

# NATIONAL ENERGY BOARD CHAMBER ROUNDTABLES

Submission to the National Energy Board  
Modernization Panel

CANADIAN CHAMBER OF COMMERCE

# ACKNOWLEDGEMENTS

The Canadian Chamber of Commerce serves a network of over 450 municipal, provincial and territorial chambers of commerce and boards of trade from across Canada. This network connects the national chamber to 200,000 small, medium and large businesses from every industry and region in Canada, tying it to the issues that truly matter to Canadian business. This submission was developed and executed under tight deadlines and would not have been possible without the professionalism and dedication of the following chamber members:

- Trish Parsons, Executive Director of the Kitimat Chamber of Commerce;
- Zoe Addington, Director of Policy, Research and Government Relations at the Calgary Chamber of Commerce;
- Greg Durocher, President and CEO of the Cambridge Chamber of Commerce;
- Krista Ross, President and CEO, and Morgan Peters, Policy and Research Manager of the Fredericton Chamber of Commerce;
- Peter M. Turner, President, and Rachel Morgan, Office Manager, of the Yukon Chamber of Commerce.

We thank you for your hard work in gathering and sharing the views of your members.

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# NATIONAL ENERGY BOARD CHAMBER ROUNDTABLES

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This March, the Canadian Chamber of Commerce collaborated with five municipal and territorial chambers to collect members' views on the National Energy Board. Our objective was to gather insights from businesses of all sizes and a range of regions and industries on the questions raised by the NEB Modernization Panel. Each of the partnering chambers held a roundtable with its members in March 2017. The notes and recordings from these sessions, as well as a number of one-on-one interviews conducted by the Canadian Chamber, form the basis of the insights and recommendations included in this submission.

Through these roundtables and interviews, we heard from 87 representatives of chambers of commerce, businesses and other non-governmental organizations. While roundtable and interview participants included several from the energy sector – including oil and gas producers, pipeline companies and electricity and gas utilities – we asked participating chambers to include members from a broad range of industries, including professional and engineering services, construction, manufacturers and clean technology providers (see Appendix II for a complete list of participants). Participating chambers included:

- The Kitimat Chamber of Commerce from British Columbia;
- The Calgary Chamber of Commerce from Alberta;
- The Cambridge Chamber of Commerce from Ontario;
- The Fredericton Chamber of Commerce from New Brunswick;
- The Yukon Chamber of Commerce.

In the *What We Heard Section*, we outline five key themes that were repeated at the various sessions across the country. The rest of the report addresses selected questions posed by the NEB Modernization Panel in its discussion guides. The direct quotations from roundtable participants included in this text have been edited for grammar and clarity. The complete list of recommendations put forward in this report is included in Appendix I.



Yukon  
Chamber of  
Commerce  
Roundtable  
March 17

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Kitimat  
Chamber of  
Commerce  
Roundtable  
March 15

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Calgary  
Chamber of  
Commerce  
March 15

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Fredericton  
Chamber of  
Commerce  
March 16

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Cambridge  
Chamber of  
Commerce  
March 14

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Canadian  
Chamber of  
Commerce

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# WHAT WE HEARD

Throughout these cross-country conversations, participants from different regions and industries frequently raised a number of themes.

## 1. **Capital will move**

Canada's energy industry is facing an increasingly competitive global environment and transformative change. The efficiency and certainty of the regulatory system is one of the few factors fully under government's control. A rigorous but efficient system that results in certain decisions can be a significant competitive advantage for Canada's energy sector. Asking industry to jump through numerous hoops with uncertain results will lead to people and capital moving elsewhere.

## 2. **Business needs an efficient lifecycle regulator**

In order to ensure the health and safety of Canada's communities and environment, government must review individual projects to ensure they comply with regulation. An independent, quasi-judicial regulator that is responsible for the entire project lifecycle is the best way to coordinate this complex task. While there are many other worthy objectives for government to address, such as promoting energy literacy, engaging Canadians in policy development and collecting essential statistics, they should be clearly distinguished from the regulator's role. Conflating diverse responsibilities to a single organization leads to perceptions of conflict of interest and stretches limited budgets. Canada's national energy regulator should focus on doing one thing and doing it well: serving Canadians through a rigorous but efficient review of energy projects that fall within federal jurisdiction.

## 3. **The regulatory processes cannot substitute for climate politics**

The role of the regulator is similar to a court of law in that both are bodies independent of the government that dispassionately adjudicate laws or regulation set by politicians based on scientific or traditional knowledge and technical expertise. The policy development process involves weighing competing values and making difficult choices over priorities. Roundtable participants did not believe the NEB process is in need of major reform. They believe the NEB performs its regulatory role well. Instead,

the issue is that a regulatory process is being used as a substitute for broad consultation on non-board policy issues, a role it is ill equipped to fulfill. Government needs to engage Canadians in a national conversation on important policy issues outside the review of individual projects and work to create clarity on the policy strategy for Canadian energy going forward.

**4. The regulatory processes cannot substitute for policy**

Canadian governments are facing major policy issues, like climate change and reconciliation with Indigenous peoples. These multifaceted challenges require multifaceted solutions that are beyond the ability of a single project proponent to address. In terms of climate change, for example, the federal and provincial governments are putting into place numerous policies to reduce greenhouse gas emissions, including carbon pricing and new regulatory regimes. While greenhouse gas emissions emitting from projects themselves should be considered as part of the regulatory review, anything beyond would not only be duplicating existing policy, but would also be unfairly asking project proponents to take responsibility for activities over which they have no control.

**5. A fair process is not necessarily a popular one**

Engaging and consulting with communities and Indigenous peoples is an essential part of the regulatory process. It helps communities understand what is being proposed and to provide their views on whether a project should proceed and how best to do so. However, the objective of these consultations is not to win universal approval for projects, an impossible hurdle to clear, or even the more nebulous concept of gaining a “social licence.” Instead, the focus must be on a consultation and hearing process that is clear, consistent, fair and final, even if the resulting decision is controversial.

## QUESTIONS & ANSWERS

*What are appropriate requirements for Board members (particularly regarding composition, expertise, regional representation and Indigenous representation)?*

Roundtable participants from across the country felt that the National Energy Board would benefit from having members from various sectors and regions. Being able to draw on a broad range of skills, expertise and regional perspectives would supply the Board with the grounding it needs for effective decision-making. Some suggestions on which factors to consider in the composition of the NEB included:

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*“Regulation is a profession. It’s not for amateurs.”*

*-Calgary Roundtable*

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- Members with an understanding of the energy sector and the business practices – this is essential.
- Representation by Indigenous Canadians would be important to better incorporate traditional knowledge and history of these peoples into decision making.
- Board members with experience in communication and community engagement should be included alongside engineering, science and corporate expertise.

One roundtable participant argued that because the Board is responsible for making billion dollar decisions that impact an enormous number of Canadians, it is reasonable that their selection and tenure process be as rigorous as possible. Short-term Board appointments may be subject to changes in the political landscape, which could result in greater politicization of the review process. For the sake of greater continuity and capacity building, an NEB board that was broadly representative would provide a depth of knowledge for decision making and legitimacy to the institution’s decisions. Diversity would help allay suspicion that the NEB serves only one industry or one region of the country.

However, the crucial skill all Board members must exhibit is the ability to assess complex facts and render a reasonable decision. In this regard, the composition of the Board may matter less than the rules governing the decisions. As one roundtable participant noted, if the decision changes depending on who is on the panel, it will create problems with the certainty of the process.

“The key issues are: Did they follow the rules of procedural fairness and natural justice? Was the process fair, and did they stick to the rules that are set for a quasi-judicial tribunal? So ask yourself, if a panel of three is hearing facts and only those facts in rendering a decision, one should argue that irrespective of the three panel members – wherever they came from, their background, their diversity – they should generally come to the same decision. If they don’t, then we have a much bigger problem around regulatory certainty.”

## RECOMMENDATIONS

1. Strengthen the process for selecting and retaining Board Members by ensuring members with a range of skills, background and expertise from across Canada.
2. Ensure the Board’s decision-making process, particularly the factors to be considered in rendering the decision, are clearly defined and articulated to Board members, project proponents and other stakeholders.

*What are your views on the NEB's existing mandate? Are there any areas over which the NEB's mandate should be changed?*

A reoccurring theme across all the roundtables was businesses' need for an efficient and independent regulator. A regulatory process that is rigorous, clear, predictable, timely and final is fundamental to creating a climate that attracts investment. A regulator that understands and has authority over the full lifecycle of a project, allowing proponents to deal with a single agency, is another crucial aspect of the NEB that should be maintained.

Businesses, particularly in capital-intensive sectors, like the energy industry, require certainty in order to attract investment. Unfortunately, the regulatory process in Canada has become a source of uncertainty, eroding businesses' ability to compete for investment dollars with other energy producers. In the words of a participant:

*"There is one fundamental value of the NEB to industry, and that is the concept of regulatory certainty. More than anything else, industry needs to know that the Board's decisions, once made, are solid decisions and will not be challenged further in court." If the regulatory process becomes too costly or uncertain, project proponents will look elsewhere for opportunities to invest, and Canada will miss opportunities.*

Some participants questioned the need for federal regulation given the existence of provincial energy regulators, asking whether a separate regulator was warranted simply because a pipeline crosses a border. Duplication of regulatory processes adds significant costs to business without improving environment or social outcomes. However, other participants noted the advantage of maintaining a federal role because it allows a proponent whose projects cross multiple jurisdictions to deal with a single entity.

Roundtable participant generally felt that the NEB should not expand its mandate that could effectively be dealt with by the provincial regulator, such as offshore renewable energy.

The mandate of the NEB was seen to be very narrow and largely relevant to the oil and gas industry. This was confusing to one participant, who felt that an organization calling itself a National Energy Board should be

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*"Our fear as business is that you're not only jumping through one hoop, but through numerous hoops."*

*-Kitimat Roundtable Participant.*

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playing a role in all forms of energy relevant to Canadians, not just oil and gas, but also nuclear, coal and renewables.

Participants recognized other parts of the NEB's mandate, such as collecting energy information, or monitoring energy supply and demand, as important. However, most speakers felt the regulator should hold this role. The energy data the NEB collects is incomplete, and other agencies, like Statistics Canada or Natural Resource Canada, may be in a better position to provide a complete view of Canada's energy system. Having a regulatory body rely on in-house market analysis could be perceived as a conflict of interest. Another speaker noted that the collection of data and energy analysis may not be the best use of limited funds for a national regulator.

Conversely, a few participant suggested areas where the NEB's mandate could be expanded that would complement rather than distract from its role as a lifecycle regulator. Playing a larger role in coordinating with other federal government departments and provinces was one such area. Another was working more closely with provinces, territories, municipalities and First Nations around emergency planning and response for pipelines under their jurisdiction.

## RECOMMENDATIONS

3. Maintain an organization independent of government focused solely on the lifecycle regulation of energy projects within the federal government's mandate, including the environmental assessments process. Consider renaming this body in order to better reflect the limits of this mandate, such as the "Federal Energy Transmission and Transportation Regulatory Board." Collecting and analyzing energy data should not be included as part of the regulator's mandate.
4. Recognize regulatory efficiency - i.e. a process that is rigorous, clear, predictable, timely and final - as a core part of this national energy regulator's mandate.
5. Refrain from expanding the role of the national energy regulator to areas that could be effectively managed by provincial regulators, such as offshore renewables. Instead, consider areas where the NEB could enhance its role as a lifecycle regulator, such as coordinating action around emergency planning.

*How should the Government of Canada provide the NEB with policy direction?*

The relationship between the NEB's regulatory role and policy development is a crucial one. Accordingly, this was one area the Canadian Chamber asked participants to focus on during the roundtable sessions.

Roundtable participants noted a clear distinction between regulation and policy. As a quasi-judicial regulator, some participants view the NEB's role as being similar to a court of law, in that both are bodies independent of the government whose role is to adjudicate laws or regulation set by politicians. Regulatory decisions are based on a narrow range of factors and types of evidence, such as scientific, technical, traditional and local knowledge. Policy development on major issues, conversely, enters into the sphere of politics and must take into account issues, like public opinion and values, that cannot be assessed and measured with precision. There is an inherent incompatibility between the process to create policy and the process to apply it in a fair, transparent and consistent manner.

Participants strongly felt that the regulatory review of specific energy projects must remain independent of government and the policy development process. As one participant stated, "you can't be the regulator of your own policies." The formal hearing process focused on a single project is appropriate to the NEB's quasi-judicial role and is essential to having a process that can make the predictable and certain decisions that are a necessary precondition for investment.

The nature of the NEB's conversations, however, draws it into policy debates, particularly with contentious issues, like climate change and the rights of Indigenous Canadians. Several speakers stated the distinction between a regulatory role and policy development was not widely understood by Canadians. In the words of one participant, many of the people involved in the NEB's processes essentially fail "to respect the difference between the politician's role, which is to act on what the electorate want, and the role of the regulator, which is to implement those policies."

Some participants argued the 2012 reforms to the *National Energy Board Act* and the *Canadian Environmental Assessment Act* that changed the role of the Governor in Council in approving major projects had exacerbated this misunderstanding. Many participants shared the opinion that, because of these changes, there is a perception the NEB has an advisory role to government rather than real independent authority. One participant framed

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*"People are annoyed when they go to hearings because they want to talk about climate change policy. They don't want to talk about how your valve is designed or how you went around an ecologically sensitive bog. They want to talk about the big picture issues."*

*-Fredericton Roundtable*

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the issue as a loss of respect of the process because the regulator is no longer seen to be the decision-maker but, instead, a point to apply political pressure.

“Before, when you went in front of the regulator, they were the decision-maker. At great peril to your own case would you raise all sorts of noise. That was not the best way to convince three people to support your views.”

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*“If we regulate counterproductive measures into effect, people and industry will leave.”*

*- Cambridge Roundtable*

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The idea that a policy vacuum or gap exists in the national discussions around energy was noted at all of the roundtables. In the absence of other forums to discuss, debate and influence government around energy policy, the national conversation has focused on the review of particular projects. The rigidity and narrow focus of a quasi-judicial process does not fit with the expectations of many participants, who would like the NEB process to provide an opportunity for discussions on broader issues. The NEB process “seems to be an opportunity to discuss these matters, but with the wrong folks in the room.”

Two policy areas were identified by many of the roundtable participants as particularly important areas for government leadership. The first was the process of determining whether projects are in the public interest. There was general agreement on the factors that should be considered: economic well-being, environmental protection, respect for Indigenous rights and public safety. Different stakeholders, however, would give different weight to each of these values. Determining which principals should take precedence in case of conflict is an inherently political decision. The weight given each of these factors evolves over time, requiring an iterative and flexible approach to determining public interest.

Participants from the pipeline industry noted that producing detailed plans on the project’s route, design and possible environmental and social impacts was an extremely resource-intensive process that, for larger projects, can cost tens or even hundreds of millions of dollars. Engaging in this year-long process, only to have the process overturned for political reasons, was a significant waste of resources and a discouragement to investment in Canada. Accordingly, they suggested a “two-part review” where the political determination of whether a

project is in the public interest is made before the detailed project assessments. A potential model for this assessment would be the “Preliminary Disclosure Process” undergone by Alberta’s surface coal mines. A brief overview of how this process could work was put forward by one participant:

“Companies provide an initial description of the project in sufficient detail that the government can understand the basic elements. Government staff review the Project against existing policies and advise their respective ministers with respect to the project’s consistency with those policies. Government then issues a written, public decision with respect to whether there are any policy issues that would cause Government to deny the application irrespective of the eventual decision of the Provincial regulator.”

Supporters of this approach argue that it provides applicants with greater certainty regarding both existing and even as yet unwritten policy. While the need for greater regulatory certainty on how to determine the public interest was broadly supported, other participants were not certain the approach would yield the desired result. Politicians would likely be unwilling to make decisions prior to having a detailed understanding of the potential impacts, and changes to design or routes could be used as an opportunity to call the initial decision on public interest into question. Instead, some participants suggested government should provide clarity from the onset on the factors on which it will base its decision, perhaps through a letter to the NEB.

The second area of government leadership referenced by roundtable participants was the need to set the policy context in which regulatory decisions are made. Many participants shared the sentiment that the regulator could not be expected to fill holes in policy. Many ideas for bodies or practices outside of the regulatory process that could provide a locus for public engagement on energy policy issues were considered by panellists, including:

- *Strategic Environmental Assessments (SEA)* – According to the Government of Canada, an SEA is “a tool that contributes to informed decisions in support of sustainable development by incorporating environmental considerations into the development of public policies and strategic decisions.” Some participants felt that, if conducted in a public and transparent manner with broad consultation, greater use of an SEA could provide an avenue for public engagement in the policy development process. The SEA could encourage the collection and sharing of environmental and social information, which could provide the basis for project-specific environmental assessments and avoid some duplication of effort. Having a foundation of background information to work from would be particularly useful in regards to consulting and accommodating Indigenous peoples, where SEAs could help determine the existence and strength of various rights as well as serve as one repository of traditional knowledge. However, approval for the

greater use of SEAs was not universal. Some participants noted that in their experience, SEAs have not been transparent or broadly consultative. In addition, there was deep concern that the greater use of SEAs would, in fact, constitute a new stage in the regulatory process, adding further delay and uncertainty.

- *Incorporating energy policy discussions into the Pan-Canadian Framework for Clean Growth and Climate Change* – As part of the United Nations Framework Convention on Clean Growth and Climate Change’s Paris Agreement, Canada has submitted its Nationally Determined Contribution (NDC) to maintaining global greenhouse gas emissions at two degrees. Starting in 2023, Canada’s NDC must be assessed and updated every five years. The Pan-Canadian Framework for Clean Growth and Climate Change, released in December, involved working with all the provinces and territories on a plan for achieving Canada’s NDC. The work involved broad and extensive consultations, with Canadians asked to provide ideas and commentary on the development of the document through a variety of forums. One participant suggested incorporating a broader discussion on energy issues into the process of updating the Pan-Canadian Framework as one way to broaden the contribution to the national energy policy development process.
- *Creating a nation energy policy advisory body* – While participants were clear that any advisory role should be kept quite distinct from a regulatory body, many supported the idea of a distinct organization with a mandate to foster national conversations on energy. This body could advise national and provincial governments on energy policy development and have a mandate to consult widely with stakeholders. A model for consideration was the United Kingdom’s Committee on Climate Change, an independent, statutory body mandated to advise the U.K. government and devolved administrations on issues related to climate change.

Participants felt there were some practices that could help clarify the distinction between the policy role of the government and the regulatory role of the NEB. For example, one participant suggested the NEB should have the ability to write to Natural Resources Canada to get clarity on policy

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*“The NEB should not be put in a political mire to make decisions the government is afraid to make.”*

*-Calgary Roundtable*

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issues that arise during the regulatory process. Adding a purpose section to the NEB Act could help to clarify the body's role. One speaker suggested "The NEB's purpose is to ensure the economic, orderly and efficient transportation of Canadian energy in a safe and environmentally sound manner."

Ultimately, however, participants recognized there were limits to what changing the NEB's processes or reorganizing government functions could achieve with regards to depoliticizing the regulatory process. Regulatory processes simply cannot substitute for politics. Politicians must provide both the regulator and the private sector with guidance on their policy objectives, clearly signaling what type of economic development is permitted and welcome and what will not be supported. They should also be prepared to defend decisions that were made according to established principles and following a fair and transparent process.

## RECOMMENDATIONS

6. The federal government should consider establishing a new process or body, separate from the national energy regulator, with a mandate to consult widely on issues related to energy policy and to provide advice to government. However, this advisory body should not in any way constitute a new layer in the regulatory process or have the ability to delay the review of individual projects.
7. Provide the NEB with greater clarity on how it will determine the public interest of a project before the start of the project. Allow the NEB to write to the Minister of Natural Resources to ask for clarification on points of policy that arise during the project review process.
8. Consider adding a purpose section to the NEB Act that clearly outlines the regulator's role in providing a rigorous, but efficient, review of energy projects in the federal mandate.

*What should be the role of the NEB in implementing government policies and priorities? 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 Mid-century Long-term Low-greenhouse Gas Development Strategy, when setting out hearing orders, lists of issues and, ultimately, recommending decisions and conditions?*

Because of its crucial importance to the current energy conversation in Canada, the Canadian Chamber asked roundtable participants to focus particularly on climate change when considering the role of the regulator in implementing policy. However, roundtable participants views on the appropriate role of the regulator in implementing policy would apply to other issues as well.

The Canadian economy is underpinned by the idea that people are allowed to take risks on an uncertain future. The regulator’s role is not to second-guess those decisions but to make sure work is conducted responsibly and according to the law. Accordingly, by its very nature, the regulatory process is focused on particular projects. In the words of one participant, the core question for the regulator is whether “particular energy infrastructure can be built in an environmentally sensitive and safe way that respects landowners’ rights”

Participants agreed it was necessary and desirable to consider the impacts of climate change that are directly related to a particular project. Participants at the Yukon roundtable, in particular, stressed the importance of addressing greenhouse gas emissions as critical to maintaining the legitimacy of the regulatory process. One participant suggested including a measure of the social cost of carbon from the particular project as part of the assessment. The impacts of climate change on the project over the long term should also be assessed. However, it is crucial the regulator make it clear at the beginning of the process how climate impacts will be measured and incorporated into the regulatory process and what kinds of actions will be required from proponents to address emissions.

There was strong agreement, however, that using the regulatory process to achieve policy objectives beyond the scope of the project under consideration would be deeply problematic for a number of reasons.

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*“They [pipeline companies] have no control over upstream and they have no control over how the product will be used when it leaves their pipeline. So, they are the wrong people to bear the brunt of the broader discussion. The discussion may be appropriate, but this is not the right forum for it.”*

*-Fredericton Roundtable*

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One participant spoke to the question of whether it was fair or effective to hold proponents responsible for impacts that were not under their control. The NEB's mandate relates to projects that primarily deal with the transportation of energy. Particularly in the oil and gas sector, pipeline companies cannot control how a product is made or how it will be used. To paraphrase one participant, "when building a highway, we don't ask the construction company to make sure only Teslas will be driving on it."

Another participant argued emissions from upstream oil and gas production were already being addressed through provincial and national regulations and other policies. Having the regulatory process consider the upstream or downstream emissions of projects would amount to a duplication of existing government policy.

Participants also raised the point that decisions made on assessments of future events are highly uncertain. Trying to incorporate long-term policy goals, such as the government's Mid-century Strategy, would lead to a "slippery slope" where the NEB would be asked to adjudicate between "competing projections" on how the world would look decades from now. This would likely be a contentious process that would introduce significant uncertainty and costs.

For these reasons, many participants felt that transforming the regulator into an instrument for social change or to achieve broad policy goals become would essentially be a decision to stop investment in oil and natural gas projects in Canada. Using the regulator as a way to implement broad social change or overarching policy goals would an opaque and subjective process that would introduce costs and uncertainty. In the interest of transparency and clarity, governments should put forward legislation or regulations to specifically ban or restrict projects or activities they do not wish to occur. Projects that propose legal activities that conform to existing regulation should be judged on their own impacts and not asked to bear the weight of societies' greatest challenges.

## RECOMMENDATION

9. The national energy regulator should only be asked to implement policies that relate directly to the impacts of projects under its regulatory authority. The project review process should not duplicate or substitute for policies and programs intended to achieve overarching policy objectives, such as addressing climate change.

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*"[Public consultation] is not just buy-in, but allowing people to have their voice heard. Buy-in means I have a product to sell you. I'm going to sell it that in the end you want to buy it. We're doing public consultation not to get buy-in, but to see how we can benefit from the wisdom of the public."*

*-Yukon Roundtable*

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*What could be improved regarding public participation?*

Participants at many of the roundtables recognized the NEB's efforts to update its public consultation processes, implementing new measures, such as open houses. The hearing process was viewed as an important part of the regulatory process, allowing local communities and Indigenous groups that could potentially be affected by the project the opportunity to better understand the proposed project and have their concerns heard. In the words of one speaker:

*"Well-run hearings do have a net social benefit in themselves. There is a catharsis that can go on. There is an ability for people to see the positions they took captured and written respectfully."*

The objective of these consultations, however, is not to win universal approval for projects, an impossible hurdle to clear, or even the more nebulous concept of gaining a "social licence." Instead, the focus must be on a consultation and public participation process that is clear, consistent and fair.

Towards that end, one participant noted a need to define what a good faith effort to consult is and to put limits around public participation. Community members and institutions are not always responsive to requests for input, and proponents may have to make several attempts to engage. Providing guidelines on how many times proponents should attempt to engage communities as well as by which mediums would help provide clarity for all stakeholders.

Roundtable participants also noted a need to place limits on public participation in the process, with one person noting that "NEB hearings can go on forever and ever if they have to hear from everybody who feels they have an interest." Many participants felt some opponents were using delays in the hearings process as a tactic, deliberately undermining the credibility of the regulatory process in order halt developments. One roundtable participant was deeply concerned with the long-term implications of this strategy.

“Part of the strategy to undermine the decision-making capability of the NEB is to undermine the institution by claiming it’s captured by someone. I struggle with that, because it’s not just the NEB. I’m talking about faith in all of our institutions. We’re watching that happen across the border right now in the United States. Fundamental things, like the free press, are being undermined, and it’s having an effect on the credibility of a lot of institutions. If we have no faith in any of our institutions, then we’re lost.”

At some roundtables, participants shared the perspective that public hearing processes were often one-sided. One person argued there was a silent majority in the support of energy pipeline and transmission projects in many communities. The person was less likely to participate in formal processes for a variety of reasons.

“There is a reluctance on the part of small businesses to actually articulate their perspective for fear they will be the victim of boycotts and protests and social media spamming because they take a point of view that is contrarian to other perspectives. I think there are a lot of people in the business community who are afraid to speak up.”

Roundtable participants also cited capacity issues as one reason small businesses might not make their views understood. Many find it difficult to spare time and resources to properly understand the issues and to make pointed interventions. For this reason, one participant noted the quality of submissions from businesses was often poor.

Informing businesses on the issues and speaking on behalf of members is the role of chambers of commerce. In many of the sessions, chamber managers acknowledged the need to do a better job of educating members of issues and speaking out on their behalf. However, chambers of commerce often face the same issues as other community groups. Many are volunteer-run and have limited resources. Allowing chambers access to similar supports as other community organizations could help to better balance the viewpoints presented during the public hearing process.

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*“The way the hearing was structured didn’t allow for people who believed in the project to want to speak up because there was so much bullying, whether it was in your community, cyber bullying or on the phone.”*

*-Kitimat Participant*

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## RECOMMENDATION

10. The hearing process should continue to be limited to participants with a direct interest in the proposed project, including communities in geographic proximity to the project as well as Indigenous Canadians whose rights would be affected.
  
11. The NEB should engage with local chambers of commerce as means to connect with local small businesses on projects, offering similar access to resources to support participation in the hearing process as other small businesses.

## HOW CAN CANADA ENHANCE ITS APPROACH TO INDIGENOUS ENGAGEMENT AND CONSULTATION?

While several participants addressed the issue of Indigenous engagement, the roundtables did not explicitly address the issue. Consequently, there was insufficient discussion of this issue to draw conclusions specific to the NEB. However, during the latter part of 2015 and the first half of 2016, the Canadian Chamber of Commerce gathered the perspectives of more than 90 business and Indigenous representatives as well as legal experts and government officials on the duty to consult and accommodate process. Our objective was to use their insights as the basis for recommendations to the federal Crown on opportunities to improve its own processes and work with other levels of government to pursue more consistency throughout the country.

This work was summarized in a 2016 report entitled *Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process*. The report's main recommendations are included below in the hopes that they contribute to the Expert Panel's deliberations.

- More actively communicate the services available to assist proponents in obtaining background information on Indigenous peoples, their historical and current relationships with the Crown, their rights and relevant contact information.
- Work with businesses, Indigenous peoples and other levels of government to develop a consistent duty to consult and accommodate framework that recognizes the different approaches to engagement, consultation and accommodation each community and project requires and that clearly defines:
  - *The aspect of the project that triggers the duty to consult and accommodate.*
  - *If the Crown will delegate all or some aspects of the consultation/accommodation, which ones and when.*
  - *The Indigenous peoples affected and their rights (established and/or potential).*
  - *The level of consultation required and how it should be undertaken.*
  - *What information the Crown will provide to businesses and Indigenous communities.*
  - *What resources/capacity are required by the Indigenous communities and who is responsible for providing them and bearing any costs involved.*

- The Crown's involvement, including: Primary contact person/resource; whether it will facilitate pre-consultation engagement between the proponent(s) and the affected Indigenous communities; whether it will provide advice or direction only; whether it will be "on the ground" in the Indigenous community with the proponent, on its own or not at all.
- Expectations of the affected Indigenous community(ies).
- Timelines (for proponents, Indigenous communities and the Crown).
- How the Crown will monitor the consultation and accommodation negotiations between proponents and Indigenous communities to measure whether each met the expectations of them and met their commitments.
- Bring Indigenous and business representatives together to develop a robust framework for engagement that emphasizes building relationships as a first step, whenever feasible, before consultation and accommodation discussions focused on particular projects begin as well as what each party will be accountable for. The resulting framework must be accompanied by resources to assist the Crown, business and Indigenous communities in ensuring engagement:
  - Respects the nation-to-nation relationship.
  - Reflects the rights and circumstances of Indigenous communities.
  - Provides businesses with the ground rules they need to avoid derailing potential projects due to missteps.
- Establish a Commissioner of Indigenous Consultation and Accommodation within the Office of the Auditor General with the mandate of providing semi-annual whole-of-government reports on the federal Crown's performance of its constitutional duties. In addition to assessing the Crown's risk management, the Commissioner's reports should include the number of consultations undertaken in the period reviewed, those that were conducted by the Crown, completely and/or partially delegated as well as their outcomes/status.

- By mid-2017, establish the framework and timelines for the review of laws, policies and operational practices related to the implementation of the recommendations of the Truth and Reconciliation Commission and the UNDRIP in its entirety. This review needs to seek the perspectives of a broad range of stake/ rights holders, including businesses and Indigenous communities, and address the tools to be available to each to fulfill additional obligations required of them.
- Communicate, annually, its progress in addressing fundamental quality of life issues for Indigenous peoples including clean drinking water, housing, education and healthcare.
- Be more ambitious in its definitions of Indigenous capacity building including such options as:
  - Tools to help Indigenous communities develop their own consultation guidelines for proponents based on their histories, rights and lands.
  - Organizing, in cooperation with other levels of government, regional conferences, workshops, etc. for Indigenous communities to share their expertise, best practices, etc.
  - Seeking the views of business and Indigenous representatives on a proponent-financed, arm's-length fund that would be available for Indigenous communities to hire the capacity they do not have and on what it could/could not be used for, etc.
  - Working with the provinces/territories to develop a list of suggested legal, environmental and other advisors to whom Indigenous representatives could turn for assistance if needed.
  - Assisting Indigenous communities to establish access to capital, including business loan guarantees and credit rating assistance.
  - Helping Indigenous communities document their resources (natural, human, financial, etc.).

## CONCLUSION

Given that energy policy is a provincial competency in Canada, the core of the NEB's role really relates to Canada's oil and gas industry. This sector is facing an increasingly competitive global environment. The efficiency and certainty of the regulatory system is one of the few factors that is fully under the government's control that could help Canada's industry compete.

A rigorous but efficient system that results in certain decisions can be a significant competitive advantage for Canada's sector. Asking industry to jump through numerous hoops with uncertain results would lead to people and capital moving elsewhere.

A major repeating theme of the roundtables was the need for regulatory certainty. The worst case scenario for business would be for governments to not clearly indicate what they intend to do, ask business to spend hundreds of millions of dollars on consultations, detailed engineering and environmental studies and then not come to a clear and final decision. A decision to create a complex and uncertain process is a decision to stop energy investments in Canada.

In your recommendations to government, we ask that you make an efficient, fair and final regulatory process a core part of any proposed reforms to the NEB. The Canadian Chamber of Commerce and its partners thank the National Energy Board Modernization Panel for the opportunity to participate in this process.

## APPENDIX I: RECOMMENDATIONS

1. Strengthen the process for selecting and retaining Board Members by ensuring members with a range of skills, background and expertise from across Canada.
2. Ensure the Board's decision-making process, particularly the factors to be considered in rendering the decision, are clearly defined and articulated to Board members, project proponents and other stakeholders.
3. Maintain an organization independent of government focused solely on the lifecycle regulation of energy projects within the federal government's mandate, including the environmental assessments process. Consider renaming this body in order to better reflect the limits of this mandate, such as the "Federal Energy Transmission and Transportation Regulatory Board." Collecting and analyzing energy data should not be included as part of the regulator's mandate.
4. Recognize regulatory efficiency – i.e. a process that is rigorous, clear, predictable, timely and final – as a core part of this national energy regulator's mandate.
5. Refrain from expanding the role of the national energy regulator to areas that could be effectively managed by provincial regulators, such as offshore renewables. Instead, consider areas where the NEB could enhance its role as a lifecycle regulator, such as coordinating action around emergency planning.
6. The federal government should consider establishing a new process or body, separate from the national energy regulator, with a mandate to consult widely on issues related to energy policy and to provide advice to government. However, this advisory body should not in any way constitute a new layer in the regulatory process or have the ability to delay the review of individual projects.
7. Provide the NEB with greater clarity on how it will determine the public interest of a project before the start of the project. Allow the NEB to write to the Minister of Natural Resources to ask for clarification on points of policy that arise during the project review process.
8. Consider adding a purpose section to the NEB Act that clearly outlines the regulator's role in providing a rigorous, but efficient, review of energy projects in the federal mandate.
9. The national energy regulator should only be asked to implement policies that relate directly to the impacts of projects under its regulatory authority. The project review process should not duplicate or substitute for policies and programs intended to achieve overarching policy objectives, such as addressing climate change.

10. The hearing process should continue to be limited to participants with a direct interest in the proposed project, including communities in geographic proximity to the project as well as Indigenous Canadians whose rights would be affected.
11. The NEB should engage with local chambers of commerce as means to connect with local small businesses on projects, offering similar access to resources to support participation in the hearing process as other small businesses.

## APPENDIX II: LIST OF ROUNDTABLE & INTERVIEW PARTICIPANTS

<b>Company</b>	<b>Representative</b>
101 Industries Ltd	Thom Meier
Accenture	Byron Schmidt
Aecon Industrial	James Gandhi
Alberta Innovates	Michael Kerr
Ale Roll-Lift Canada Inc.	Lucy Praught
AMEC	Judy Bennett
AMEC	Janet Blackadar
As an individual	Barrett Horne
As an individual	JP Pinard
As an individual	Sally Wright
As an individual	Itai Katz
Atco Gas	Kari Lynn Reed
Axxon Packaging	Brian Smith
Berkshire Hathaway Energy	Matt Bucholz
Bietz Resources Ltd.	Brian Bietz
Borden Ladner Gervais LLP	Chidinma Thompson
C.R & Wall Co In	Jeff Erickson
Calgary Chamber of Commerce	Zoe Addington
Calgary Chamber of Commerce	Gianfranco Terrazzano
Cambridge Cntr Honda	Nicole Pereira
Cambridge Engineering	Jim Collishaw
Canadian Chamber of Commerce	Katrina Marsh
Canadian Energy Pipeline Association	Sonya Savage
Canadian Energy Pipeline Association	Kai Horsfield
Canaport	Sergio Carvana
Clean Cut Energy	
Cold Climate Innovation	Eoin Sheridan
Dakwakada Capital Investments	Alex Doepel
Daudet Creek Contracting Ltd	Mark Minifie
Derome & Associates	Claire Derome
Dillon Consulting	Kristen Banks
District of Kitimat: Economic Development	Josh Marsh
Eccobee	Sarah Colvin
Enbridge	Brad Lattanzie
Energy +	Ian Miles
Energy +	Sarah Hughes
Engineers Yukon	Kimberly Kim
Envision Financial	Wendy Kraft

Fédération des chambres de commerce du Quebec	David Laureti
First Canada ULC	Phillip Malnis
First Nations Chamber of Commerce	Albert Drapeau
Fredericton Chamber of Commerce	Morgan Peters
Fredericton Chamber of Commerce	Krista Ross
Goldcorp	Buddy Crill
Ignite Fredericton	Larry Shaw
Ignite Fredericton	Laurie Guthrie
Jennkar Mechanical	John Correira
Kitimat Chamber of Commerce	Trish Parsons
Kitimat Chamber of Commerce	Jill Barrowman
Kitimat Valley Institute	Dusan Jankovis
L-Tech Instument Service Ltd.	Larry Thompson
Malloch Consulting Services	Mal Malloch
McElhanney Consulting Services Ltd.	BJ Houghton
Meridian Manufacturing	Ken Kingston
Mosaic Communications	Amanda Leslie
Naveco Power	Amit Vermani
Naveco Power	Peter Corbyn
Naveco Power	Emily McPhee
NB Power	Chantal St. Pierre
Norda Stelo Inc.	Nicolas Sabbagh
North Star Agriculture	Sonny Gray
Northern Vision Development	Mike Nixon
Polaris Solutions Inc.	Lesley Matthews
Private Consultant	Georgette Habib
Prolog Canada	Kells Boland
Pyrotek Inc.	Derick Stinson
Quebec Hydro	Henri Jacques
Randstad Engineering	Keith Wark
Red Dragon	Prakash Venkataraman
Region of Waterloo	Helen Jowett
RPS HMA	Bob Gallen
RSK Serco	Ryan Mushumanski
S & L Generation Consulting Ltd. (Retired)	Leo Flaman
Sisson Partnership	Louise Steward
Squarefield	Paul Huizinga
Stantec	Chris Blair
Stantec	Jeff Barnes
Suncor	Ginny Flood
T.N.C. Agencies	Sheryl Watson
Tower Peak Consultants Ltd.	Sheila Leggett

TransCanada  
Corporate Counsel Solutions  
Vintri Technologies  
Watson Lake Chamber  
Whitehorse Chamber of Commerce  
Yukon Development Corporation  
Yukon Energy Mines & Resources

Robert Tarvydas  
Kathy Pawluk  
Brendan Boyle  
Cheryl O'Brien  
Stan Thompson  
Krista Roske  
Cristina Pekarik