TE'MEXW TREATY ASSOCIATION

Written Submissions of the Te'mexw Treaty Association to the Expert Panel on the Modernization of the National Energy Board

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Part I – Overview

The Te'mexw Treaty Association represents five First Nations on Vancouver Island, BC in the British Columbia Modern Treaty Process. These First Nations are located along marine shipping routes, and their marine territories are significantly impacted by marine development, marine transport, and related impacts.

Te'mexw is concerned that the review process so far, particularly the late announcement of how the process would proceed and opportunities for engagement, has not allowed our organization to complete a thorough review of the National Energy Board ("NEB") process and related legislation and fully consult with our communities about their concerns. We hope to have the opportunity to provide more detailed submissions to decision-makers at a later time, however we highlight in this submission some of our initial areas of concern and recommended opportunities for improving the NEB.

We believe that our cultural, economic, 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 distinct way of life. NEB reviews are a critical tool that can and should be used to assist us and the Crown in understanding the potential consequences of development in and around our traditional territory.

In our experience, the NEB approves projects without considering their impacts on Aboriginal and treaty rights, and fails to adequately assess key environmental indicators that are a component of those rights. Of particular concern to Te'mexw is the failure of the NEB process to consistently consider impacts to the marine environment that relate to Aboriginal and treaty rights, and impose conditions on marine shipping to mitigate those impacts. Despite these fundamental flaws and the fact that the NEB does not purport to consult with Indigenous peoples, the Crown often relies on the NEB to fulfill the duty to consult in part or in full.

The mandate given to the Expert Panel is a once in a generation opportunity to re-envision the *National Energy Board Act*[1] in a way that implements Call to Action number 43 of the Truth and Reconciliation Commission that requires the federal government to fully adopt and implement the 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. 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;

[1] RSC 1985, c N-7 ("*NEB Act*").

- 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, perspectives and laws;
- incorporates Indigenous-led environmental assessments; and
- involves Indigenous peoples in monitoring and emergency response.

In the following sections, we summarize our concerns with the present *NEB Act* and recommend improvements that will help give Indigenous peoples more confidence that NEB decisions take into account Indigenous peoples' rights, interests, concerns and perspectives.

Part II – The Te'mexw Treaty Association

The Te'mexw Treaty Association ("Te'mexw") represents five First Nations in the British Columbia Treaty Process ("Treaty Process"): Beecher Bay (Scia'new) First Nation, Malahat Nation, Nanoose (Snaw-Naw-As) First Nation, Songhees Nation and T'Sou-ke Nation (the "Te'mexw Nations"). We understand that some of the Te'mexw Nations may be submitting comments to you directly and where such comments conflict with ours they should take precedence over our comments for those Nations.

The Te'mexw Nations are "Aboriginal peoples" within the meaning of s. 35 of the *Constitution Act, 1982*, and "bands" within the meaning of the *Indian Act.* Their reserves are located in urban and suburban areas of Southern Vancouver Island. The Te'mexw Nations signed an Agreement-in-Principle on April 9, 2015 and are currently in the Final Agreement negotiation stage of the Treaty Process.

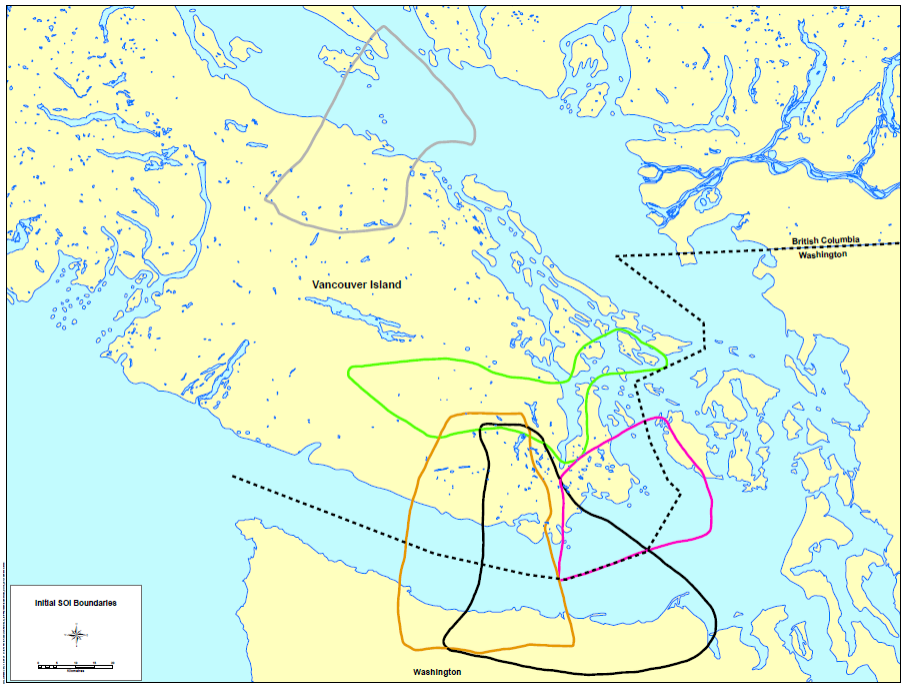

Figure 1: Statement of Intent Areas asserted by the Te'mexw Nations in the BC Treaty Process

The Te'mexw Nations are fishing peoples and have fished the waters and shores on and around Vancouver Island, the southern coast of British Columbia and the Fraser River since time immemorial. They are beneficiaries of the Douglas Treaties, which include the right to carry on their "fisheries as formerly" which have nutritional, cultural and economic components. The oral history of the Te'mexw Nations and accounts by the Hudson's Bay Company and other early settlers of Vancouver Island record significant harvest and trade in fish (meaning all marine life, including marine mammals), especially salmon, and fish products by the Te'mexw Nations. Despite the clear importance of the exercise of their rights to the economic health of these communities, the Douglas Treaty rights of the Te'mexw Nations have largely been ignored by the Crown while resource extraction and urban development have proceeded without their input. This has included significant developments in or around marine environments such as marinas, marine terminals, marine shipping, and military and naval bases and testing ranges**.** The traditional territories of the Te'mexw Nations are located along or in close proximity to major marine shipping routes for tankers carrying oil and gas products and other goods to market and are increasingly concerned about the impacts of intensifying vessel traffic.

Part III – Concerns with the Process and Consultation on Upcoming Changes

While funding for Te'mexw's participation in this process was approved in late November 2016, we did not learn the specifics of the activities that would be undertaken by the Expert Panel and the timing of those activities until January 2017. We did not learn of the Expert Panel's engagement sessions until mid-January and the only session in our region (Vancouver) occurred in early February. Given the extensive burden put on First Nations to participate in any number of consultation processes in addition to the demands of their regular governance activities this left us with grossly insufficient time to collect feedback from our Nations and arrange for attendance to make submissions to the Panel. It is simply unreasonable to expect that all Indigenous communities can prepare for such an opportunity within a space of three weeks. As a result, we were unable to present oral submissions to the Expert Panel or engage with the Te'mexw communities in a comprehensive way prior to the preparation of our written submissions.

The Expert Panel's report should recognize the shortcomings of this stage of the process, remind the Government of Canada of its duty to consult on legislative and policy changes, and recommend that the Minister conduct meaningful and deep consultation with Indigenous groups on actual legislative and policy proposals to reform the National Energy Board. This consultation should be funded in a timely manner so that Aboriginal communities can fully participate, consider proposals and respond meaningfully.

Part IV – Recommendations to Modernize the National Energy Board

National Energy Board's Mandate

Recommendation 1: 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 all economic factors except (e), which covers any residual "public interests."

Reconciliation with Indigenous peoples ought to be one of the factors that goes into the NEB's determination of whether a project should be approved. 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.[2] These duties include not infringing Aboriginal and treaty rights unjustifiably[3] and fulfilling the duty to consult and accommodate before a decision that may adversely affect Aboriginal or treaty rights is made.[4]

When the NEB determines that a project is in the public interest under the current framework, it does so 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, including impacts on Aboriginal and treaty rights and the adequacy of consultation.

Section 52(2) of the *NEB Act* should be amended to explicitly require consideration of impacts of the project on Aboriginal and treaty rights and the adequacy of Crown consultation. In sum, this is a logical and necessary amendment to the Act 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. The duty to consult should fall to the Crown.
2. Deferring consultation until after the NEB approves or recommends approval of a project results in confusion that allows the Crown to minimize its role in consultation or denies that it plays any role at all.
3. Consultation should start at the beginning of the regulatory process, and not after 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.[5]

[2] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.
[3] *R v Sparrow*, [1990] 1 SCR 1075 at 1109.
[4] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.
[5] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.

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

Recommendation 2: The NEB should require proponents to assess impacts on Aboriginal and treaty rights

The NEB must consider impacts on Aboriginal and treaty rights and require proponents to assume the cost of gathering and analyzing the relevant information. Currently, if Indigenous peoples want the NEB to consider impacts on their Aboriginal and treaty rights, they must conduct that assessment themselves, at their own cost. 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. Indigenous peoples should be involved in this assessment to whatever extent they desire to be, and this participation funded by proponents.

Recommendation 3: Current assessment categories must not be treated as 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). For example, a project that increases the number of tankers passing through our territory may not cause the death of a species of fish, but it may make it less safe for Te'mexw Nation fishers to travel to the places where they exercise their right to fish.

Assessment of the effects of a proposed project on the "current use of lands for traditional purposes" is also often taken as a proxy for assessment of impacts on Aboriginal and treaty rights in environmental assessments. This is not valid for the following reasons:

1. A focus on "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 of a project's impacts on the exercise of Aboriginal and treaty rights that do not involve the use of land, such as governance rights.

Recommendation 4: Scoping must include impacts of marine shipping and conditions on certificates must address marine shipping impacts

Marine shipping is a significant component of pipelines that extend to the coast of British Columbia. The impacts of transporting oil and gas by tanker, including the risk of a spill, increased wave action causing erosion, increased noise in the aquatic environment, vessel strikes of marine mammals and other impacts, are important factors in determining impacts on Aboriginal and treaty rights, and whether a project is in the public interest. The Te'mexw Nations are already experiencing the costs of these impacts. For example, islands in their traditional territories are being eroded away by wave action from large vessels, in some cases uncovering human remains in traditional burial sites near the foreshore which is extremely emotionally distressing and culturally unacceptable. They have also seen diminishing numbers of marine mammals they have depended on for sustenance, cultural and economic purposes as they are impacted by increasing aquatic noise and vessel strikes. They remain greatly concerned about the impact a marine oil spill would have on the marine resources they depend on.

Currently, the NEB acts inconsistently in scoping the impacts of marine shipping into environmental assessments of energy infrastructure projects – sometimes they are included, other times not – despite the fact that the *Canadian Environmental Assessment Act, 2012* definition of "designated project" includes "incidental activities".[15] To avoid improper scoping that excludes marine shipping impacts from assessment, the *NEB Act* should be amended to include a non-exhaustive list of "incidental activities" that must be considered when assessing certain types of projects. This list must include marine shipping for pipelines to marine export terminals.

In addition, the NEB does not view any regulation of marine transport as falling within its mandate. This has led to the problematic result that, even where marine shipping impacts are scoped into an environmental assessment, the NEB will approve a project without imposing any conditions relating to marine shipping on the project on the basis it has no jurisdiction to do so. This is of particular concern to the Te'mexw Nations, for whom marine shipping is the component of pipeline projects regulated by the NEB that has the greatest impact on their territories. Section 52(1)(b) currently states that the NEB must, for any certificate, set out "all the terms and conditions that it considers necessary or desirable in the public interest". If some of those conditions fall under the jurisdiction of another federal body and require cooperation, such

[8] *R v Sparrow*, [1990] 1 SCR 1075 at 1093.
[15] Section 2(1) "designated project".

as conditions on marine shipping which fall under the purview of Transport Canada, then the *NEB Act* should be amended to explicitly provide for the necessary coordination between the NEB and that body and give the NEB the power to impose conditions or at a minimum make recommendations to other federal bodies as to conditions that should be imposed.

Decision-Making Process

Recommendation 5: Minimum timelines should be legislated and maximum timelines should be more flexible

The mandatory time limits for completing a review should be removed from the *NEB Act*. 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 superseded 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. At the same time, to ensure that time limits are not unduly shortened, the *NEB Act* should prescribe minimum time periods at key stages in the review to ensure that Indigenous peoples have sufficient time to provide input.

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 proponents late in the assessment process.

Governance

Recommendation 6: Composition and expertise of Board Members and staff should better reflect Indigenous peoples and stakeholders outside of the energy industry

One major contributor to the lack of public confidence in the NEB is the homogeneity of its board 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. This has led to the widespread opinion that the NEB generally favours energy infrastructure development. A recent study found that between 2000 and 2014, the NEB approved almost 100% of projects even though in the case of many of those projects Indigenous people raised concerns that the proponent did not address.[17]

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

[17] 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.

rights, part of which includes conducting strength of claim assessments for claimed rights. It should be mandatory that these people be assigned to projects that have the potential to affect Indigenous peoples. Non-specialist board members and staff should also receive training to understand Aboriginal and treaty rights and the duty to consult.

Indigenous Engagement

Recommendation 7: Broaden standing requirements for NEB hearings to ensure affected Indigenous communities may participate

Prior to 2012, the *NEB Act* allowed participation by "any interested person". This has been narrowed in the current s. 55.2 of the Act to only those who can show they are "directly affected". Indigenous communities that may be affected by a project indirectly, but significantly, risk being excluded from participating. The previous wording should be restored with a slight amendment to allow participation by "any interested person or party", or at a minimum should provide for participation by "any person or party with a genuine interest" in the project.

Recommendation 8: Available funding for Indigenous participation should be increased

Funding levels hinder meaningful Indigenous participation in NEB reviews. NEB processes are complex and extremely resource and time-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 does 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, preparing evidence, participating in hearings, preparing written submissions, participating in consultation meetings or briefing the community.

Recommendation 9: Indigenous knowledge, Indigenous perspectives and Indigenous laws must be incorporated into reviews

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 Western science, perspectives and law, and should carry the same weight as all other relevant evidence. Second, Indigenous peoples' prior occupation of the land that is now Canada gives rise

to Constitutional rights to exercise governance powers and jurisdiction over themselves and their lands. Some Indigenous communities may also have certain self-governance rights recognized in a modern treaty. As many leading jurists have argued, a critical part of reconciliation is recognizing and giving force to Indigenous law.[18]

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 Aboriginal and treaty rights to fish in terms of how many fish are available to harvest. Indigenous peoples, however, would consider additional factors relevant such as:

- the conditions required for the exercise of the right (for example, are the fish not only available but accessible);
- the cultural connections the Indigenous group has to the area and resources in that area;
- the timing of fishing;
- the quality of the resource;
- any potential for avoidance reactions (e.g. might the exercise of the right be impacted by safety concerns such as increased boat traffic or concerns over contamination of fish);
- the cultural transmission activities that occur in the area;
- the Indigenous laws that apply to the exercise of fishing rights;
- the habitat availability and quality in other accessible areas; and
- where and when 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 information on Indigenous knowledge, perspectives and laws should be mandatory where it is provided by affected communities.

[18] 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*.

Recommendation 10: The Act must provide for an enhanced role for Indigenous peoples in monitoring energy infrastructure construction and operations and in developing emergency response plans

The *NEB Act* should:

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;
4) Make it an offence to fail to provide information as required by the *NEB Act* and the terms and conditions of an approval; and
5) Make it mandatory for proponents to engage Indigenous people in the development of monitoring and emergency response plans and to integrate traditional knowledge.

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.

Indigenous traditional knowledge is highly relevant to monitoring and emergency response, as Indigenous 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 increasing the community's 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 Indigenous knowledge into monitoring, where available, mandatory. Local Indigenous communities are often the "first responders" in the case of an emergency. Where projects receive approval these communities should be given the first opportunity to participate in monitoring and benefit economically from any spill response facilities required.

Recommendation 11: The Act must recognize assessments led by Indigenous communities and provide for collaborative decision-making with Indigenous people

The *NEB Act* should enable the NEB to harmonize its processes and timelines with Indigenous community-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 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 other governments in 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. Such collaborative models should be incorporated into the NEB process for Indigenous communities with the interest and capacity to do so.

Part V – Conclusion

The Te'mexw Nations are increasingly concerned that their territories, and particularly their marine resources, will be subject to very real, negative effects as the result of decisions made on oil sands development and the associated pipeline construction and expansion by a Board sitting hundreds of kilometers from any ocean. This concern is further exacerbated by the impoverished approach the NEB currently takes to the consideration of Aboriginal and treaty rights, which deprives the Te'mexw Nations of a meaningful opportunity to ensure their concerns are heard and addressed. The Te'mexw Nations face the very real risk of further degradation of their existing Douglas Treaty rights and future modern treaty opportunities by decisions made in a place and by people far removed from the Te'mexw Nations' experiences.

A modernized NEB would recognize that issues relating to marine impacts, Aboriginal and treaty rights and Crown consultation cannot be detached from the business of the Board if its role in environmental assessment is to be consistent with reconciliation between Indigenous and non-Indigenous peoples. We look forward to the Expert Panel's recommendations in this regard, and to further engagement with the government of Canada on the modernization of the NEB.