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Modernizing the NEB: Using International Best Practices as a Benchmark for Regulator Reform

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Introduction

On October 15th, 1957, the first appointments were made to Canada's Royal Commission on Energy ("Commission").¹ The Diefenbaker government tasked the Commission with enquiring into and making recommendations on "the extent of authority that might be best conferred on a National Energy Board" and aspects of energy policy that "may be desirable to entrust in such a Board."²

Just one year after the Commission appointees gathered, they released their "First Report." True to its name, this report documents the Commissioners' insights and commentary as they, acting on their terms of reference, sought to review the need and public interest in a national energy regulator.

Despite its now archival nature, the commentary contextualized the need not only for a national energy regulator, but for Canada to respond and act in an era of technological change. As the Royal Commission on Energy stated:

The significance of energy in a modern industrial nation is great. Technological developments and discoveries of new sources of energy as well as a rapidly growing requirement for energy in Canada suggest that the problems involved will be of growing proportions and importance.³

Over the course of a six-month tour, the Royal Commission on Energy spent seventy-two days in six Canadian cities, holding public hearings and gathering submissions.⁴

The result of their cross-country tour perhaps comes as no surprise, as the Commission recommended that enabling legislation be enacted to govern national energy policy in all its forms and sources, through a body to be called the National Energy Board. This body, they commented, would be "designed to assure the people of Canada the best use of the energy and sources of energy in Canada." While at the time the Commission refrained from opining on the Board's ability to place energy sources other than natural gas and oil under its jurisdiction, they recommended that legislation be written in such a way that "as may time to time be specified," the National Energy Board may retain jurisdiction over other sources of energy.⁵

Nearly sixty years on, the federal government established the National Energy Board Modernization Expert Panel ("Expert Panel") in November of 2016. Members were appointed and tasked with

¹ Royal Commission on Energy, *First Report*, (Ottawa: Privy Council Office, 1958) at 43 [*Royal Commission*]

² *Ibid*

³ *Ibid* at 48

⁴ *Ibid* at 95

⁵ *Ibid* at 51

conducting a “targeted review of the NEB’s structure, role and mandate” in order to prepare a report with the Panels’ recommendations. Over the course of a three-month tour, the Expert Panel spent nineteen days in ten cities, holding public presentations, engagement sessions and open houses.⁶

This report, delivered by the Canadian Environmental Law Association precedes the delivery of the Expert Panel’s “First Report”. CELA was established in 1970, as a non-profit, public interest organization, for the purposes of using and improving Canada’s existing laws to protect the public interest and the environment. Funded as a legal aid clinic and tasked with a mandate of providing services to low income and vulnerable communities, CELA actively engages in policy and legislative reform. CELA appreciates not only the opportunity to partake in this review but the funding that was made available to facilitate our involvement.

While CELA has sought to provide a forward-looking report to the Expert Panel, through a review of regulators on a global scale and their approaches to energy, environment and participatory decision-making, we recommend a return to first principles and an understanding of the NEB within its historical underpinnings. In 1958, the Commission envisioned a Board which in its decision-making not only took into consideration the economic feasibility of a pipeline project, but also “whether or not such project is in the national interest.”⁷ It was also to be a Board, as recommended by the Commission, that was accountable to the people of Canada in deciding upon the best use of energy resources.

In recommending a return to first principles, this report does not call for a stagnation of vision but rather, it encourages the Expert Panel to recognize how a Board, whose founding purpose was premised on acting in the national interest, can now re-envision its mandate, governance and *modus operandi*, to inform the next generation of energy policy and regulation in Canada.

⁶ Government of Canada, “Registration for Events,” online: <http://www.neb-modernization.ca/registration>

⁷ *Royal Commission*, *supra* note 1 at 49

1.0 MANDATE

*“Our laws are the most precise, if not the most poetic,
expressions of man’s relationship to his government”*

- John Swaigen⁸

Regulatory statutes are unique among laws. While like other statutes, they emulate the social and political will at their time of assent, they also impose a legislative purpose and grant authority to an agency. This agency, in administering its act’s purpose, is bestowed a duty to justify its choices in line with the principles to which it is obliged.⁹ Therefore, it becomes necessary for the agency to develop a conceptual understanding of its purpose and in moving forward, “not simply implement, but to implement in furtherance of the principles.”¹⁰ Herein lies the uniqueness of a regulatory statute: its agency is not conformed to a binary “shall” and “shall not,” style of decision-making, but instead is given discretion to preserve the integrity of its enabling statute, and the purpose and principles it seeks to further.¹¹

In response to the Expert Panel’s review of the NEB’s mandate, CELA submits that it is integral that a vision and focus for the NEB be defined. In order to become a ‘best in class’ regulator, there must be clarity in the agency’s mandate. It is only through the furtherance of core values, priorities and goals that regulatory excellence can emerge.¹²

Through this report’s global interjurisdictional review of energy and environmental statutes, energy regulators, policy and legal discussions, CELA has identified principles of decision-making which can enable regulatory excellence: (1) transparency, (2) environmental protection, and (3) the public interest. This chapter is comprised of a review of these three principles and the interpretations which should accompany their use.

It is necessary that these principles become part of the NEB’s legal mandate and not ‘guiding principles’ or commentary in an unenforceable guide or practice direction.¹³ All recommendations in this chapter are intended to be integrated within the NEB’s revised mandate through statutory,

⁸ John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 8 [*Environmental Rights*]

⁹ Kevin M Stack, “Purposivism in the Executive Branch: How Agencies Interpret Statutes” (2015) 109 (4) *Northwestern University LR* at 888 [*Purposivism*]

¹⁰ *Ibid* at 895

¹¹ *Ibid*

¹² Daniel Esty, “Lessons from Theory and Practice” in Cary Coglianese, ed, *Achieving Regulatory Excellence* (Washington: Brookings Institution Press, 2017) at 136 [*Regulatory Excellence*]

¹³ Canadian Environmental Law Association, “Consideration of Climate Change in Environmental Assessment in Ontario” (2016), online: <http://www.cela.ca> at 10 [*CELA Climate Change*]

regulatory, policy and administrative reforms, to thereby impose a positive duty on the NEB to consider these principles at all times.¹⁴

1.1 Transparency

Issues

The scope the Expert Panel's review of the NEB's mandate includes recommendations which may "clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis."¹⁵ In response to this research need, CELA will address the following issues:

- How can transparency be applied to all actions and decisions made by the Board?
- How can the NEB, through its mandate, increase the independence and transparency of its decision-making?

Current Weakness

The NEB has self-identified its need to improve transparency. This was publicly confirmed by Chair and CEO Peter Watson who recently stated, "the NEB needs to do a better job of being transparent and allowing the general public to have a better understanding of the process."¹⁶

In 2015, the Office of the Auditor General of Canada concluded in its report, *Oversight of Federally Regulated Pipelines*, that the NEB had not posted "information about company compliance with pipeline approval on its public dashboard"¹⁷ and "information about company compliance with pipeline approval conditions was hindered by the way the information was presented."¹⁸ The Commissioner noted that "easily locatable and user-friendly access to information is essential to transparency and accountability," especially "at a time when there is much public debate about pipelines."¹⁹

¹⁴ *Ibid* at 1

¹⁵ Government of Canada, "National Energy Board Modernization Expert Panel: Terms of Reference," (2016) online: <http://www.neb-modernization.ca/terms-of-reference> [*Terms of Reference*]

¹⁶ 919 The Ben, "NEB Chair Speaks About Transparency in Saint John," (1 Feb 2016) online: <http://www.919thebend.ca/news/1209771889/neb-chair-speaks-about-transparency-saint-john>

¹⁷ Office of the Auditor General of Canada, "Report 2 – Oversight of Federally Regulated Pipelines," (2015) online: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_02_e_41021.html#p61 at 2.61

¹⁸ *Ibid* at 2.56

¹⁹ *Ibid*

Rationale for Reform

Openness and transparency strengthen democracy by requiring the accountability of decision-makers' actions.²⁰ There is a systemic disinterest among energy regulators to provide access to basic data on the impacts of its regulated industry, which if released, would shape public concerns.²¹ A lack of transparency inevitably creates a data void and inhibits the ability of independent scientists and researchers to scrutinize the parameters upon which decisions are made.

If the NEB chooses to be a regulatory leader and embrace a high level of transparency, the public's trust in the NEB's independence, competence, integrity and impartiality can be healed.²²

Recommendations

i. Adopt international directives on transparency

CELA submits that the NEB should adopt the leading enunciation of the principle of transparency and symbolically implement the United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (herein, the "Aarhus Convention"). According to the Aarhus Convention, transparency operates as a compliance mechanism and through the collection and dissemination of information ensures that:

- a) Public authorities possess and update information relevant to their functions;
- b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment; and
- c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by a public authority which could enable the public to take measures to prevent or mitigate harm should be disseminated immediately and without delay to members of the public who may be affected.²³

²⁰ United Nations Economic Commission for Europe, "The Aarhus Convention: An Implementation Guide" (2014) online http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf at 14

²¹ Angela V Carter, Gail S Fraser & Anna Zalik, "Environmental Policy Convergence in Canada's Fossil Fuel Provinces? Regulatory Streamlining, Impediments, and Drift" (2017) 43(1) *Can Pub Pol'y* 61 at at 69 [*Environmental Policy*]

²² International Atomic Energy Agency, "Communicating with the public and other interested parties" (2017) online: <https://www.iaea.org/topics/communicating-with-stakeholders-and-the-public>

²³ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, online: UNECE

While this convention was adopted on June 25, 1998, and came into force October 30, 2001, Canada was not a signatory and has not ratified the agreement.²⁴ The NEB, however, is not barred from relying upon the Aarhus Convention in principle and, as CELA submits, it can be used as a template for defining transparency in the NEB's revised mandate.

Incorporating the ethos of transparency in its mandate will serve to infuse all of the NEB's adjudicative and operational powers stated in the *National Energy Board Act* ("NEB Act").²⁵ Examples include the NEB's study, review and reporting obligations to the Minister per sections 26(1) and (2), any data collected or received regarding a pipeline operator's compliance with licence conditions per s 30(2), or work orders for safety and security under s 29.²⁶ In line with the Aarhus Convention, the NEB must acknowledge that as a public authority, it holds information in the public's interest.²⁷

The International Atomic Energy Agency is another international body that encourages the release of official documents to "increase the institution's credibility by demonstrating it to be an honest and credible communicator."²⁸

RECOMMENDATION NO. 1: In addition to including transparency in its revised mandate, the NEB should rely upon the principles in the UN's Aarhus Convention to define its meaning.

ii. *Maintain a user-friendly public database*

CELA recognizes that the NEB has two existing online portal-like tools, the Interactive Pipeline Map and the Performance Dashboard, which visually plot pipelines and incident reports.²⁹ However, each of these tools only provides cursory information and not detailed reports. Nor, do these information portals present a 'one stop' location for all data, past and present, related to pipelines, approvals, and ongoing compliance actions.

<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf><http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [*Aarhus Convention*]

²⁴ Environment and Climate Change Canada, "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" (2015), online: <https://www.ec.gc.ca/international/default.asp?lang=En&n=BA645515-1>

²⁵ *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*]

²⁶ *Ibid.*

²⁷ *Aarhus Convention*, *supra* note 23

²⁸ International Atomic Energy Agency, "Enhancing Transparency and Communication Effectiveness in the Event of a Nuclear or Radiological Emergency" (2012) online: <https://www.iaea.org/sites/default/files/enhancetransparency180612.pdf>

²⁹ National Energy Board, "Interactive Pipeline Map" (2017) online: <https://www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/mp/index-eng.html>; National Energy Board, "Safety and environmental performance dashboard" (2017) online: <https://www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/mp/index-eng.html>

CELA has reviewed a number of approaches used by regulators to present accessible and user-friendly data. In Ireland, for instance, the Petroleum Affairs Division is responsible for the policy development, licensing and regulation of on and offshore oil and gas exploration and production. They have an online tool called the “Integrated Petroleum Affairs System” (see Image 1, below), which allows the public to access information, using a search function or map interface, to browse licence authorizations, wells, potential fields and seismic surveys.³⁰

Unlike the NEB’s Interactive Pipeline Map which only includes the company’s name, substance and status of the pipeline, Ireland’s database provides a record of key dates, a breakdown of the owners by percentage of ownership, the size of the infrastructure’s footprint and GPS coordinates.

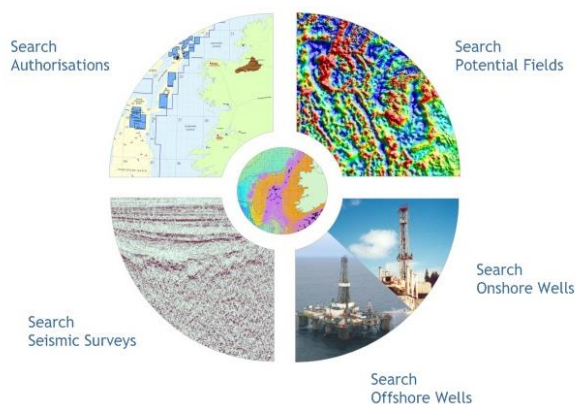


Image 1: Integrated Petroleum Affairs System³¹

In Victoria, Australia, petroleum and extractive industries are managed by the Department of Economic Development, Jobs, Transport and Resources. The Department’s Earth Resources Information Centre has developed a map-interface tool called the “Mining Licences Near Me” which allows users to identify earth resource leases near their location (see Image 2, below).³² The map enables users to plot exploration, retention and production licences of all commodities. While this map function unfortunately does not provide detailed licence information, it does excel at visually presenting the project types and their status. The most innovative feature of this interface is its “enter your address” function. This allows anyone to enter a postal code, plot licences near their location and in a user-friendly way, quickly narrow data and sort for relevance.³³

³⁰ Petroleum Affairs Division, “Integrated Petroleum Affairs System” online: <http://gis.dcenr.gov.ie/internetIPAS/servlet/internet/IPAS2IHome>

³¹ *Ibid*

³² Victoria State Government, “Mining Licences Near Me,” online: <http://earthresources.vic.gov.au/earth-resources/maps-reports-and-data/mining-licences-near-me/mining-licences-near-me>

³³ *Ibid*

Having a repository of information in a consolidated location would greatly assist the NEB during public hearings. Despite being a public body, great frustration can be caused to the public when compliance documents, licensing reviews and reports which have informed regulatory decisions are not openly disclosed. By way of example, at a recent Canadian Nuclear Safety Commission hearing, it came to the attention of CELA as a participant, that a key document being discussed by the proponent and regulator was not publicly available, except through a formal request for information process. A procedural hindrance such as this not only detracts from the level of meaningful public engagement during the time of the hearing, but needlessly redirects the participant’s efforts to the act of information collection.

To further supplement public accessibility, CELA encourages the NEB to post all of its decisions on the open access, Canadian Legal Information Institute (CanLII) site. This is a practice adopted by many tribunals and allows decisions to be more easily accessed, searched and cross-referenced with hyperlinks to other decisions and cases.

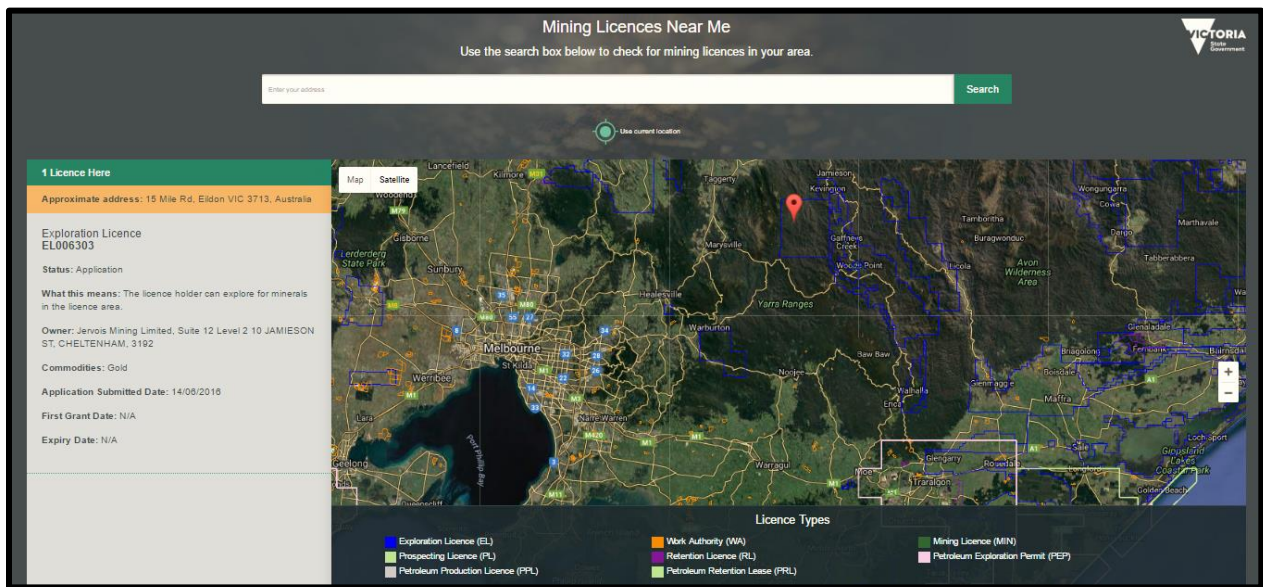


Image 2: Mining Licences Near Me ³⁴

RECOMMENDATION NO. 2: To enhance transparency and accountability, the NEB must maintain a public database which consolidates the documentation, decisions, and orders which inform their advisory and operational functions. This database must enable the easy access of information and incorporate a user-centred design.

³⁴ Ibid

1.2 Protection of the Environment

Issues

A second theme which emerged from this report's review of international discussions on energy regulation and excellence was the duty to consider the environment, particularly in the context of the public interest and environmental assessment.

According to the NEB Modernization terms of reference, the Expert Panel seeks input regarding how environmental factors may be considered in "defining and measuring the public interest" and secondly, where there may be "potential to expand the NEB's mandate." In response, CELA seeks to address:

- What reforms to the NEB's mandate and purposes in the *NEB Act* are required to reflect leading environmental decision-making principles?
- How shall environmental protection in the revised *NEB Act* be interpreted?

Current Weakness

The NEB is one of three federal authorities charged with carrying out environmental assessments, pursuant to the *Canadian Environmental Assessment Act, 2012* ("CEAA").³⁵ Researchers have noted that the streamlining of environmental regulation within oil and gas dependent jurisdictions has resulted in a consolidation of authority for environmental decision-making within regulatory authorities primarily designed to foster the energy sector.³⁶

One of the most noted critiques of environmental assessments ("EAs"), is their failure to identify and evaluate the 'upstream' and 'downstream' implications of climate change resulting from proposed undertakings. Comments submitted to the Expert Panel highlight that "the exclusion of climate change from pipeline review processes administered by the NEB has been problematic to date."³⁷

³⁵ *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19 [CEAA, 2012]

³⁶ Gregory Inwood et al, "Intergovernmental Policy Capacity in Canada" cited *Environmental Policy*, *supra* note 21 at 67 and 71; N. Olewiler, "Environmental Policy in Canada: Harmonized at the Bottom" cited in *Environmental Policy*, *supra* note 21; B. Rabe, "Federalism and Entrepreneurship: Explaining American and Canadian Innovation in Pollution Prevention and Regulatory Integration" cited in *Environmental Policy*, *supra* note 21; D. Spence, "Federalism, Regulatory Lags, and the Political Economy of Energy Production" cited in *Environmental Policy*, *supra* note 21.

³⁷ Ecojustice, "Ecojustice Comments on the Draft Terms of Reference for the National Energy Board Modernization Expert Panel" (20 July 2016) online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/NEB012-Ecojustice.pdf>

Rationale for Reform

Academic literature notes a positive correlation between the deepening of a jurisdiction's economic dependence on oil and gas with (1) the weakening of environmental policy and (2) heightened environmental impacts and effects.³⁸ The anticipated oil and gas development in Canada signals the need for stronger environmental decision-making.

The NEB states it takes a lifecycle approach to the management of environmental issues "throughout all phases of a regulated facility."³⁹ Therefore, the modernization of the NEB presents an exciting opportunity to incorporate its purported environmental decision-making principles into its re-envisioned mandate.

CELA submits that the NEB must expressly recognize environmental protection in its mandate. The terms 'environment' and 'protection' can be amorphous and therefore this chapter outlines which environmental principles must inform decision-making.

Recommendations

i. Climate change must be considered within project approvals

CELA submits that the NEB has been largely ineffective at reconciling pipeline projects with the goal of environmental protection. While CELA is of the view that the NEB should not have the authority to conduct EAs,⁴⁰ until such a time that this authority is replaced by an independent body, CELA submits the following environmental principles should guide the NEB's decisions on projects and EAs.

The greatest threat to species diversity and ecosystem health is climate change and therefore, climate change must be considered within CEAA's meaning of environmental effects.⁴¹

Furthermore, CELA submits that EAs must not only consider the direct greenhouse gas emissions produced by the infrastructure, during construction, operation and eventual decommissioning, but also the emissions generated in the extraction of raw materials, their processing and transportation, before being utilized by the energy infrastructure.

³⁸ *Environmental Policy*, *supra* 21 at 61

³⁹ National Energy Board, "Environment" (2016) online: <https://www.neb-one.gc.ca/sftnvrnmnt/nvrnmnt/index-eng.html>

⁴⁰ See Canadian Environmental Law Association, "The Legal Path to Sustainability: The Top Five Reforms Needed for Next-Generation Assessment" (December 2016) online: <http://www.cela.ca/sites/cela.ca/files/CELA-Submissions-Expert-Panel.pdf> [*Legal Path to Sustainability*]

⁴¹ CEAA, 2012, *supra* note 35, s 4(1).

To ensure a “transition to a low carbon economy” as stated in the terms of reference, every major energy project must be considered in light of its upstream and downstream emissions.⁴² The NEB must seek to ensure that Canada’s commitments under the Paris Agreement are met, both as an energy regulator and EA authority.⁴³ The NEB is in a unique position to take action on the Paris Agreement provisions, specifically to enable the conservation of greenhouse gas sinks and reservoirs (Article 5), by lessening deforestation and the development of wetlands, and implementing adaption actions (Action 7) which may help to stabilize greenhouse gas concentrations in the atmosphere.⁴⁴

As the Supreme Court of Canada held in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, it is incumbent that statutory authority be interpreted consistently with the principles of international law.⁴⁵ In this case, the court ruled that international law’s precautionary principle could be implemented within domestic law.⁴⁶

Jurisdictions throughout the EU have already incorporated binding climate change goals into their regulation.⁴⁷ The Energy Authority in Finland, for instance, has a dual purpose of “supervising and promoting the operation of the energy market” and fulfilling “climate targets.”⁴⁸ Likewise, Scotland’s strategic environmental assessments are meant to be undertaken in conjunction with the *Scottish Climate Change (Scotland) Act 2009*.⁴⁹ This Act imposes that public bodies must, in exercising their functions, act:

- In the best way calculated to contribute to the delivery of the emissions reduction targets
- In the best way calculated to help deliver any program for adapting to the impacts of climate change.⁵⁰

⁴² Online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/NEB012-Ecojustice.pdf>

⁴³ *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties from 30 November to 13 December 2015 – Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session*, 29 January 2016, online: UNFCCC <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

⁴⁴ *Ibid*

⁴⁵ *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241; 2001 SCC 40 at paras 30 and 31

⁴⁶ *Ibid*

⁴⁷ See European Union “Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment” (2013) online: <http://ec.europa.eu/environment/eia/pdf/SEA%20Guidance.pdf>

⁴⁸ <https://www.energiavirasto.fi/web/energy-authority/energy-authority>

⁴⁹ The Scottish Government, “Strategic Environmental Assessment of the Scottish Climate Change Bill: Consultation Proposals: Environmental Report” online: <http://www.gov.scot/Publications/2008/12/03145652/4>

⁵⁰ The Scottish Government, “Consideration of Climatic Factors within Strategic Environmental Assessment” (March 2010) online: <https://www.historicenvironment.scot/media/2383/0096207.pdf> at 1

RECOMMENDATION NO. 3: The NEB must include the phrase environmental protection in its mandate.

RECOMMENDATION NO. 4: The NEB's revised mandate must expressly include a commitment and an explanation as to how it will assist Canada in meeting climate change targets.

RECOMMENDATION NO. 5: Until such a time that the NEB is no longer an authority for EAs, the impact of a project on Canada's ability to mitigate and adapt to climate change must be considered within the meaning of 'environmental effects' in *CEAA, 2012*.

ii. *Ecological restoration should be the twin of sustainable development*

Sustainable development is one of the stated purposes of *CEAA*. Therefore, as a federal authority charged with carrying out EAs, it is important that the NEB and its members, in seeking to avoid risk and mitigate harm, are cognizant of past destruction and the need for environmental restoration.⁵¹ The implicit, future temporal bias of sustainable development has caused ecological restoration to be dubbed "the necessary twin of sustainability."⁵² As explained by environmental law professor Ben Richardson:

Modern environmental law is infatuated with the future. Under the aegis of the philosophy of sustainable development, the law has embraced a future tense in which the priority is averting, mitigating or adapting to new ecological impacts rather than healing past ones. While it is essential to avoid further environmental upheaval, sustaining what remains may be illusory if prevailing conditions are too degraded.⁵³

Environmental decision-makers prevalently rely upon ecological baselines reflective of current species richness. For instance, studies of fish populations, migratory bird habitat and wildlife corridors are viewed in their present-day form.⁵⁴ A disregard for historical levels is a malaise of environmental decision-making and therefore, the NEB must be cognizant in its interpretation of environmental effects that it not only seeks to protect against risk, but also rebuild natural capital.⁵⁵

⁵¹ Benjamin Richardson & Lauren Butterly, "Temporalities of Environmental Governance: Insights from Australia's Marine Reserves Review" (2015) *IUCN Academy of Environmental Law* 96 at 100 [*Temporalities of Governance*]; Benjamin Richardson, "The Emerging Age of Ecological Restoration Law" (2016) 25 (3) *Review of European, Comparative & International Environmental Law* 273 at 290 [*Ecological Restoration*]

⁵² *Ecological Restoration*, *supra* note 51 at 277

⁵³ *Ibid* at 277

⁵⁴ *Temporalities of Governance*, *supra* note 51 at 99

⁵⁵ *Ecological Restoration*, *supra* note 51 at 277

Internationally, there is a paucity of laws which reference ecological restoration and provide guidance on its inclusion. While South Africa's *National Environmental Management Act, 1998*, includes remedying environmental damage among its core principles for decision-makers, it has been critiqued as being just an "aspirational tone" creating "room to do nothing."⁵⁶

At a slightly improved level, is the definition of conservation in the European Commission's Habitats Directive. This Directive defines conservation as, "to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."⁵⁷ The Habitats Directive does not, however, provide guidance on how best to return to a historical benchmark of ecological health. Lastly, Canada's own *CEAA, 2012*, includes restoration in its definition of 'mitigation measures', but again, lacks a definition of restoration.⁵⁸

Interpreting environmental impacts in line with an ecological restoration approach to decision-making is particularly relevant to the NEB's regulatory operation. By nature, pipelines and transmission lines cover vast numbers of kilometres and by extension, a range of ecosystem types, watersheds, and wildlife habitats and corridors. Therefore, the NEB as a regulator overseeing the uses of great expanses of lands and waters is aptly placed for applying an ecological restoration framework, whose effects are best achieved on a large, panoramic scale.

RECOMMENDATION NO. 6: In all decision-making matters related to the environment, the NEB must consider historical ecological baselines and ensure mitigation measures further the goals of ecological restoration.

iii. The NEB must develop an Environmental Code

Having presented CELA's views on how the term environment is best interpreted in the context of the NEB's operational and adjudicative functions, CELA, in summary, submits an Environmental Code should be implemented either as a regulation under the *NEB Act* or by reference, into its mandate. This recommendation is inspired by the approach taken in Sweden, where decisions as to whether a project or activity should be approved, must fulfil the "general rules of consideration" in its Environmental Code.

⁵⁶ *Ibid* at 283

⁵⁷ European Union, "The Habitats Directive" (2016) online: http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

⁵⁸ *Ecological Restoration*, *supra* note 51 at 283

The Swedish Environmental Code came into force in 1999 and since, has grown to comprise 33 chapters and 500 sections of “fundamental environmental rules.”⁵⁹ In Part One, General Provisions, it states that the Code shall be applied in such a way as to ensure the preservation of biological diversity, and the protection of valuable natural and cultural environments. It continues that environmental assessments must establish the “direct and indirect impact of planned activity ... on people, animals, plants, land, water, air, the climate [etc].”⁶⁰

CELA submits that any environmental decision-making principle is best applied when it forms part of a legal framework. Therefore, if the NEB were to draft an Environmental Code similar to Sweden, it could serve both as an adjudicator handbook on environmental decision-making and also as a guide to proponents, highlighting the parameters within which the environmental effects of a project will be reviewed.

RECOMMENDATION NO. 7: The NEB should develop an Environmental Code which lists the parameters and principles within which the environmental effects of a projects must be reviewed.

1.3 Public Interest

Issues

In 1958, the Royal Commission on Energy was tasked with making recommendations concerning “the policies which will best serve the national interest” in relation to the export of Canada’s energy sources.⁶¹ In 2016, the Expert Panel was similarly tasked with delivering potential outcomes and recommendations in the area of “defining and measuring public interest.”⁶² Therefore, this chapter, will seek to address:

- How does acting in the public interest relate to public confidence in the NEB?
- What is required of the NEB in fulfilling its public interest mandate?

Current Weakness

In September 2016, three members presiding over an Energy East pipeline hearing recused themselves because of a reasonable apprehension of bias. Transition Initiative Kenora, represented

⁵⁹ Government Office of Sweden, “The Swedish Environmental Code” online: <http://www.government.se/legal-documents/2000/08/ds-200061/>

⁶⁰ *Ibid* at Part One, General Provisions

⁶¹ *Royal Commission, supra* note 1.

⁶² *Terms of Reference, supra* note 15

by Ecojustice, brought a motion seeking the recusal of the members because of concerns that they had met with Energy East stakeholders behind closed doors.⁶³ While the motion resulted in the members stepping aside, this should not be celebrated as a victory. The members' actions may be viewed by the public as a symptom of a larger, systemic disrespect the NEB has for its public interest role.

Rationale for Reform

The NEB's enabling legislation explicitly makes reference to the "public interest" and therefore it must serve as a source of guidance in its decision-making. Furthermore, the public interest is arguably implicit in the broader purposes of the legislation and recognized as such by the NEB, who states they carry out the "organization's regulatory responsibility in Canada's public interest." The *NEB Act* does not define the term public interest and only provides guidance with regard to its meaning in their "Introduction to the NEB" guide. It reads:

The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time.⁶⁴

Therefore, CELA will respond to the broader question posed in the Expert Panel's terms of reference which seeks to define and understand the meaning of the public interest from the perspective of a quasi-judicial administrative body. As previously noted, environmental protection (see section 1.2) is a relevant factor which must be included in considerations of the public interest. As will later be described, how the board seeks to govern itself (see section 2.0) and allow for public participation (see section 3.0) are also factors that serve to enhance or detract from its public interest foundation.

Recommendations

i. Impartiality is required to further the public interest

On September 6, 2016, Members Roland George, Lyne Mercier and Jacques Gauthier recused themselves from the Energy East and Eastern Mainline hearing panel to avoid the appearance of bias.⁶⁵ As a public body, the NEB and its members have a duty of impartiality. In describing what is

⁶³ Ecojustice "NEB members recuse themselves from Energy East review, Ecojustice and Transition Initiative Kenora react" (9 Sept 2016) online: <http://www.ecojjustice.ca/pressrelease/neb-members-recuse-themselves-from-energy-east-review/>

⁶⁴ National Energy Board, "Chapter 1: Introduction to the NEB" (2016) online: <https://www.neb-one.gc.ca/prtcptn/Indwnrgd/Indwnrgdch1-eng.html>

⁶⁵ National Energy Board, Hearing Order OH-002-2016, Ruling No. 28, Filing No. A79373, (9 September 2016)

meant by impartiality, the Supreme Court of Canada stated in *R v S (RD)* that it was a “state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.”⁶⁶ The Court continued that bias “denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.”⁶⁷

Despite these legal principles outlined by the Supreme Court of Canada, which are binding on the NEB, there is widespread declining faith in government agencies. This study’s review of journals and policies speaking to the excellence of regulators revealed a strong sentiment that governments have been “far more deferential to industry preference” and “downplay environmental protection.”⁶⁸

It is crucial the Expert Panel understand how individual, adjudicator bias is connected to the public interest. A decision from the Supreme Court of Canada in 1978 succinctly connects the test for reasonable apprehension of bias to the upholding of the public interest. The Supreme Court stated that the test of reasonable apprehension of bias,

[...] is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.⁶⁹

The Supreme Court continued that the “decision to be made by the Board transcends the interest of the parties and involves the public interest at large.”

While CELA appreciates having the opportunity to comment on the role of the public interest in a re-imagined and possibly re-defined mandate, CELA again reminds the Expert Panel that the public interest is not a factor to be considered in the NEB’s role, in a secondary or parallel process, but is a founding principle upon which every operational and adjudicative decision of the NEB must be based. Truly excellent regulators must ensure that in devising and implementing rules, policies and decisions, the “public is not only solicited but engaged” and the resulting decisions are justified.⁷⁰

RECOMMENDATION NO. 8: The NEB must ensure that the public interest is the foundation of all actions and expressly referenced in all rules, policies and decisions.⁷¹

⁶⁶ *R v S (RD)*, [1997] 3 SCR 484 at para 104

⁶⁷ *Ibid* at para 105

⁶⁸ *Environmental Policy*, *supra* note 21 at 63

⁶⁹ *Committee for Justice and Liberty et al v National Energy Board et al* [1978] 1 SCR 369

⁷⁰ Wendy Wagner, “Regulating by the Stars” in *Regulatory Excellence*, *supra* note 12 at 47

⁷¹ Angus Corbett, “A Systems Approach to Regulatory Excellence” in *Regulatory Excellence*, *supra* note 12 at 256

ii. *Decisions must address how the public interest factored into the NEB's analysis*

Using NEB licensing decisions as an example, it is necessary for the NEB to address how it considered the public interest and likewise, how an analysis of the public interest factors into its decision-making.

This study reviewed all decisions and orders issued by the NEB thus far in 2017 and found but one that explained how the Board considered and analyzed the Application in view of the public interest.⁷² CELA recognizes that during decision writing, tribunal members will undoubtedly have to strike a balance between adverse interests, but as the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, "In each case, careful consideration will have to be given to the reasons for the decision."⁷³

2.0 GOVERNANCE

Issues

A second theme within the Expert Panel's terms of reference is governance. Specifically, the Minister of Natural Resources in its mandate letter has asked that the NEB's composition be diverse and have sufficient expertise in fields including environmental science. Therefore, CELA has reviewed approaches taken in other international jurisdictions to understand how energy regulators ensure organizational operations and adjudicative functions reflect a high level of expertise.

In this light, CELA will respond to the following issues:

- What strategic decision-making elements would allow NEB decisions to reflect their public interest mandate?
- How can the NEB ensure it is not the target of 'regulatory capture'?
- Does the NEB have sufficient expertise to conduct environmental assessments?
- Are there alternative decision-making structures which could remedy gaps in member expertise?

Current Weakness

Administrative tribunals were created to enhance efficiency and access to justice. Having members whose expertise aligned with the scope of their legislated mandate was intended to facilitate the

⁷² National Energy Board, Filing Nos. A82112-1 (16 March 2017); A82012-1 (8 March 2017); A81866-1 (27 Feb 2017); A81483-1 (26 Jan 2017); A81375-1 (19 Jan 2017); A81274-1 (12 Jan 2017).

⁷³ *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190 at para 151

timely resolution of disputes.⁷⁴ Conversely, if an expert body does not actively maintain its currency in the field and a pulse on the public interest, it can become a laggard and slow to adapt to new developments.

By way of example, there is mounting concern and critique that the NEB has not been responsive to the public interest and the need to consider climate change within its mandate. As Daniel Esty notes in his paper, *Regulatory Excellence – Lessons from Theory and Practice*:

Some of the worst environmental regulatory failures of the twentieth century arose from the difficulty of capturing and managing slow-to-emerge or disaggregated harms, such as fishing practices that depleted fish stocks across the world or the buildup of greenhouse gas emissions from millions of sources that now threaten to cause climate change.⁷⁵

It has also been argued that the NEB has been subject to “regulatory capture” – a phenomenon whereby the regulatory agency becomes beholden to the interests of the business or sector it is supposed to regulate.⁷⁶

Furthermore, CELA and other environmental groups have frequently pointed to the discord between the NEB’s primary function as an energy regulator and ancillary power as an environmental assessment authority. The NEB has a very focused mandate and expertise, directed at attaching conditions to proponent licenses and ensuring compliance by means of inspection. Issues of environmental project effects were never the intended focus of the NEB and therefore, they should not retain authority to conduct EAs.

Rationale for Reform

The purpose of this report is largely, to discern among regulators on a global scale and identify the exemplary characteristics which make one ‘stand out’ from its counterparts. While this chapter heavily relies upon country-specific examples, there is also a need to begin this chapter with a review of commonalities shared by regulators across the world’s democracies:

1. A delegated mission;
2. Tremendous discretion combined with public accountability for the use of that discretion;
3. Complex, dynamic problems; and

⁷⁴ Jerry V DeMarco & Paul Muldoon, *Environmental Boards and Tribunals – A Practical Guide (2ed)*, (Toronto: 2016, LexisNexis) at 12 [*Environmental Boards*]

⁷⁵ Daniel Esty, “Lessons from Theory and Practice” in *Regulatory Excellence*, *supra* note 12 at 140

⁷⁶ Keith M Mahar, “A case study of regulatory capture, systemic corruption” (2015) online: <https://www.friends.ca/files/PDF/one-media-law-case-study.pdf> at 9

4. Diverse regulatory interests (possibly in conflict) ⁷⁷

Therefore, while this report seeks to provide the Expert Panel with exceptional, engaged and participatory-based examples of regulator operations and decision-making, it does not aim to isolate these country specific examples and posit them as being *so* different that they not be relatable nor transferable to the Canadian context.

The Minister of Natural Resources Mandate Letter explicitly requests the NEB “ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.”⁷⁸ In response, the recommendations below address how the governance of the NEB can ensure this objective at both the board and adjudicator level.

Recommendations

i. The NEB must be responsive to its public interest mandate

In many instances, the NEB is the first instance decision-maker and also the primary “official interpreter” of its enabling statute, the *NEB Act*.⁷⁹ Within these roles, the NEB is not only tasked with developing board-wide strategic priorities and policies, but also demonstrating its commitment to implementing its statute. The jurisdiction of the NEB per section 12 of the *NEB Act* reads:

The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter ... where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

The broad scope of the NEB’s jurisdiction is not unlike that which was envisioned by the Royal Commission on Energy in 1958. As the proposed text then stated, the National Energy Board “shall have the authority to study, review, ... recommend” any such policies or measures “advisable in the public interest.”⁸⁰

⁷⁷ Cary Coglianesi, “The Challenge of Regulatory Excellence” in *Regulatory Excellence*, *supra* note 12 at 15

⁷⁸ Prime Minister of Canada, “Minister of Natural Resources Mandate Letter” online: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

⁷⁹ *Purposivism*, *supra* note 9 at 874

⁸⁰ *Royal Commission*, *supra* note 1 at 43

It is incumbent that the NEB recognize their first and longstanding duty: a duty to act in the public interest. Execution of this objective requires a number of strategic elements including strong leadership, a visible commitment to improved performance, and a transparent recognition that things must be done “differently and better.”⁸¹ It was noted during this report’s research that government bodies tasked with active environmental policy and decision-making, like the NEB, often operate in a context of government passivity.⁸²

Using climate change as an example, the NEB must be responsive to the public’s concern that the approval of projects will diminish Canada’s ability to mitigate climate change impacts. Despite the existence of legal arguments before the NEB outlining how climate change could be incorporated into a project’s licence or EA, the NEB has resisted these recommendations and instead, written at length describing why the upstream and downstream emissions of a project are not within the NEB’s purview. This not only signals the NEB’s institutional lack of responsiveness, but the stagnation of its vision and by extension, jurisprudence.

In light of climate change’s incalculable effects on weather patterns and ecological systems,⁸³ the NEB must function in a way that allows it to adapt and respond to new scientific theory and data.⁸⁴ The state of South Australia is a great example of this and in 2009, it proclaimed the *Petroleum and Geothermal Energy Act* into force. After conducting an extensive review of its former Act, South Australia sought to create a revised statute which would allow emerging issues to be captured in administrative and regulatory responses. The revised Act not only establishes features which are “strongly supported by both industry and community interest groups” but embraces six key principles, including transparency and openness.⁸⁵

In order to be responsive, it is crucial that the NEB appreciate the heuristic nature of their function.⁸⁶ All NEB decisions, from public hearing decisions (s 24) or reports and recommendations to the Minister (s 26) should be placed on a continuum based on their ability to enable, direct or restrict change.⁸⁷ Climate change, politics, human geography and global economics are all factors that can shape the public interest and therefore, NEB directions and decisions should also be emblematic of these shifts and changes.

⁸¹ *Regulatory Excellence*, *supra* note 12 at 137

⁸² *Environmental Policy*, *supra* note 21.

⁸³ Bridget Hutter, “A Risk Regulation Perspective on Regulatory Excellence” in *Regulatory Excellence*, *supra* note 12 at 111 [Hutter]

⁸⁴ *Regulatory Excellence*, *supra* note 12 at 142

⁸⁵ See South Australia, “Petroleum and Geothermal Energy Act and Regulations” (2014) online: http://petroleum.statedevelopment.sa.gov.au/legislation_and_compliance/petroleum_and_geothermal_energy_act_and_regulations#independent

⁸⁶ *Utter*, *supra* note 83 at 112

⁸⁷ *Ibid* 115

RECOMMENDATION NO. 9: The NEB must be responsive to its public interest mandate and in all decisions, reference how the public interest factored in to its reasoning and analysis.

ii. *The NEB must provide decisions which are resilient*

A second aspect that the NEB must incorporate into its decision-making style is resiliency. In defining its strategic priorities, it is necessary that the NEB identify the risks and vulnerabilities faced by the sector and the licencees it regulates.⁸⁸

The International Energy Agency in its report, *Making the energy sector more resilient to climate change*, states the “energy sector faces multiple threats from climate change.”⁸⁹ This statement is prefaced by the reminder that,

Extreme weather events have long been a cause of oil and gas production disruptions. For example, in May 2015 wildfires near oil sands production areas in Alberta, Canada reduced total oil output by around 10%, its lowest level in almost two years. Hurricanes Katrina and Rita damaged more than 100 oil drilling platforms in the Gulf of Mexico in 2005.⁹⁰

In response, the IEA report highlights a number of ways government entities and regulators can further the resilience of the sector:

1. Integrate future climate concerns into current planning and licensing decisions;⁹¹
2. Require the proponent to conduct an assessment of climate vulnerabilities on the proposed energy infrastructure;⁹² and
3. Incorporate climate risk into data, modelling and forecasting of energy system planning.

Another international guideline, titled *Better Regulation* by the European Commission, also states that to ensure resiliency in decision and policy making, the agency must “engage with a different possible future” and “challenge present assumptions.”⁹³ In the case of the NEB, the issues and objectives it seeks to address in a licensing or permitting application have been too narrowly focused and therefore, their operational and adjudicative ability to respond in dynamic or changing contexts has been compromised.

⁸⁸ Shelley Metzenbaum et al “What Makes a Regulator Excellent” in *Regulatory Excellence*, *supra* note 12 at 159

⁸⁹ International Energy Agency “Making the energy sector more resilient to climate change” (2015) online: https://www.iea.org/publications/freepublications/publication/COP21_Resilience_Brochure.pdf

⁹⁰ *Ibid* at 3

⁹¹ *Ibid* at 8

⁹² *Ibid* at 9

⁹³ European Commission, “Tool #2: Evidence Based Better Regulation” (2015) online: http://ec.europa.eu/smart-regulation/guidelines/tool_2_en.htm [Tool #2]

In striving for resiliency, it is necessary that the regulatory agency never be complacent and, as an organization, constantly engage with new information.⁹⁴ Learning from regulators in other countries, this can be accomplished without expanding the existing capacity of the NEB. For instance, the federal *Environment, Protection and Biodiversity Conservation Act, 1999*, in Australia requires that prior to any energy licensing approvals by the authority, advice is required from the Independent Expert and Scientific Committee which specifically speaks to the Application's impact on water resources.⁹⁵ The Committee produces extensive reports which, while providing recommendations, also develop crucial baseline data and improve scientific understandings.⁹⁶ In the context of the NEB, a similar body could be formed and in addition to water resource protection, consider climate effects.

Another way to increase the contemporaneity of institutional knowledge is to appoint liaisons. In the UK, every offshore oil operating license requires that a Fisheries Liaison Officer be appointed to act as the point of contact between the government, licensee and fishing organizations. In this role, the Liaison Officer provides advice to government departments on fisheries science, techniques and activity. Canada could also adopt a liaison approach and for every licensee, have an appointee to act as a contact between the proponent and a community, or the proponent and regional conservation authorities.⁹⁷

RECOMMENDATION NO. 10: The NEB must build considerations of energy vulnerability and risk into its consideration of projects and actively enhance its knowledge of climate change and its effects.

iii. The expertise of a Member must relate to their statutory purpose

As Justice Rand famously stated in *Roncarelli v Duplessis*, [1959] SCR 122 “there is always a [legislative] perspective within which a statute is intended to operate.”⁹⁸ While the mandate presented on the NEB website includes environmental protection as a purpose, it is important to note that it is not a stated purpose in the *NEB Act*. While arguably the NEB imports environmental protection as a legislated purpose because it is a federal body, vested with the authority to conduct environmental assessments, there remains two fundamental distinctions between a member of the NEB and panel member of CEAA.

⁹⁴ David Vogel, “The Role of Policy Learning and Reputation in Regulatory Excellence” in *Regulatory Excellence*, *supra* note 12 at 220

⁹⁵ *Environment, Protection and Biodiversity Conservation Act, 1999*, C 2016 C 00777 at s 131AB.

⁹⁶ Independent Expert Scientific Committee on Coal Gas and Large Coal Mining Development, “The IESC” (2017) online: <http://www.iesc.environment.gov.au/iesc>

⁹⁷ Oil and Gas UK, “Fisheries Liaison Office” (2015) online: <http://oilandgasuk.co.uk/wp-content/uploads/2015/05/OP027.pdf>

⁹⁸ *Roncarelli v Duplessis*, [1959] SCR 121at para 140

First, under *CEAA, 2012*, the members appointed by the Minister must be “unbiased and free from any conflict of interest relative to the designated project” and “have knowledge or experience relevant to its anticipated environmental effects.”⁹⁹ There is no equivalent expertise threshold for members of the NEB.

Secondly, members appointed to a CEAA panel are not employees of the federal government and receive a stipend while participating in an assessment. Furthermore, these members are chosen for a particular review panel because of their relevant expertise. This contrasts with NEB members who are not selected on a project-by-project basis and instead, are appointed for a period of seven years¹⁰⁰ and are required to “devote the whole of his time to the performance of his duties under this Act.”¹⁰¹

Therefore, not only are the backgrounds of CEAA and NEB members potentially vastly different, the NEB does not have the same level of member independence from government as a CEAA panel member.¹⁰² CELA reiterates that the NEB is an inappropriate body to be vested with authority to conduct EAs.

RECOMMENDATION No. 11: NEB members must be free of bias and conflicts of interest, and have knowledge and experience relevant to the anticipated environmental effects of a project.

iv. The role of energy regulator and environmental assessor should be separate

The issue of statutory purpose is closely related to member expertise. As an expert tribunal, the NEB must ensure that its members have sufficient expertise and resources to rule on the projects before them.

From the perspective of the tribunal and its members, steps must be taken to enhance member expertise by identifying evidence needs and gaps early in the decision-making process, and seeking evidence from a broad range of sources.¹⁰³ While adjudicative expertise can be gained through ‘on the job’ experience in the hearing room, many members of specialized tribunals are appointed because of their expertise in a relatable field.¹⁰⁴

⁹⁹ *CEAA, 2012*, *supra* note 35, s 42(1)

¹⁰⁰ *NEB Act*, *supra* note 25, s 5(2)

¹⁰¹ *Ibid*, s 5(b)

¹⁰² West Coast Environmental Law, “Environmental Assessment by NEB not a Bright Idea” (5 March 2010) online: <http://wcel.org/resources/environmental-law-alert/environmental-assessments-neb-not-bright-idea>

¹⁰³ *Tool #2*, *supra* note 93

¹⁰⁴ *Environmental Boards*, *supra* note 74 at 11

A review of other energy authorities reveals that EA streamlining within energy infrastructure and project approvals has not occurred to the same extent as in Canada. For instance:

- The BalticConnector pipeline project is a proposed 22 km pipe connecting Finland and Estonia, with an estimated start date of December 2020.¹⁰⁵ The environmental impact assessment was conducted in both countries for compliance with national legislation by authorities who do not also act as the energy regulator.¹⁰⁶
- The IFA2 is a proposed undersea high voltage direct current connection between France and England.¹⁰⁷ The cable is subject to an environmental impact assessment, a habitat assessment (Directive 92/43/EEC) and a bird conservation assessment (2009/147/EC) conducted by authorities other than the energy regulator.¹⁰⁸ The data provided by the EA is used as a basis for the habitat assessment, which seeks to conserve the natural habitats of wild flora and fauna and the bird directive, aimed at the conservation of wild birds.¹⁰⁹

Iceland is another jurisdiction which separates the powers of its National Energy Authority from the Ministries of Fisheries and Agriculture, and Environment. While the Authority has the power in the granting of licences to place conditions on the licensee, which could include environmental protection or the protection of biological resources (Article 18), the advice for these measures originates with ministers external to the Authority (Article 6).¹¹⁰

3.0 PUBLIC PARTICIPATION

Issues

A third theme which falls within the Expert Panel's scope of review is public participation. The terms of reference state, "stakeholders have expressed increased interest in the NEB's activities" and therefore, the panel seeks recommendations to identify legislative changes which will support greater stakeholder and public participation in NEB activities.¹¹¹ In response, CELA seeks to address:

¹⁰⁵ European Commission, "Interconnector between Estonia and Finland (BalticConnector)" online:

<https://ec.europa.eu/eipp/desktop/en/projects/project-98.html>

¹⁰⁶ Gasum & AS EG Vorguteenus, "BalticConnector Environmental Impact Assessment Report" (April 2015) online:

https://www.envir.ee/sites/default/files/balticconnector_yva_finland_eng_48.pdf

¹⁰⁷ Réseau de transport d'électricité, "IFAS EIA Summary" (April 2016) online:

<http://www.ifa2interconnector.com/media/1053/ifa2-eia-summary-document.pdf>

¹⁰⁸ *Ibid* at 5 and 6

¹⁰⁹ *Ibid*

¹¹⁰ *Regulation on Prospecting, Exploration and Production of Hydrocarbons*, No 884/2011 online:

<http://www.nea.is/media/olia/Regulation-884-2011-03102011.pdf>

¹¹¹ *Terms of Reference*, *supra* note 15

- Who is the public and how can they best be involved?
- How can the public (ie. individuals, public interest organizations and municipalities) inform decision making?
- What can the NEB incorporate from international best practices on participatory-based decision making?
- How can the high level of access enjoyed by the regulated industry be balanced by participant funding?
- Can participant funding address the inequality that exists between industry proponents and the public?

Current Weakness

The Expert Panel's terms of reference state that stakeholders have expressed 'increased interest' in the NEB's activities and therefore, the review will consider adjustments to public participation. The terms of reference, however, do not cite the degree to which shifts in environmental policy in past decades have contributed to this response. Environmental decision-making has moved away from a legitimization of environmental interests, as existed in the late 1980s, to a contemporary model which is now remarkably closed and the public is impeded, in some cases, from accessing very basic information about the regulated industry and its impacts.¹¹²

There are also indications on both sides of the spectrum that public participation, as it is currently performed, is not functional. For instance, a "mob the mic" event where thousands of British Columbians sought to testify at a NEB hearing concerning the Northern Gateway pipeline was depicted by some as healthy citizen engagement and others, as purposely obstructionist.¹¹³

Unfortunately, there has been sparse promotion of constructive and transparent dialogue between regulator, stakeholders and the public, and a continuation of historically poor public access to decisions and records.¹¹⁴

¹¹² *Environmental Policy*, *supra* note 21 at 68

¹¹³ Kathryn Harrison, "Regulatory Excellence and Democratic Accountability" in *Regulation Excellence*, *supra* note 12 at 75; C Kemm Yates, Blakes "The Regulatory Process – Is it Broken?" (2015) online: <http://www.camput.org/wp-content/uploads/2015/05/7-Yates.pdf>

¹¹⁴ *Environmental Policy*, *supra* note 21 at 69.

Rationale for Reform

In January of 2017, the Nuclear Energy Agency released a study which interviewed 130 experts from 26 countries and unanimously concluded stakeholder support and involvement are essential to achieving accepted and sustainable decisions.¹¹⁵

The need for, and the societal benefits of public participation in decision-making processes has long been recognized. Meaningful opportunities for public involvement result in more fair and credible processes, and improve the overall quality, acceptability and soundness of decisions.¹¹⁶

Recommendations

i. The diversity of the public must be recognized and their interests legitimized

Throughout this report, CELA has reiterated that the NEB has a legislated mandate to regulate in the Canadian public interest. This means that it must factor economic, environmental and social considerations into its decision-making process, as well as matters with respect to Indigenous rights and interests.¹¹⁷ Tribunals by nature are intended to have a more “expansive and inclusive approach” and therefore, hearings before the NEB should not be primarily focused on the proponent and regulator, but the many other public and environmental interests.¹¹⁸

In defining who the public is, it is important to note that the public is not a homogeneous group and opportunities for involvement must mirror the diverse interests the public represents. Involving the public requires that meaningful participation begin as early in the planning and decision-making process as possible as a means of building public confidence. Participation must also inform and impact every stage of the process, from the scoping of issues to the review and submission of evidence. This commitment must “reach into the very heart of organisational structures and operational procedures.”¹¹⁹

¹¹⁵ Nuclear Energy Agency, “Stakeholder Support and Involvement Essential to Future of Nuclear Energy Decision Making” (19 Jan 2017) OECD online: <https://www.oecd-nea.org/news/2017/2017-01.html>

¹¹⁶ *Legal Path to Sustainability*, *supra* note 40 at 6

¹¹⁷ *Terms of Reference*, *supra* note 15

¹¹⁸ *Stericycle Inc v Ontario (Ministry of Environment)*, [2006] OERTD No 21 at para 27

¹¹⁹ OECD, “Stakeholder Participation in Radiological Decision Making: Processes and Implications” (October 2003) online: <http://www.oecd-nea.org/rp/reports/2004/nea5368-stakholder.pdf> [*OECD Participation*]; *Regulatory Excellence*, *supra* note 12 at 27

Public participation must be valued for the opportunity it provides for collective and mutual learning. This study's review of academic papers repeatedly found stakeholder engagement to be as important to the regulator as it is to the public.¹²⁰ As a study conducted by the OECD found,

Taking the shorter route and bypassing serious public engagement risks reaching decisions that will not stand the test of time as stakeholders continue to question the decision after it has been made. In the end, this path would cost much more, take much longer and also damage the credibility of decision makers in the process.¹²¹

There a number of ways other energy regulators have sought to embed public engagement in the decision-making and approval process. For instance, in the state of Victoria, Australia, the proponent of a pipeline project must prepare a consultation plan for the proposed pipeline. The intent of the plan is to demonstrate how the proponent will consult with land owners and communities. The plan must enable two-way communication, be transparent in the provision of information and unambiguous in its reporting to ensure inclusivity.¹²²

In Belgium, during the course of licensing for nuclear projects, all neighbouring municipalities are informed and their advice, collected through public enquiries and consultations, is considered by an independent scientific council who advises the Minister.¹²³

RECOMMENDATION No. 12: Public participation and opportunities for public comment must be open to all interested parties and involve the public in designing the participation program.

ii. The NEB can learn from international treaties and conventions

In reforming its public participation design, CELA reiterates that there are lessons which can be garnered from international treaties and conventions. The NEB can use the provisions in international treaties as benchmarks in its revised process:

- Sufficient time for informing the public must be provided as well as reasonable timeframes for the different phases of decision-making and planning (Aarhus Convention, Article 3)

¹²⁰ *Ibid*; *Regulatory Excellence*, *supra* note 12 at 16

¹²¹ *OECD Participation*, *supra* note 119

¹²² See Victoria State Government, "Guidelines for the preparation of Pipeline Consultation Plans" (2015) online: http://earthresources.vic.gov.au/earth-resources-regulation/information-for-community-and-landholders/pipelines?SQ_DESIGN_NAME=mobile&SQ_ACTION=set_design_name

¹²³ OECD, "Nuclear Legislation in OECD and NEA Countries: Belgium" (2010) online: <https://www.oecd-nea.org/law/legislation/belgium.pdf>

- Public involvement must be supported by access to the full range of needed information (Aarhus Convention, Article 3)
- Each individual must have access to information concerning the environment as held by the public authority (Rio Declaration on Environment and Development, Principle 10)
- Opportunities for involvement must commence early enough in the decision-making and planning process so that options remain open and the decision authority can respond to the input¹²⁴ (OECD reiterating Aarhus Convention)
- Participation should be continuous along the chain of related decisions¹²⁵ (OECD reiterating Aarhus Convention)
- The regulator shall engage indigenous peoples in a fair, independent, open and transparent process (UN Rights of Indigenous Peoples, Article 27)
- Indigenous peoples shall have the right to participate in decision-making in matters which would affect their rights as well as to maintain and develop their own indigenous decision making institutions (UN Rights of Indigenous Peoples, Article 18)
- The importance of education, training, public awareness, public participation, public access to information and cooperation at all levels must be addressed (United Nations Framework on Climate Change, Preamble and Article 12)

iii. Participant funding can remedy the 'elitism' in government decision-making

It is imperative that the NEB revise its participant funding program to ensure that the importance, value, and utility of public and indigenous input into EA and project decisions are fully canvassed and considered. For those who may have public interest standing before the NEB, it is a hollow right if such persons do not have the financial capacity to retain technical and scientific expertise necessary to review the highly complex and voluminous documents in the application.¹²⁶

¹²⁴ OECD, "Stakeholder Involvement in Decision Making: A Short Guide to Issues, Approaches and Resources" (2015) online: <http://www.oecd-nea.org/rwm/pubs/2015/7189-stakeholder-involvement-2015.pdf> at 18.

¹²⁵ *Ibid*

¹²⁶ See *CELA Climate Change*, *supra* note 13 at 9

Academic journals critique current participatory models as being ‘elitist’ by design and procedure.¹²⁷ Academics and researchers reported that the interventions were costly for Indigenous and farmer-landowner participants, and the interested ‘unorganized public’ (ie. lower-income citizens, nonunion workers, ordinary taxpayers, and consumers).¹²⁸ The accessibility of hearings, both in terms of location and timing, was also criticized as narrowing the group of stakeholders and individuals able to participate.¹²⁹

The availability and size of participant funding under a modernized NEB should be commensurate with the nature and extent of the environmental, social and economic factors at issue in the project’s scope or EA.¹³⁰ Participant funding should not be restricted only to proposals which are subject to public hearings, and should instead be made available at the earliest (and critical) stages of decision-making when specific problems or opportunities are being identified, alternatives are being formulated, and potential project descriptions are taking shape.¹³¹

Moreover, to ensure that eligible persons, groups and indigenous communities receive sufficient funding to retain legal, technical, and scientific assistance, the quantum of participant funding in the new regime must be dramatically increased over the small awards typically issued. In this regard, consideration should be given to restructuring the federal participant funding program, in whole or in part, on a “proponent pays” basis, which was the approach used in Ontario’s former (and highly regarded) intervenor funding law.¹³²

RECOMMENDATION NO. 13: Legislation should require early and meaningful public participation in both the information-gathering and decision-making stages of project and environmental assessment.

RECOMMENDATION NO. 14: The participant funding program should be restructured in order to ensure interested persons, groups and communities can retain legal, technical and scientific assistance.

¹²⁷ John R Parkins & A John Sinclair, “Patterns of elitism within participatory environmental governance” (2014) 32 *Environment and Planning* 746

¹²⁸ *Ibid*

¹²⁹ *Ibid*; *Environmental Policy*, *supra* note 21; *Environmental Rights*, *supra* note 8 at 266

¹³⁰ *Legal Path to Sustainability*, *supra* note 40 at 7

¹³¹ *Ibid*

¹³² *Ibid*

CONCLUSION

This report has sought to bring together international best practices and principles which can form the baseline of the NEB's revised mandate, operational and adjudicative governance, and approach to public participation.

The principles identified as best practices from the international community are based on an analysis of country-specific energy authorities, reports by broader think tanks, and UN conventions. This report has also discovered, unfortunately, that these best practices are not new nor, are they so revolutionary that they could not have been applicable to the NEB five or even ten years ago.

CELA is appreciative of this opportunity to review the current weaknesses of the NEB and propose tangible and transferrable solutions to the Expert Panel.

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION NO. 1: In addition to including transparency in its revised mandate, the NEB should rely upon the principles in the UN's Aarhus Convention to define its meaning.

RECOMMENDATION NO. 2: To enhance transparency and accountability, the NEB must maintain a public database which consolidates the documentation, decisions, and orders which inform their advisory and operational functions. This database must enable the easy access of information and incorporate a user-centred design.

RECOMMENDATION NO. 3: The NEB must include the phrase environmental protection in its mandate.

RECOMMENDATION NO. 4: The NEB's revised mandate must expressly include a commitment and an explanation as to how it will assist Canada in meeting climate change targets.

RECOMMENDATION NO. 5: Until such a time that the NEB is no longer an authority for EAs, the impact of a project on Canada's ability to mitigate and adapt to climate change must be considered within the meaning of 'environmental effects' in *CEAA, 2012*.

RECOMMENDATION NO. 6: In all decision-making matters related to the environment, the NEB must consider historical ecological baselines and ensure mitigation measures further the goals of ecological restoration.

RECOMMENDATION NO. 7: The NEB should develop an Environment Code which lists the parameters and principles within which the environmental effects of a projects must be reviewed.

RECOMMENDATION NO. 8: The NEB must ensure that the public interest is the foundation of all actions and expressly referenced in all rules, policies and decisions.

RECOMMENDATION NO. 9: The NEB must be responsive to its public interest mandate and in all decisions, reference how the public interest factored into its reasoning and analysis.

RECOMMENDATION NO. 10: The NEB must build considerations of energy vulnerability and risk into its consideration of projects and actively enhance its knowledge of climate change and its effects.

RECOMMENDATION NO. 11: NEB members must be free of bias and conflicts of interest, and have knowledge and experience relevant to the anticipated environmental effects of a project.

RECOMMENDATION NO. 12: Public participation and opportunities for public comment must be open to all interested parties and involve the public in designing the participation program.

RECOMMENDATION NO. 13: Legislation should require early and meaningful public participation in both the information-gathering and decision-making stages of project and environmental assessment.

RECOMMENDATION NO. 14: The participant funding program should be restructured in order to ensure interested persons, groups and communities can retain legal, technical and scientific assistance.