - a. Power lines (section 58.301), and pipelines (e.g., section 111) should not be exempt from The *Navigation Protection Act* (R.S.C., 1985, c. N-22).
  - b. The NEB should not “assess potential effects of [Projects] on fish or fish habitat and species at risk” as outlined in the December 2013 MOU with the Department of Fisheries and Oceans<sup>1</sup>
2. The recommendations in this paper are based on the assumption that the NEB will no longer conduct environmental assessment.

### NEB Mandate

3. The NEB’s mandate should be specified in the legislation.
4. The NEB’s mandate includes a renewed definition of public interest, which is developed in partnership with Indigenous People, respectful of Indigenous Legal Traditions. This definition will necessarily include language specific to climate change, cumulative effects, the UN Declaration on Indigenous People and the principles of Free, Prior and Informed Consent, in addition to the regulatory functions.
5. The NEB should return to addressing the regulatory aspects of pipelines, transmission lines and imports of hydrocarbons as electricity, focusing on “tolls, tariffs, engineering design and operating safety, resource supply, markets, economic feasibility, effectiveness of public consultation, and landowner issues.”<sup>2</sup>

### NEB and Regulatory Independence

6. In contemplating a modernized National Energy Board, this panel should consider what degree, if any, of independence is necessary for this institution to achieve its mandate.

### NEB Governance

7. The NEB Act codify the requirement that the appointments to the board be merit-based.
  - a. The Board members should have a diversity of skills, including western law, Indigenous Law, Engineering, Climate Change, accounting, emerging technologies and other competencies, as needed<sup>3</sup>
  - b. The selection criteria should reflect the diversity of the population, and include representation by First Nations, Métis, Inuit and other Indigenous communities; women; and diverse regions of the country
8. Eligibility criteria (see section 3(4)) should include a “cooling off period” of at least one year for those who previously were “owner, shareholder, director, officer, partner or

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<sup>1</sup> See <https://www.neb-one.gc.ca/bts/ctrg/mmrndm/2013fshrcnscnd-eng.html>, dated December 2013

<sup>2</sup> *Cooperation plan for the environmental impact assessment and regulatory review of a northern gas pipeline project through the Northwest Territories* (2002) at p. 14.

<sup>3</sup> This is a partial list, derived from the notes on the panel’s public sessions in Toronto and Saskatoon

otherwise engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or electrify or holds any bond, debenture or other security of a corporation engaged in any such business”

9. Given the need for regional representation, NEB appointments should no longer be required to reside in Calgary (section 3(5)).
  - a. In order to restore public trust, it may be necessary to relocate the headquarters of the NEB.

#### Meaningful Participation and Engagement

10. The panel review the NEB’s approach to public participation against long-standing literature related to meaningful participation, including the work by the International Association of Public Participation<sup>4</sup>, and research by Stewart and Sinclair<sup>5</sup>, and Diduck, Reed and George<sup>6</sup>, among others<sup>7</sup>.
11. The legislation, regulation and guidance material should consider how the NEB can facilitate meaningful engagement in its participation programs.
12. The NEB should play an increased role in fostering energy literacy, including contributing to a robust, national energy data set which is comparable across Canadian jurisdictions.

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<sup>4</sup> International Association for Public Participation. (2006). IAP2’s Public Participation Toolbox. Retrieved from [http://iap2.affiniscape.com/associations/4748/files/06Dec\\_Toolbox.pdf](http://iap2.affiniscape.com/associations/4748/files/06Dec_Toolbox.pdf)

<sup>5</sup> Stewart, J., & Sinclair, A.J. (2007). Meaningful public participation: Perspectives from participants, proponents and government. *Journal of Environmental Assessment Policy and Management*, 9(2), 1-23.

<sup>6</sup> Diduck, A.P., Reed, M., & George, C. (2015). Participatory approaches to resource and environmental management. In B. Mitchell (Ed.), *Resource and environmental management in Canada* (5th ed., pp. 142-170). Toronto, ON, Canada: Oxford University Press.

<sup>7</sup> Praxis. (1988). Public involvement: Planning and implementing public involvement programs. In Federal Environmental Assessment Review Office (Canada) (Ed.). Calgary, AB, Canada.

## Section Two: The Review of Environmental and Regulatory Processes

In June, 2016, the federal government announced a review of its environmental and regulatory processes. There are four laws and processes under consideration, through four separate but interconnected processes:

- The Parliamentary Standing Committee on Fisheries and Oceans is reviewing Fish Habitat Protection under the *Fisheries Act* (R.S.C., 1985, c. F-14);
- The Parliamentary Standing Committee on Transport, Infrastructure and Communities is reviewing *the Navigation Protection Act* (R.S.C., 1985, c. N-22) (hereafter NPA)
- An independent panel is reviewing the federal environmental assessment process, currently governed by the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52) (hereafter CEAA 2012). The panel's report is expected March 31, 2017; and,
- This panel is contemplating efforts to modernize the National Energy Board (NEB), under the *National Energy Board Act* (R.S.C., 1985, c. N-7) (hereafter NEB Act).

As noted in the submission to the NPA by Fitzpatrick, Fast, Desorcy & McGregor<sup>8</sup>, in order to fully understand and develop robust protection, these four ongoing reviews should be undertaken together.

While elements of fish and fish habitat protect, navigation protection and environmental assessment are outside the terms of reference for this panel, I would argue the findings of the other three reviews intersect with, and should inform your work.

## Section Three: The NEB and Environmental Protection

In my submission to the Independent Panel reviewing federal environmental assessment, I recommended that the NEB, and by extension, the Canadian Nuclear Safety Commission, should not conduct environmental assessments for the federal governments. In making this recommendation, I reviewed evidence surrounding Emera Brunswick Transmission Project<sup>10</sup>, as well as my recent experiences participating in the assessments of the Enbridge Line 3 Replacement Project, and the Energy East Projects. In short, there are significant challenges to assessments conducted by the NEB which impedes opportunities for meaningful public participation, and restricts public confidence in the assessment process.

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<sup>8</sup> Fitzpatrick, P., Fast, H., Desorcy, G., & McGregor, B. (2016). Reform of the navigation protection act: Strengthening the protection of provincial and federal water resources (pp. 22). Winnipeg, MB: The University of Winnipeg

<sup>9</sup> Fitzpatrick, P. (2016). Building better federal EA: Submission to the expert panel upon its visit to Winnipeg (pp. 16). Winnipeg, MB: The University of Winnipeg (see <http://eareview-examenee.ca/view-submission/?id=1481222002.2512> )

<sup>10</sup> Sinclair, A.J., G. Schneider, and L. Mitchell, *Environmental impact assessment process substitution: experience of participants*. Impact Assessment and Project Appraisal, 2012. **30**(2): p. 85-93; Sinclair, A.J., G. Schneider, and L. Mitchell, *Environmental impact assessment process substitution: experience of participants*. Impact Assessment and Project Appraisal, 2012. **30**(2): p. 85-93; Schneider, G., A.J. Sinclair, and L. Mitchell. *Environmental assessment process substitution: Is meaningful public participation possible*. 2009 [cited 2010 October 20]; Available from: [www.cen-rce.org/eng/caucuses/assessment/docs/Substitution%20FINAL.pdf](http://www.cen-rce.org/eng/caucuses/assessment/docs/Substitution%20FINAL.pdf).; Canadian Environmental Assessment Agency, *Substitution under the Canadian Environmental Assessment Act: A report on the evaluation of the substitution of the National Energy Board review process for a Canadian Environmental Assessment Act Review Panel for the Emera Brunswick Pipeline Project*, 2009: Ottawa, ON.

Beyond issues with meaningful participation, my review of follow-up and monitoring documentation under an NEB-led environmental assessment falls short of EA best practice. I argued the material submitted by the proponent of the Enbridge Line 3 Replacement project was more reflective of compliance mechanisms required by the NEB Act<sup>11</sup>, as opposed to addressing the specifications under CEAA 2012<sup>12</sup> the operational policy statement associated with the Act<sup>13</sup>, or best practice<sup>14</sup>.

While the role of the NEB with respect to environmental assessment is outside the mandate of this panel, I nonetheless recommend that it no longer conduct environmental assessment. Assuming that the EA panel recommends that the NEB should not conduct federal environmental assessment and this is adopted by the Governor-in-Council, I would recommend that the Board also discontinue its reach into Navigation Protection, and Fisheries & Fish Habitat.

Specifically:

1. **The National Energy Board should not be a Responsible Authority under the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52), and thus should not conduct federal environmental assessments.**
  - a. **Power lines (section 58.301), and pipelines (e.g., section 111) should not be exempt from *The Navigation Protection Act* (R.S.C., 1985, c. N-22).**
  - b. **The NEB should not “assess potential effects of [Projects] on fish or fish habitat and species at risk” as outlined in the December 2013 MOU with the Department of Fisheries and Oceans<sup>15</sup>**
2. **The recommendations in this paper are based on the assumption that the NEB will no longer conduct environmental assessment.**

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<sup>11</sup> Fitzpatrick, P. (2015). Working at building sustainable relationships: Strengthening follow-up in the Enbridge Line 3 Proposed Project. A report prepared for the Assembly of Manitoba Chiefs and the Public Interest Law Centre of Legal Aid Manitoba (pp. 59). Winnipeg, MB: Public Interest Law Centre.

<sup>12</sup> CEAA 2012 defines a follow-up program as “a program for (a) verifying the accuracy of the environmental assessment of a designated project; and (b) determining the effectiveness of any mitigation measures.”

<sup>13</sup> Canadian Environmental Assessment Agency. (2011, December). Operational policy statement: Follow-up programs under the Canadian Environmental Assessment Act. Retrieved July 09, 2015, from <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=499F0D58-1> A follow-up program “is used to verify predictions of environmental effects identified in the environmental assessment; determine the effectiveness of mitigation measures in order to modify or implement new measures where required; support the implementation of adaptive management measures to address previously unanticipated adverse environmental effects; provide information on environmental effects and mitigation that can be used to improve and/or support future environmental assessments including cumulative environmental effects assessments; and support environmental management systems used to manage the environmental effects of projects.”

<sup>14</sup> Fitzpatrick, P. (2015). Working at building sustainable relationships: Strengthening follow-up in the Enbridge Line 3 Proposed Project. A report prepared for the Assembly of Manitoba Chiefs and the Public Interest Law Centre of Legal Aid Manitoba (pp. 59). Winnipeg, MB: Public Interest Law Centre.

<sup>15</sup> See <https://www.neb-one.gc.ca/bts/ctrg/mmrndm/2013fshrcnscnd-eng.html>, dated December 2013

## Section Four: NEB Mandate

According to the discussion paper, “The NEB has a specific mandate as set out in the *National Energy Board Act* (NEB Act) as well as responsibilities and authorities under other federal legislation.”<sup>16</sup> The mandate is then inferred based on the types of authorities established through the NEB Act, including on designated regulation of interprovincial and/or international pipelines and power lines, and imports of hydrocarbons and electricity.

I would argue this is a narrow definition of the Board’s mandate, drawing exclusively on the regulatory functions of the legislation. While these responsibilities are an important aspect of the mandate, the Board also has responsibilities outlined in the Act: namely, it has a responsibility to act in the public interest<sup>17</sup>. This concept is explored in a Discussion Paper<sup>18</sup> on public interest, which takes its definition from the NEB’s 2015 Annual Report to Parliament<sup>19</sup>:

“The Board has described the public interest in the following terms: ‘The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interest’s that changes as society’s values and preferences evolve over time.’”<sup>20</sup>

A clear mandate is an important for “an effective, efficient and fair regulatory system”<sup>21</sup>. It establishes the government’s intentions, frames the processes and outcomes of the Board, and is closely associated with how a board is accountable for its decisions.

Mandates (sometimes termed objectives or objects), can be established in the legislation (see Table 1)

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<sup>16</sup> [http://www.neb-modernization.ca/system/documents/attachments/e95149e9a07e6a150f9c1b344a33a5fbdcc48a3e/000/005/299/original/Discussion\\_Paper-NEB\\_Mandate\\_EN\\_-\\_FINAL.pdf?1484775564](http://www.neb-modernization.ca/system/documents/attachments/e95149e9a07e6a150f9c1b344a33a5fbdcc48a3e/000/005/299/original/Discussion_Paper-NEB_Mandate_EN_-_FINAL.pdf?1484775564) at p. 1; see also <https://www.neb-one.gc.ca/bts/whwr/index-eng.html>

<sup>17</sup> See the NEB Act sections 12(1)(a) which specifies the Jurisdiction of the Board; section 16.1 (b) (i) and 16.2 (b) on Confidentiality; and section 52(2) which establishes criteria for decision-making, among others. See also the

<sup>18</sup> See [http://www.neb-modernization.ca/participate/forum\\_topics/discussion-paper-5-determining-the-canadian-public-interest](http://www.neb-modernization.ca/participate/forum_topics/discussion-paper-5-determining-the-canadian-public-interest)

<sup>19</sup> See <http://www.neb.gc.ca/bts/pblctn/nnlrprt/2015/nnlrprt2015-eng.pdf> at p.12

<sup>20</sup> See [http://www.neb-modernization.ca/participate/forum\\_topics/discussion-paper-5-determining-the-canadian-public-interest](http://www.neb-modernization.ca/participate/forum_topics/discussion-paper-5-determining-the-canadian-public-interest) at p. 1

<sup>21</sup> McCrank, N. (2008). Road to improvement *Report to the Honourable Chuck Strahl*. Ottawa: Indian Affairs and Northern Development Canada at pp. 5-6

**Table 1: Mandates established in legislation. Please note, this is neither an exhaustive nor representative list; these were picked simply based on the author's familiarity with these Acts, and time.**

Legislation	Section	Mandate
CEAA 2012	4(2) <i>Mandate</i>	The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.
<i>Mackenzie Resource Management Act</i> (S.C. 1998, c. 25)	101.1 Mandate of the Board	Objective- Board <b>101.1</b> (1) The objectives of the Board are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley. Objectives — Gwich'in and Sahtu regional panels (2) The objectives of a regional panel referred to in subsection 99(2) are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit for residents of its management area and of the Mackenzie Valley and for all Canadians. Objectives — Wekeezhii regional panel (3) The objectives of the regional panel referred to in subsection 99(2.1) are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area.
<i>Nuclear Safety and Control Act</i> (S.C. 1997, c. 9)	9	<b>OBJECTS</b> <b>9</b> The objects of the Commission are (a) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to (i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use, (ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and (iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and (b) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (a).

Thus I recommend:

**3. The NEB's mandate should be specified in the legislation.**

The mandate of the NEB should expand beyond the specific regulatory areas. If the mandate is narrowly defined, based on solely on its regulatory functions, policy gaps emerge, which can restrict public confidence<sup>22</sup>. Crafting a mandate which establishes regulatory functions of the Board, but also the lens through which the decision should be made will provide transparency for all involved.

A starting point for this discussion is the definition of public interest. From a western perspective, this definition is dated, and does not address important components including climate change, cumulative effects and meaningful engagement (necessary for capturing “changing societal values and preferences”).

Moreover, there is a critical opportunity in this review to re-conceptualize public interest to reflect the direction from the Prime Minister to engage in nation-to-nation relationships with Indigenous People<sup>23</sup>. Public interest must necessarily include the “recognition of rights, respect, co-operation, and partnership”<sup>24</sup>. This concept, and by extension the mandate of the NEB, must be developed in partnership with Indigenous peoples, so that we can start the process of reconciliation as described in the Truth and Reconciliation Report<sup>25</sup>

**4. The NEB’s mandate includes a renewed definition of public interest, which is developed in partnership with Indigenous People, respectful of Indigenous Legal Traditions. This definition will necessarily include language specific to climate change, cumulative effects, the UN Declaration on Indigenous People and the principles of Free, Prior and Informed Consent, in addition to the regulatory functions.**

That being said, and in conjunction with my argument that the responsibility for environmental assessment, and associated Consultation are removed from the NEB, the Board would continue to deal with pipelines, transmission lines, and imports of hydrocarbons & electrify in the context of issuing necessary certificates of public convenience and necessity. In this way, the Board’s regulatory functions would return to matters technical matters related to “tolls, tariffs, engineering design and operating safety, resource supply, markets, economic feasibility, effectiveness of public consultation, and landowner issues.”<sup>26</sup> Public interest (as newly expanded), should continue to guide its decisions.

In past cases, when the NEB was not a Responsible Authority under CEAA 2012, it conducted its regulatory review concurrent with the environmental assessment process<sup>27</sup>. However, having

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<sup>22</sup> See the discussion in Gattinger, M. (2016). Public confidence in energy and mining development: Context, opportunities/challenges and issues for discussion A paper prepared for the June 8-9 2016 National Workshop on Public Confidence in Energy and Mining Development for the Energy and Mine Minister’s Conference 2016 (pp. 17); . Proceedings of the national workshop on public confidence in energy and mining development. (2016) Report to the 2016 Energy and Mine Minister’s Conference (pp. 20); Cleland, M., Nourallah, L., & Fast, S. (2016). Fair enough: Assessing community confidence in energy authorities. Ottawa: University of Ottawa, Canada West Foundation., among others.

In short, narrowly defined regulatory mandates limit the public’s ability to debate broader policy questions which ultimately frame specific resource development decisions. Disconnects, including gaps in climate change, Indigenous governance, cumulative effects, among others, are excluded from deliberation, which contributes growing challenges in public confidence.

<sup>23</sup> See <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

<sup>24</sup> Ibid.

<sup>25</sup> Truth and Reconciliation Report at pp. 16-17

<sup>26</sup> *Cooperation plan for the environmental impact assessment and regulatory review of a northern gas pipeline project through the Northwest Territories* (2002) at p. 14.

<sup>27</sup> This was the case in the Sable Gas Project, and the Mackenzie Gas Project.

the detailed technical review (as described in the previous paragraph) at the same time with the broader conceptual analysis which frames environmental assessment, has, at times, decreased public confidence in the decision-making. In the Mackenzie Gas Project, the NEB released draft conditions for approval long before the hearings for the assessment were complete. This led to people questioning if the assessment decision would be, in fact, a foregone conclusion.

If the Board were to return to its earlier purview, the Panel should contemplate the timing of the NEB's activities. I would suggest the NEB could serve an advisory function for environmental assessment (if required); however, the bulk of its activities would commence after a project successfully makes it through the assessment process.

5. **The NEB should return to addressing the regulatory aspects of pipelines, transmission lines and imports of hydrocarbons as electricity, focusing on “tolls, tariffs, engineering design and operating safety, resource supply, markets, economic feasibility, effectiveness of public consultation, and landowner issues.”<sup>28</sup>**

### Section Five: Should the NEB strive for regulatory independence?

A fundamental question, which underpins the terms of reference for this review<sup>29</sup> and questions posed throughout the twelve discussion papers<sup>30</sup> is: What the nature of the NEB, with respect to its independence?

As described by Harrison<sup>31</sup>, the role of the NEB has undergone significant changes since it was created. With a “broad public interest mandate”<sup>32</sup>, “core decisions that were essential final”<sup>33</sup>, and specific “measures to ensure the Board’s independence”<sup>34</sup>, the NEB was independent of government, not only with respect to its process, but also its decisions.

However, changes to the NEB Act in 2012 “fundamentally change the Board’s role. The Board has been stripped of its core decision-making authority over new pipelines projects and has been reconstituted as what might best be described as a ‘special status adviser’ to Cabinet. The amendments have also introduced significant procedural constraints on the Board, and have conferred extensive powers on the Chairperson to take measures to meet specified time limits. Panels of Board members designated to hear individual applications will no longer be complete matters of their own procedure.”<sup>35</sup>

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<sup>28</sup> *Cooperation plan for the environmental impact assessment and regulatory review of a northern gas pipeline project through the Northwest Territories* (2002) at p. 14.

<sup>29</sup> See <http://www.neb-modernization.ca/terms-of-reference>

<sup>30</sup> See <http://www.neb-modernization.ca/discussion-papers>

<sup>31</sup> Harrison, R.J. (2012). The elusive goal of regulatory independence and the national energy board: Is regulatory independence achievable: What does regulatory independence mean: Should we pursue it. *Alta. L. Rev.*, 50, 757-782.

<sup>32</sup> *Ibid* at 765

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid* at p. 758

I found this paper to be particularly interesting, as my interesting in the legislative changes of 2012, with respect to the NEB focused on environmental assessment<sup>36</sup>. If the Board's responsibilities go back to a pre-2012, pre-environmental assessment state, is there a continued need for independence? If so, would that involve independence with respect to the Board's regulatory process, or its process and outcomes?<sup>37</sup>

This is an important point of deliberation for your panel.

- 6. In contemplating a modernized National Energy Board, this panel should consider what degree, if any, of independence is necessary for this institution to achieve its mandate.**

## **Section Six: NEB Governance**

Discussions about governance are intricately linked with one's position on questions related to the role of the NEB and Environmental Protection (Section Three), the mandate of the NEB (Section Four) and nature of the NEB with respect to regulatory independence (Section Five).

That being said, there are some key principles which should inform governance of the NEB, which I see as serving as a regulatory board <sup>38</sup>. Specifically, I recommend:

- 7. The NEB Act codify the requirement that the appointments to the board be merit-based.**
  - a. The Board members should have a diversity of skills, including western law, Indigenous Law, Engineering, Climate Change, accounting, emerging technologies and other competencies, as needed<sup>39</sup>**
  - b. The selection criteria should reflect the diversity of the population, and include representation by First Nations, Métis, Inuit and other Indigenous communities; women; and diverse regions of the country**
- 8. Eligibility criteria (see section 3(4)) should include a "cooling off period" of at least one year for those who previously were "owner, shareholder, director, officer, partner or otherwise engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or electrify or holds any bond, debenture or other security of a corporation engaged in any such business"**
- 9. Given the need for regional representation, NEB appointments should no longer be required to reside in Calgary (section 3(5)).**

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<sup>36</sup> E.g., Doelle, M. (2014). The evolution of federal EA in Canada: One step forward, two steps back?; Gibson, R.B. (2012). In full retreat: The Canadian government's new environmental assessment law undoes decades of progress. *Impact Assessment and Project Appraisal*, 30(3), 179-188. .

<sup>37</sup> Harrison, R.J. (2012). The elusive goal of regulatory independence and the national energy board: Is regulatory independence achievable: What does regulatory independence mean: Should we pursue it. *Alta. L. Rev.*, 50, 757. At p. 760.

<sup>38</sup> "Regulatory boards are those charged with regulating complex or technical sectors and their decisions, while made in a somewhat adversarial process, affect many." See Manitoba Law Reform Commission. (2009). Improving administrative justice in Manitoba: Starting with the appointments process. Winnipeg, MB: Manitoba Law Reform Commission, at p.12.

<sup>39</sup> This is a partial list, derived from the notes on the panel's public sessions in Toronto and Saskatoon

- a. In order to restore public trust, it may be necessary to relocate the headquarters of the NEB.**

### Section Seven: Meaningful Participation and Engagement

There is a growing work which addresses nation-to-nation relationships, and what this means for environmental and regulatory processes<sup>40</sup>; I would encourage the Panel to work with the Elders, Knowledge Keepers and Youth to learn about nation-to-nation relationships, and how that should inform the modernization of the NEB as a whole, and Indigenous engagement.

My research on meaningful participation and opportunities for social learning focuses on the general public and non-governmental organizations.

There are significant problems with public participation in recent NEB applications, as noted in Section Three. My experience with the NEB dates back to my Master's thesis, where I explored the role of critical education in the environmental assessment of the Sable Gas Project<sup>41</sup>. Over the past seventeen years, I have been involved in a variety of projects that involve the NEB in different capacities, including as strictly regulator (i.e. The Mackenzie Gas Project), and as Regulatory Authority for environmental assessment and regulatory (i.e., The Enbridge Line 3 Replacement Project, and the Energy East Project).

As the NEB has assumed responsibility for environmental assessment, access to meaningful engagement in projects has decreased. For example, Sinclair et. al.<sup>42</sup> and Schneider et. al.<sup>43</sup> identified a variety of "procedural aspects that impeded meaningful involvement in the Emera case, including

- Deficient pre-hearing consultation
- Need for legal representation
- Lack of fair notice and time to prepare

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<sup>40</sup> I am grateful for the teachings of the Elders and Knowledge Keepers who prepared the Great Binding Law (Elders Oshoshko Bineshiikwe - Blue Thunderbird Woman - Osawa Aki Ikwe (Florence Paynter), Zoongi Gabowi Ozawa Kinew Ikwe - Strong Standing Golden Eagle Woman (Mary Maytwayashing), Nii Gaani Aki Inini- Leading Earth Man (Dave Courchene), Giizih-Inini- (Dr Harry Bone), Zhonga-giizhing - Strong Day (Wally Swain), Bird), N.D.W., & Kamintowe Pemohtet- Spirit Walker (D'Arcy Linklater). (2015). The Great Binding Law. from <http://www.turtlelodge.org/2015/12/the-great-binding-law-statement-of-manitoba-elders/>, and informed the submission by the Assembly of Manitoba Chiefs to the EA Panel (Assembly of Manitoba Chiefs (penned by Joelle Pastora Sala and Katrine Dilay of the Public Interest Law Centre), & Guided by the Elders and Knowledge Holders. (2016). Written submission of the Assembly of Manitoba Chiefs submitted to the expert panel for the review of the environmental assessment process (pp. 36). Ottawa, ON: EA

<sup>41</sup> This was a harmonized review involving the National Energy Board, the Nova Scotia-Canada Offshore Petroleum Board, the Province of Nova Scotia, the Province of New Brunswick, and the Federal government (under the original *Canadian Environmental Assessment Act* (S.C. 1992, c.37)

See Fitzpatrick, P. (2001). *The role of critical education in a panel that includes hearings*. (Masters), Natural Resources Institute, University of Manitoba, Winnipeg, MB. ; Fitzpatrick, P., & Sinclair, A.J. (2003). Learning through public involvement in environmental assessment hearings. *Journal of Environmental Management*, 67(2), 161-174. ; Fitzpatrick, P., & Sinclair, A.J. (2005). Multi-jurisdictional environmental assessment. In K. Hanna (Ed.), *Environmental impact assessment: Process and practice* (pp. 160-184). Toronto, ON, Canada: Oxford University Press.

<sup>42</sup> Sinclair, A.J., Schneider, G., & Mitchell, L. (2012). Environmental impact assessment process substitution: Experience of participants. *Impact Assessment and Project Appraisal*, 30(2), 85-93.

<sup>43</sup> Schneider, G., Sinclair, A.J., & Mitchell, L. (2009). Environmental assessment process substitution: Is meaningful public participation possible. Retrieved October 20, 2010, from [www.cenrce.org/eng/caucuses/assessment/docs/Substitution%20FINAL.pdf](http://www.cenrce.org/eng/caucuses/assessment/docs/Substitution%20FINAL.pdf)

- Lack of participant support
- Quasi-judicial process that limited open dialogue”<sup>44</sup>

In a document I submitted to the independent panel for EA<sup>45</sup>, I noted:

*“My experience with [the Enbridge Line 3 Replacement Project and the Energy East Project], unfortunately, underscores procedural aspects that impede meaningful public involvement<sup>46</sup>. Specifically:*

- *There is a need for legal representation to be involved in the review (EL3RP, EEP) to respond to directions from the Board and develop/respond to motions.*
- *Motions are important, as for the EL3RP, the process changes as the assessment moved forward. At first, it appeared there would be public hearings. However, once the IR stage was coming to a close, the NEB decided it would only hold hearings for First Nations and other Indigenous Participants.*
  - *This meant the company was not held to account. The evidence was not subject to cross-examination. While the public submitted written reports, these were not tested. Ultimately, the proponent rebutted the evidence in its closing argument.*
  - *The Winnipeg hearing did not provide simultaneous translation for the Elders and Knowledge Keepers, something which the NEB has done in other jurisdictions.*
- *The combination of regulatory- and EA documentation made the public registry difficult to navigate (EL3RP, EEP)*
- *The narrow interpretation of “directly affected publics”- counters foundational principle of EA, and alienates members of the Canadian public who have taken the time to get involved. For the EE project, over 2600 people/organizations applied; the success rate was 22.9%. In Manitoba, at least two non-governmental organizations are relegated to commentor status, despite having active research related to the proposed pipeline.*
- *The scope the EEP is narrow, focusing on largely on new construction, when much of the project crossing Manitoba (including that passing through our aqueduct) involves converting natural gas pipe, constructed between 1971 and 1977<sup>47</sup>”*

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<sup>44</sup> Fitzpatrick, P., & Sinclair, A.J. (2016). Multi-jurisdictional environmental assessment in Canada. In K. Hanna (Ed.), *Environmental impact assessment: Process and practice* (3rd ed., pp. 182-197). Toronto, ON, Canada: Oxford University Press, at p. 190

<sup>45</sup> Fitzpatrick, P. (2016). Building better federal EA: Submission to the expert panel upon its visit to Winnipeg (pp. 16). Winnipeg, MB: The University of Winnipeg

<sup>46</sup> I had originally assumed that the role of the NEB in EA would be canvassed by the panel appointed to modernize the National Energy Board. Having read its terms of reference, released on November 8, I see that this falls under this panel’s mandate. Apologies, I will include a more systematic analysis for the deadline on December 23.

<sup>47</sup> This is based on the company’s requested Section 58 exemptions which include “activities and works in support of converting the required TransCanada gas assets to oil service” as described in Volume 1, Consolidated Application (section 2.2.5), and the scope of the project for the purpose of the ESA, which “includes the construction, operation and decommissioning and abandonment of the pipeline and facilities as listed in section 1” (Volume 14, section 3.4). In reviewing the impact statement, most activities surrounding conversion of the “natural gas pipeline to oil service, for example in- Other activities associated with conversion of the existing natural gas pipeline to oil service, for example, in-line inspections, integrity investigations, digs and repairs, and removal of facilities not required for oil transport, were not assessed. These activities are routine in nature, will take place on the conversion pipeline RoW and other TransCanada- owned, leased or licensed property, and will otherwise meet the criteria established in the NEB s. 58 streamlining order (August 2012), decommissioning exemption order (October 2008), or Operations and Maintenance Guidance Notes (November 2013). Environmental protection will be accomplished in accordance with

I would recommend:

**10. The panel review the NEB's approach to public participation against long-standing literature related to meaningful participation, including the work by the International Association of Public Participation<sup>48</sup>, and research by Stewart and Sinclair<sup>49</sup>, and Diduck, Reed and George<sup>50</sup>, among others<sup>51</sup>.**

It is particularly troubling that a Board which is charged with recommending a course of action in the context of the public interest would exclude interested parties from participating in the dialogue<sup>52</sup>.

In addition, I would note that community engagement was identified as an important aspect of restoring public confidence at the 2016 Energy and Mine Minister's Conference<sup>53</sup>. This is a particularly important turn, as engagement is

is about building a relationship with communities. It moves beyond the traditional conception of participation and moves towards an on-going relationship for the purpose of developing a common interests and a common vision for the benefit of the community. Engagement moves beyond short-term and episodic contact to sustained, meaningful relationships. For effective community engagement, governments, industry and communities need to think about how to promote relationship-building. For effective community engagement, governments, industry and communities need to think about how to promote relationship-building.<sup>54</sup>

The NEB, as a key regulator of the energy sector, needs to develop more inclusive practices and procedures that will serve this directive. For example, participants of the workshop suggested that the government should establish national principles for engagement for resource development, including policy and procedures<sup>55</sup>, foster community capacity by developing learning opportunities, and establish opportunities for community partnerships, among others.

**11. The legislation, regulation and guidance material should consider how the NEB can facilitate meaningful engagement in its participation programs.**

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TransCanada's Health, Safety and Environmental Management System and the NEB's Onshore Pipeline Regulations, as well as the Environmental Protection Plan for Conversion Segments" (Volume 15, section 1.2; and Volume 16, section 1.2). Some section appear to scope in the conversion.

<sup>48</sup> International Association for Public Participation. (2006). IAP2's Public Participation Toolbox. Retrieved from [http://iap2.affiniscape.com/associations/4748/files/06Dec\\_Toolbox.pdf](http://iap2.affiniscape.com/associations/4748/files/06Dec_Toolbox.pdf)

<sup>49</sup> Stewart, J., & Sinclair, A.J. (2007). Meaningful public participation: Perspectives from participants, proponents and government. *Journal of Environmental Assessment Policy and Management*, 9(2), 1-23.

<sup>50</sup> Diduck, A.P., Reed, M., & George, C. (2015). Participatory approaches to resource and environmental management. In B. Mitchell (Ed.), *Resource and environmental management in Canada* (5th ed., pp. 142-170). Toronto, ON, Canada: Oxford University Press.

<sup>51</sup> Praxis. (1988). Public involvement: Planning and implementing public involvement programs. In Federal Environmental Assessment Review Office (Canada) (Ed.). Calgary, AB, Canada.

<sup>52</sup> See the section in the discussion paper ([http://www.neb-modernization.ca/system/documents/attachments/5a3a926d759d0c25d7785c556c1d461d0b9e772c/000/005/302/original/Discussion\\_Paper-Public\\_Participation\\_EN.pdf?1484767783](http://www.neb-modernization.ca/system/documents/attachments/5a3a926d759d0c25d7785c556c1d461d0b9e772c/000/005/302/original/Discussion_Paper-Public_Participation_EN.pdf?1484767783)) that canvases the criteria for participation, as outlined in section 55.2 of the Act

<sup>53</sup> Proceedings of the national workshop on public confidence in energy and mining development. (2016) *Report to the 2016 Energy and Mine Minister's Conference* (pp. 20).

<sup>54</sup> Ibid at pp. 8-9

<sup>55</sup> "Possible models/ processes to study include Norway's National Energy Strategy and the Whitehorse Mining Initiative" ibid at p. 10

In addition, this Conference identified the importance of resource literacy as a component of restoring public confidence. The NEB should play a role in addressing current challenges, which include multi-stakeholder resource literacy initiatives, and developing a robust, national energy data set, which would make available high quality, timely, independent energy data that was comparable across jurisdictions.

**12. The NEB should play an increased role in fostering energy literacy, including contributing to a robust, national energy data set which is comparable across Canadian jurisdictions.**