MIKISEW CREE
FIRST NATION

National Energy Board Modernization

Written Submission to the Expert Panel

Mikisew Cree First Nation, March 31, 2017

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Introduction

The Mikisew Cree First Nation ("Mikisew") is a woodland Cree Nation, with a registered population of approximately 2,800 members. Approximately half of its members live in and around Fort Chipewyan and on the surrounding traditional trapping, hunting and fishing lands, and most of the remaining half live in the vicinity of Fort McKay and Fort McMurray, Alberta. MCFN has nine reserves in northeastern in Alberta in the vicinity of Fort Chipewyan, including one within Wood Buffalo National Park (Peace Point No. 222).

Mikisew is a signatory to Treaty 8, which guarantees our Nation the right to maintain their traditional way of life. The Treaty is meant to protect our ability to use the land, water and resources provided by the creator, in order to continue their way of life as our ancestors have for generations. Mikisew members continue to sustain our way of life through hunting, fishing, trapping, gathering and we regularly engage in cultural and spiritual practices within our traditional territories.

For our Nation, cultural, social and spiritual health cannot be separated from the biophysical health of our territory. Our confidence in the health of our waters and resources is similarly connected to the health of our community and our ability to maintain our distinctive way of life. Our ability to exercise our Treaty rights is tied to how well the government protects the biophysical and human environment. Accordingly, National Energy Board ("NEB") reviews are a critical tool that can and should be used to assist us and the Crown in understanding the potential consequences of authorizing land uses in our traditional territory. Without rigorous assessment, informed by Indigenous knowledge, the Crown cannot expect to uphold its obligation to ensure that our Nation continues to be able to meaningfully carry out our way of life, as guaranteed by Treaty 8.

As the bitter disputes over the Northern Gateway and Trans Mountain pipeline projects show, Indigenous peoples do not see pipeline development occurring in a way that protects their rights and interests. The NEB Modernization project is an effort to deliver on the current government's promise to restore the public's and Indigenous peoples' confidence in the credibility and transparency of the NEB and other regulatory bodies.[1]

In our experience, proponents design pipeline projects to ensure that NEB Reviews are not triggered, even though these pipelines transport oil outside of Alberta. When NEB Reviews are triggered, Mikisew sees its concerns minimized or ignored altogether.

The mandate given to the Expert Panel is a once in a generation opportunity to re-envision the *National Energy Board Act*[2] in a way that implements the Calls to Action of the Truth and Reconciliation Commission requiring the federal government to fully adopt and implement the

[1] "Environmental Assessments" (2017), Liberal Party of Canada, available: <https://www.liberal.ca/realchange/environmental-assessments/>.
[2] RSC 1985, c N-7 [*NEB Act*].

United Nations Declaration on the Rights of Indigenous Peoples. We envision a regulatory regime that puts reconciliation and indigenous participation at the heart of the review process. For our Nation, this means a process that:

- is engaged when Aboriginal and Treaty Rights may be adversely affected,
- supports Indigenous participation at each stage of the assessment process by providing appropriate timelines and capacity funding,
- requires consideration of potential effects on Aboriginal and Treaty Rights
- results in transparent decision making,
- clarifies the relationship between the Crown's duty to consult with potentially affected Indigenous peoples and the review process,
- requires meaningful and respectful collection and consideration of Indigenous knowledge
- accommodates Indigenous-led assessments where appropriate, and
- involves Indigenous peoples in monitoring and emergency response.

In the following sections, we summarize our concerns with the present *NEB Act* and suggest improvements that will help give Indigenous peoples more confidence that NEB decisions further the public interest.

Mandate

The NEB should assess impacts on Aboriginal and treaty rights and the adequacy of Crown consultation

Section 52(2) prescribes the factors that the NEB must consider in determining whether a project is in the public interest. These are economic factors except (e), which covers any residual "public interests":

(a) the availability of oil, gas or any other commodity to the pipeline;
(b) the existence of markets, actual or potential;
(c) the economic feasibility of the pipeline;
(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

Reconciliation with Indigenous peoples ought to be one of the factors that goes into the NEB's determination of the public interest. The Supreme Court of Canada has held that consideration of the "public interest" includes assessing whether the Crown has met its constitutional duties to

Indigenous peoples.[3] These duties include not infringing Aboriginal and treaty rights unjustifiably[4] and fulfilling the duty to consult and accommodate before a decision that may adversely affect Aboriginal or treaty rights is made.[5]

When the NEB determines that a project is in the public interest, it is really recommending that the project is in the public interest based on all relevant factors except impacts on Aboriginal and treaty rights and the adequacy of Crown consultation. Given that the NEB describes the public interest as a balance struck between a number of competing considerations, this balance is not meaningful unless it is based on all relevant considerations.

The NEB should assess impacts on Aboriginal and treaty rights

The *NEB Act* should require the NEB to assess impacts on Aboriginal and treaty rights. This requirement should apply to decisions made under both ss. 52 and 58 of the *NEB Act*.

The fundamental goal of the law of Aboriginal and treaty rights is the reconciliation of Indigenous and non-Indigenous peoples' interests and aspirations.[6] One of the most important areas where reconciliation must occur is the resource development sector, as it is the site of great conflict between Indigenous peoples, governments seeking to grow the economy and private interests. At a minimum, reconciliation requires that impacts on Aboriginal and treaty rights be considered in regulatory processes in a manner that is transparent, accessible and meaningful. Unfortunately this is not presently the case in NEB processes. The NEB maintains that it does not have jurisdiction to assess impacts on Aboriginal and treaty rights when it recommends approval of projects (pursuant to s. 52) or approves projects (pursuant to s. 58). Instead, the NEB relies on the Crown to deal with these matters. This is inadequate in both law and practice. The constitutional entrenchment of Aboriginal and treaty rights was meant to renounce the "old rules of the game" where these rights were ignored.[7] This promise has yet to materialize in the NEB's decision making processes.

Current assessment categories are not proxies for the assessment of impacts on Aboriginal and treaty rights

Proponents and the Crown often argue that the study of biophysical impacts on natural resources is a valid proxy for the assessment of impacts on Aboriginal and treaty rights. However this is a very narrow view that does not take into account Indigenous knowledge, perspectives and laws (as discussed under "Indigenous Engagement" below). Similarly, assessment of the effects of a proposed project on the "current use of lands for traditional purposes" is often taken as a proxy for assessment of impacts on Aboriginal and treaty rights in environmental assessments. This is not valid.

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[3] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.
[4] *R v Sparrow*, [1990] 1 SCR 1075 at 1109.
[5] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.
[6] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.
[7] *R v Sparrow*, [1990] 1 SCR 1075 at 1105-1106.

1. Requiring "current use" may fail to capture the Aboriginal and treaty rights that require the most protection. For example, an Indigenous people may not currently be harvesting a species for conservation reasons. This requirement also excludes consideration of where rights might be practiced in the future.
2. The exercise of Aboriginal and treaty rights is not frozen in time at the moment of contact with Europeans.[8] The category of "traditional purposes" may not capture modern exercises of Aboriginal and treaty rights.
3. A focus on "use" may exclude consideration a project's impacts on the exercise of Aboriginal and treaty rights that do not involve the use of land, such as governance rights.

The NEB should require proponents to assess impacts on Aboriginal and treaty rights

The NEB must require proponents to gather information about impacts on Aboriginal and treaty rights. Currently, Indigenous peoples they must conduct that assessment themselves if they want to put that evidence before the NEB. Project proponents are expected to assume the cost of assessing all other potential Project effects. The potential effects on the rights of Indigenous peoples should be treated no differently especially given Indigenous peoples' limited resources.

The NEB should assess the adequacy of Crown consultation

The *NEB Act* should provide that the NEB may not approve or recommend approval of a project until it determines that the Crown has fulfilled the duty to consult.

The duty to consult is meant to ensure that Indigenous peoples' concerns receive meaningful and demonstrable consideration in regulatory decision-making processes. The Crown relies on administrative decision-making processes to fulfill the duty to consult in part or in full. It should be clear how these processes carry out the duty, and there should be a clear division of labour between administrative tribunals and the Crown. However, in the case of the NEB, there is a woeful lack of transparency. The NEB does not consult, and relies on the Crown to do so after it makes its recommendations. However the Crown relies on NEB processes to discharge the duty to consult in part or in full. In practice, the Crown takes the position that the NEB process adequately deals with the concerns that First Nations raise through consultation even where there is no direct or credible assessment of impacts on Aboriginal and treaty rights. In the case of decisions under s. 58 of the *NEB Act*, the Crown may not consult at all. The result is a muddle in which Indigenous peoples' concerns inevitably slip through the cracks.

The Crown must consult with Indigenous peoples from the beginning of the decision making process.[9] The Crown interprets this duty as simply informing Indigenous peoples that it will not

[8] *R v Sparrow*, [1990] 1 SCR 1075 at 1093.
[9] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31; *The Squamish Nation et al v The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 at para 74.

consult on a decision until after the NEB process has finished.[10] By that point, the Crown is consulting on a decision that has already been recommended for approval by the NEB. Legislated timelines leave nowhere near enough time for the Crown to conduct a meaningful impact assessment even if it wanted to.

The Crown further maintains that it can fulfill the duty to consult by consulting on related but different decisions (Phase V). Consulting on a different decision is not a valid substitute for consultation on the decision itself. Furthermore, consultation related to a decision that has already been made is no more than an invitation for Indigenous peoples to "blow off steam."[11]

The issue of what roles the NEB and the Crown play in fulfilling the duty to consult is presently before the Supreme Court of Canada.[12] However, the Court's task is to interpret the existing statutory division of labour, and not to determine what would be the best division of labour.

The *NEB Act* should require the NEB to assess the adequacy of Crown consultation for the following reasons:

1. The NEB does not purport to consult, and maintains that doing so is inconsistent with its status as a quasi-judicial tribunal. Therefore the duty should fall on the Crown.
2. Deferring consultation until after the NEB approves or recommends approval of a project results in confusion whereby the Crown minimizes its role or denies that it plays any role at all.
3. Consultation should start at the beginning of the regulatory process, and should not be conducted on the premise that the NEB has already recommended approval of a project.
4. Whether the Crown has fulfilled the duty to consult is a factor that determines whether approving a project is in the public interest.[13]

Assessing impacts on Aboriginal and treaty rights and the adequacy of consultation is not outside the NEB's mandate

Assessing impacts on Aboriginal and treaty rights and the adequacy of Crown consultation are critical to the NEB fulfilling its mandate. In NEB processes and environmental assessments, the NEB routinely assess the current use of land for traditional purposes and biophysical effects on plants and wildlife. Furthermore, the NEB assesses the adequacy of proponents' consultation with Indigenous peoples. There is no principled reason to think that it is incapable of assessing

[10] The Crown typically uses a five stage approach to consultation for s. 52 applications. In Phase I, the Crown encourages Indigenous peoples to participate in the NEB review (Phases II and III) if they want their concerns to be heard. The Crown refuses to consult with Indigenous peoples until Phase IV, after the NEB has issued its recommendations and before the Governor in Council makes a decision. In Phase V, the Crown then consults with Indigenous people if and when it issues permits for other aspects of the project such as fisheries and navigation.
[11] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54.
[12] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2015] SCCA No 524; *Hamlet of Clyde River v Petroleum Geo-Services Inc (PGS)*, [2015] SCCA No 430.
[13] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.

the adequacy of Crown consultation. The NEB Act should be amended to clarify the NEB's role and jurisdiction in this regard.

New areas for the NEB's mandate

Upstream impacts of approving pipelines and climate change

In Alberta, pipeline development is tied to oil and gas production, including development of the oil sands. Approval of a pipeline may cause projects to produce more oil without triggering a regulatory review of those projects themselves. Expanded oil production has a variety of consequences that the NEB must consider so that its determination of the public interest is based on all of a pipeline project's effects.

Climate change is an important upstream impact of oil sands development. The NEB only assesses the direct contribution to climate change caused by pipelines themselves rather than the much greater indirect contribution to climate change caused by expansion of the oil sands. Canada has set targets for greenhouse gas emissions, and it and the provinces are developing carbon taxes and other schemes to incentivize emissions reductions. The NEB review should gather information that will support these undertakings and allow for monitoring and testing of methods to reduce greenhouse gas emissions.

Decision-Making Roles

Assessing the adequacy of Crown consultation

As discussed above, the duty to consult should lie entirely on the Crown and the *NEB Act* should require that the NEB cannot approve or recommend approval of a project if it determines that the Crown has not fulfilled the duty to consult.

Terms and conditions that would apply to the government

The *NEB Act* should allow the NEB to propose terms and conditions that will engage the government, rather than proponents only. The NEB may conclude that it is necessary to implement measures that fall outside its jurisdiction. In the 2013 review of the Shell Jackpine Mine Expansion,[14] for example, the Joint Review Panel identified a number of areas where government action was necessary, such as preserving ecosystems and biodiversity in the oil sands region, improving monitoring programs and protecting bison habitat. However, the government never followed through on these actions.

Regional cumulative effects studies

The *NEB Act* should provide for regional studies which focus on understanding the cumulative effects of development. The *NEB Act* should provide criteria that trigger a regional assessment or

[14] Note that was not an NEB review but the same principle applies.

provide guidance to decision-makers as to when they should order a regional assessment. The could include the following:

1. the proposed project is in a region or ecosystem that has a unique value, including significant cultural value to one or more Indigenous groups;
2. the region or ecosystem has already been subject to heavy development, or significant development is anticipated; and
3. cumulative effects are expected and are of particular concern.

Project-based reviews are not an effective way to assess cumulative effects. It is not possible or reasonable for individual project proponents to gather the necessary information or to conduct an assessment at this scope. In areas where cumulative effects are a concern, a regional assessment should be conducted before individual projects are reviewed.

As many have observed, the need for a cumulative effects study of the oil sands area is critical and such a study is decades overdue. Given that there is no indication that development in the region is slowing down, this is exactly the sort of place where the *NEB Act* should require or indicate that a regional study be undertaken.

Timelines

The mandatory time limits for completing a review should be removed from the *NEB Act*. The review of different projects will take different amounts of time. The *NEB Act* should not provide a "one-size-fits-all" time limit on NEB reviews, especially one that is so short. Reviews that are curtailed by generic time limits lack credibility. Indigenous peoples may be deprived of a meaningful opportunity to collect Indigenous knowledge to inform the environmental assessment process and to respond to information divulged by better resourced proponents late in the assessment process.

Time limits should be established on a case-by-case basis in non-legislative documents such as Procedural Directives, Hearing Orders or Joint Review Panel Agreements, which can be amended or superceded as the circumstances require. If the *NEB Act* retains time limits, it should enable the NEB (rather than the Minister of Natural Resources or the Governor in Council) to extend timelines and provide triggers that would require it to do so.

The *NEB Act* should prescribe minimum time periods at key stages in the review to ensure that interveners have sufficient time to provide input.

Governance

Composition and expertise of Board Members and staff

One contributor to the lack of public confidence in the NEB is the homogeneity of its members and staff. The NEB is dominated by individuals from the energy industry. The NEB is based in

Calgary, and the *NEB Act* requires that Board Members live there full-time. One notorious example of overreliance on individuals from the energy industry was the appointment of Steven Kelly as a Board Member even though he was actively representing Kinder Morgan in the Trans Mountain Expansion Project review. This has led to the widespread opinion that the NEB generally favours development. A recent study found that between 2000 and 2014, the NEB approved almost 100% of projects even though in many Indigenous peoples raised concerns that proponents did not address.[15]

As the NEB must take into account a broader range of considerations when determining whether projects are in the public interest, more diversity in Board members and staff is required. There should be Board Members and staff with the expertise to assess impacts on Aboriginal and treaty rights, part of which includes conducting strength of claim assessments for claimed rights. These people should mandatorily be assigned to projects that potentially affect Indigenous peoples. Non-specialist Board Members and staff should also receive training to understand this evidence and its probative value regarding the assessment of the public interest.

Legislative tools for lifecycle regulation

Project splitting

The *NEB Act* should specify that intra-provincial pipeline projects that connect to inter- or extra-provincial pipelines require approval under the *Act*.

Numerous pipelines are applied for and constructed each year Mikisew's traditional territory, yet pipeline projects in Mikisew's traditional territory rarely trigger a NEB review. This is because of a fundamental disconnect between the statutory provisions in the *NEB Act* and the on-the-ground reality of modern pipeline infrastructure. Because of the way that pipeline is defined in the *NEB Act*, proponents can circumvent NEB assessment, regulatory and oversight processes simply by framing projects as intra-provincial pipelines that connect to terminals when in fact a primary purpose of most of these pipelines is to ultimately transport oil out of the province and country.

The definition of "pipeline" in the *NEB Act* is as follows:

> ***pipeline*** means a line that is used or to be used for the transmission of oil, gas or any other commodity and that **connects a province with any other province or provinces or extends beyond the limits of a province**… and **includes all branches, extensions**, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property, or immovable and movable, **and**

[15] Sari Graben, Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (Fall 2015), 65 University of Toronto Law Journal 382.

> **works connected to them**, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes.[16]

While a plain reading of this definition suggests that the pipelines in Mikisew's territory should trigger NEB review because they "connect" Alberta oil producers with other provinces and the United States or are "branches" of such to inter-jurisdictional pipelines, that is not the way the NEB interprets and applies the Act.

In the NEB's view, it would seem that only pipelines that directly carry oil out of Alberta trigger a review under the *NEB Act*. This is an excessively narrow view of the NEB's jurisdiction. By that definition, only massive projects such as the Keystone XL or Energy East projects would trigger NEB reviews. This is not the intent of the *NEB Act*, which places pipelines of even less than 40km under the NEB's jurisdiction.[17]

The current approach of offloading regulatory reviews that should require NEB involvement is a problem in a number of respects that should be of concern to this Expert Panel, given its terms of reference. We highlight a number of examples that illustrate the differences between the NEB and its provincial counterpart, the Alberta Energy Regulator (the "AER")

- While there are legitimate public trust issues with the NEB, these are magnified with respect to AER, whose primary purpose is to facilitate the development of energy resources in Alberta.[18]

- The scope and function of AER reviews is fundamentally different than the NEB: unlike the NEB, the AER is not required to assess whether a pipeline is in the public interest, and is barred from assessing the adequacy of Crown consultation.[19]

- The AER has significantly more restrictions on indigenous participation than the NEB: the AER may approve projects without holding a hearing,[20] restricts participation at hearings to those that may be "directly and adversely affected" by the project[21] does not necessarily provide advance funding for participation in hearings.[22]

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[16] *NEB Act*, s. 2. [Emphasis added].
[17] *NEB Act*, s. 58.
[18] The AER describes its mandate as follows: "The AER's mandate is to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta": *Report of Recommendations on Odours and Emissions in the Peace River Area (Re)*, 2014 ABAER 5, Executive Summary; *Pembina Pipeline Corp (Re)*, 2016 ABAER 4 at para 19; *Bonavista Energy Corp (Re)*, 2017 ABAER 1 at para 19.
[19] The AER's predecessor, the Energy Resources Conservation Board, was required to consider whether energy projects were in the public interest, but this requirement did not carry into the AER's mandate. On the AER's inability to assess the adequacy of Crown consultation, see *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*], s. 21.
[20] *REDA*, s. 34(1).
[21] *REDA*, s. 34(3).
[22] *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013, s. 59.

- AER proceedings create access to justice concerns: the AER's decisions are immune from judicial review[23] and can only be appealed on questions of law or jurisdiction.[24]

- The AER also does not consider cumulative effects when reviewing projects. This is important as large parts of Mikisew's traditional territory have been taken up by pipeline projects and the cumulative effect of oil sands development on treaty rights is staggering.

For these reasons, we recommend that the Expert Panel confirm that the mandate of the NEB should include all pipelines that that support the transfer of bitumen and other materials used in the oil sands region across provincial or international boundaries.

Indigenous engagement

Funding

Current approaches to participant funding hinder meaningful Indigenous participation in NEB reviews. NEB processes are complex and extremely resource-intensive. Indigenous peoples often need to retain consultants with legal, technical or scientific expertise to support their participation. This is especially true given the reluctance of non-Indigenous people to accept Indigenous knowledge, perspectives or laws without corroboration or "legitimization" by experts, especially when it conflicts with the information provided by a proponent. This comes at a significant cost.

Often, funding provided by the NEB will not even cover a technical review of the proponent's application. It does not extend to the many other steps of the review process such as reviewing and making comments on key documents such as Joint Review Panel Terms of Reference, preparing evidence, participating in hearings, preparing written submissions, participating in consultation meetings or briefing the community.

Incorporating Indigenous knowledge, Indigenous perspectives and Indigenous laws

Indigenous knowledge, Indigenous perspectives and Indigenous laws should all be incorporated into NEB regulatory reviews where they are provided. "Indigenous knowledge," also known as "traditional knowledge," includes ecological knowledge, social rules, spirituality and Indigenous philosophy. "Indigenous perspectives" include the views, opinions, perceptions and interpretations of circumstances or events shaped by the world view of an Indigenous people. "Indigenous laws" means the laws of an Indigenous community, including traditional teachings, protocols, rules of conduct and laws of more recent origin.

Indigenous knowledge, perspectives and laws should be integrated into NEB regulatory review processes for two reasons. First, these are a rich source of evidence that is complementary to

[23] *REDA*, s. 56.
[24] *REDA*, s. 45.

Western science, perspectives and law, and should carry the same weight as all other relevant evidence. Second, Indigenous peoples' status as the founding peoples of Canada means that they exercise governance rights and jurisdiction over themselves and their lands. A critical part of reconciliation is recognizing and giving force to Indigenous law as many leading jurists have argued.[25]

Indigenous knowledge, perspectives and law should be integrated into every stage of the NEB review process, such as determining the issues to study, the scope of factors, assessment of strength of claim and impacts on Aboriginal and treaty rights, and the effectiveness of mitigation measures. Failure to integrate these sources of knowledge devalues Indigenous peoples' concerns. For example, proponents and governments often conceive of impacts on hunting rights in terms of how many animals there are to hunt. Indigenous peoples, however, would consider the following additional factors relevant:

- what conditions are required for the exercise of the right?
- what cultural connections does the Indigenous group have to the area and resources in that area?
- what is the timing of the hunt?
- what is the quality of the resource?
- is there potential for avoidance reactions (e.g. might the exercise of the right be impacted by safety concerns or concerns over contamination of wildlife)?
- what cultural transmission activities occur in the area?
- what laws apply to the exercise of rights?
- what is the habitat availability and quality in other accessible areas? and
- where and when do members of the Indigenous community prefer to exercise the right?

Indigenous peoples have not had much success in getting regulatory bodies to understand and give weight to their knowledge, perspectives and laws. This is partly because this is left to the NEB's discretion, and reviewers fail to see their value or are uncomfortable engaging with them

Consideration of Indigenous knowledge, perspectives and laws should be mandatory where they are provided.

Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans

The *NEB Act* should:

[25] See, for example, the Honourable Chief Justice Lance SG Finch, ""The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice"(2012), Continuing Legal Education Society of British Columbia, *Indigenous Legal Orders and the Common Law.*

1) Establish an ongoing post-approval requirement that proponents provide information related to the issues identified by the NEB in the project review,
2) Require that such information be available to the public,
3) Enable the NEB to revise the terms and conditions of an approval in light of new evidence, and
4) Make it an offence to fail to provide information as required by the *NEB Act* and the terms and conditions of an approval.

NEB decisions are based on projects' predicted effects. It is essential to monitor projects' actual effects to inform future assessments. The NEB should be able to revise the terms and conditions of an approval as more information about a project's effects comes to light, particularly when predictions from the review turn out to be incorrect.

The *NEB Act* should make it mandatory for proponents to engage Indigenous people in the development of monitoring and emergency response plans and to integrate traditional knowledge.

Indigenous traditional knowledge is highly relevant to monitoring and emergency response, as knowledge holders are skilled at identifying and explaining changes to the environment caused by a project, including accidents. Community driven monitoring programs are effective at identifying effects that conventional techniques do not monitor, and increase the communities' confidence that a project is being operated responsibly and that its effects are known and under control. At a minimum, the *NEB Act* should require that proponents engage Indigenous peoples in monitoring and make the integration of traditional knowledge mandatory. Indigenous communities are often "first responders" in the case of an emergency if they are located near an accident.

Regulatory reviews by Indigenous peoples

The *NEB Act* should enable the NEB to harmonize its processes and timelines with Indigenous-led assessments and to enter into collaborative decision making arrangements with Indigenous peoples.

Traditional knowledge is grounded in a particular worldview, one that is not easily understood by non-Indigenous people without significant training. The most effective way to ensure that traditional knowledge is not ignored, minimized or misappropriated is to put Indigenous peoples in control of applying that knowledge in regulatory processes. This avoids the frequent problem where government or proponent "experts" dismiss or mischaracterize traditional knowledge and inevitably come to the conclusion that a project will cause no significant environmental effects or other impacts.

Giving Indigenous peoples a role in regulatory reviews also recognizes their governance rights and jurisdiction to participate in decision making processes that affect them and their lands.

There are a number of models in Canada where Indigenous peoples are working with the provincial and territorial governments to develop collaborative models for regulatory decision making. In the North, Indigenous peoples and Canada each nominate the members of regulatory decision making bodies such as the MacKenzie Valley Environmental Impact Review Board. In Ontario, the provincial government and First Nations are developing terms of reference for a Joint Review Panel with a member appointed by First Nations.