

UP FRONT

Modernizing the

**NATIONAL
ENERGY
BOARD**

**CANADAWEST
FOUNDATION**

**NATURAL
RESOURCES
CENTRE**

APRIL 2017
TREVOR McLEOD

CANADA WEST FOUNDATION

cwf.ca

The Canada West Foundation focuses on the policies that shape the West, and by extension, Canada. Through our evidence-based research and commentary, we provide practical solutions to tough public policy challenges facing the West, and Canada as a whole, at home and on the global stage.

This paper was originally prepared as a submission to the National Energy Board Modernization Expert Panel.

Any errors or omissions are the sole responsibility of the authors. The opinions expressed in this report are those of the authors and are not necessarily those of the Canada West Foundation's Board of Directors, advisers or funders. Permission to use or reproduce this report is granted for personal or classroom use without fee and without formal request, provided that it is properly cited. Copies are available for download from the Canada West Foundation website at *cwf.ca*.

2016-17 PATRONS

Natural Resources Centre

Arthur J.E. Child Foundation Endowment Fund at the Calgary Foundation

Enbridge Inc.

Government of Alberta,
Ministry of Culture and Tourism

Government of Manitoba

Government of Saskatchewan,
Crown Investments Corporation
of Saskatchewan

Government of Saskatchewan,
Ministry of the Economy

Imperial Oil Limited

Max Bell Foundation

N. Murray Edwards/Canadian Natural
Resources Limited

Richardson Foundation

Ron Mannix/Coril Holdings Ltd.



© Canada West Foundation

ISBN 978-1-927488-43-0

Canada West Foundation is a registered Canadian charitable organization incorporated under federal charter. (#11882 8698 RR 0001)



CONTENTS

02	EXECUTIVE SUMMARY
05	INTRODUCTION
07	LEGITIMACY
13	TRUST
19	CONCLUSION
20	BIBLIOGRAPHY

EXECUTIVE SUMMARY

The Trudeau government is looking for ways to make the National Energy Board (NEB) more “modern, efficient and effective” in an attempt to regain public trust. Most of the criticism of the NEB stems from (1) concerns about the legitimacy of the regulator and (2) whether Canadians trust it to make important energy decisions. This submission shows that the two concepts are distinct – and that distinction matters.

We deal with legitimacy first, demonstrating how it can be bolstered through results and procedural fairness – which often must be traded off, one for the other. Legitimacy suffers when efficiency, certainty and procedural fairness – including transparency and accountability – are compromised. While we find evidence to suggest that Canadians believe the NEB process is fair, there remains room for improvement – particularly with when and how communities are engaged. Yet, we warn that some of the recommendations received by the expert panel, if implemented, would in fact damage the NEB’s claim to procedural fairness and harm its legitimacy.

Our research shows plainly that legitimacy alone is not enough to rebuild trust in the NEB. Trust involves something more; it is highly subjective and constitutes a leap of faith for each individual. Here again, some of the proposed changes to the NEB’s structure, role and mandate may make things worse by not addressing the real problem. Other recommendations, such as moving the energy information function from the NEB to the federal government/Statistics Canada, should improve trust in the entire energy system.

We make the following six recommendations to the panel and the minister. These recommendations will both enhance the legitimacy of the NEB, and help it to rebuild public trust:

01 The panel should adopt a two-part review process that puts the political decision up front. Separating the political decision from the regulatory decision – and making the political decision up front – enhances the legitimacy of the entire process and gives potential investors the certainty they need.

02 Climate change decisions should not be made by the NEB. Important climate policy decisions – which are value judgments – belong in the political sphere, not in the regulatory sphere. The NEB mandate should not be broadened to include consideration of upstream oil and gas emissions. There are legal and practical issues associated with expanding the NEB mandate to include such emissions.

**TRUST INVOLVES SOMETHING MORE;
IT IS HIGHLY SUBJECTIVE AND
CONSTITUTES A LEAP OF FAITH FOR
EACH INDIVIDUAL.**

03 NEB staff should continue to improve engagement in local communities. There is a legitimate role for NEB staff to play in communicating with people about the regulatory process and procedure. Having staff in communities should help to build trust between Canadians and the regulator.

05 NEB panel members should avoid turning into competing experts. Experts are necessary but we need to make sure NEB panelists do not turn into advocates for a particular world view. If opinions cannot be changed through discussion and persuasion, then our institutions will be meaningless.

04 NEB panel members should not engage with communities; they should remain objective and above the fray. We recommend that the role for panel members be modelled on the role of case management judges in the Canadian legal system.

06 The NEB's energy information function should be housed elsewhere. This function should be moved into a respected, trusted federal body such as Statistics Canada, or an arm thereof – as is the case in other jurisdictions. Separating the energy information function from the NEB will avoid the perception of conflict of interest and build trust in both energy information and the NEB.



The NEB modernization debate centres on:

LEGITIMACY

– the legitimacy of our national energy regulator,

& TRUST

*– whether Canadians trust the regulator
to make important energy decisions.*

INTRODUCTION

This submission is as much about putting the entire energy decision-making system into perspective as it is about fixing the NEB.

Prime Minister Justin Trudeau has promised to modernize the NEB as part of an attempt to restore trust in government. Minister of Natural Resources James Carr has tasked an expert panel with making recommendations about the NEB structure, role and mandate. The core goal of the expert panel's review is to find a way to make the NEB more "modern, efficient and effective" in an attempt to regain public trust.

All of this is happening against a backdrop of ferocious energy debates. Companies willing to develop energy infrastructure are often embattled, risking billions and brand damage. Federal and provincial elections have been fought about whether we should build pipelines, hydroelectric dams and gas plants. Battles are also waged about how project benefits should be distributed.

While it is important for organizations such as the NEB to evolve as society changes, it is also important to remember that the problem is much bigger than the NEB. The NEB has been caught in the crossfire. Unresolved political questions – such as climate and Indigenous policy – have found their way into the NEB process where they do not belong. In a representative liberal democracy, political and policy questions are best addressed by elected representatives, not regulators. Without fora for Canadians to debate these important issues, organizations like the NEB will be overwhelmed.

That said, it remains an important goal to rebuild trust in the NEB. The NEB modernization debate centres on two things: (1) legitimacy – the legitimacy of our national energy regulator, and (2) trust – whether Canadians trust the regulator to make important energy decisions. More often than not, the concepts of legitimacy and trust are used interchangeably in the debate. This submission shows both that the concepts are distinct and why the distinction matters.

**THE NEB HAS BEEN CAUGHT IN
THE CROSSFIRE. UNRESOLVED
POLITICAL QUESTIONS – SUCH AS
CLIMATE AND INDIGENOUS POLICY
– HAVE FOUND THEIR WAY
INTO THE NEB PROCESS WHERE
THEY DO NOT BELONG.**



*Ministers can transfer powers to arm's-length
bodies but they cannot transfer their*

**DEMOCRATIC
LEGITIMACY.**

LEGITIMACY

In a representative liberal democracy such as ours, legitimacy is derived from the will of the people. Voters elect politicians to represent their interests in parliament. They delegate authority and democratic legitimacy to parliament, to government, to ministers and, eventually, to bureaucracy. Delegation to arm's-length regulators, such as the NEB, involves an extra step – which is different in that the regulator is not directly responsible to either voters or elected officials.¹

Ministers can transfer powers to arm's-length bodies but they cannot transfer their democratic legitimacy. The democratic legitimacy of arm's-length bodies needs to be shored up. The literature points to two ways to do this: (1) through results, and (2) through procedural fairness.²

SHORING UP LEGITIMACY THROUGH RESULTS

The results argument holds that a democratic deficit might be overcome if citizens believe the regulator delivers satisfactory outcomes. This concept suffers because it is hard to define what constitutes regulatory quality. One's perception of the quality of regulation very much depends on whether one is a political decision-maker, civil servant, expert, producer, consumer, activist or citizen. As a result, it is difficult to reach consensus on the metrics for measuring regulatory quality.

Proponents of this approach tend to argue that legitimacy is enhanced via increased efficiency and competence delivered by regulators with specialized knowledge. There is certainly something to be said for

efficient and well-reasoned judgments delivered by knowledgeable experts. In recent years, governments in Canada have zoned in on the efficiency concept, arguing that investors will take a pass on Canada if decisions take too long and are too costly. In response, governments have attempted to develop one-stop shopping to simplify the system and make it faster. In practice, this approach has been met with staunch resistance; part of the Liberal Party of Canada's narrative during the last federal election was built on the idea that the Harper government was trying to ram pipeline projects through quickly with little regard for procedural fairness. Yet, the terms of reference given to the panel demonstrate that the Trudeau government very much understands the importance of an efficient regulator.

Two-part review – restoring both efficiency and certainty

Canada must be vigilant about maintaining a competitive investment climate. Since capital is highly mobile, companies will invest elsewhere if they believe, for example, that the Canadian regulatory system is overly costly while lacking sufficient process certainty. The Enbridge Northern Gateway example illustrates the point. The company spent billions to get the pipeline through the regulatory process. While it received federal cabinet approval under the Harper government, that approval was overturned by the Trudeau government even while Enbridge complied with regulatory requirements. Presuming that Canada wants to attract energy infrastructure investment, it does not make sense to impose a political decision at the end of a long and expensive regulatory process.

¹ The North Dakota government addresses the democratic deficit issue by putting its Public Service Commission on the ballot, thereby providing a direct democratic legitimacy to its arm's-length regulator.

² Martino Maggetti. "Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review." 2010.

The Canadian Energy Pipeline Association (CEPA) has proposed a two-part review as a possible solution to the uncertainty problem. The two-part review separates the national interest determination from the standard technical review of routing, engineering and detailed environmental and land issues. The national interest determination – which would consider issues such as climate change, the need for new infrastructure, regional and cumulative social and economic impacts, overarching Indigenous issues and overall national energy policy – would be made by the federal government. In effect, the federal government would make an early, high-level political decision about whether the project should – in principle – go ahead.

This would pull contentious public policy debates out of the regulatory context, which is neither a legitimate place for such discussions (more on that below) nor well-suited as a forum for such debates. If this approach is to work, however, the federal government will need to provide fora for Canadians to engage in discussions about big policy issues such as our energy and environmental future. Without such an outlet, there will be pressure to push debates back into the regulatory process.

Climate change decisions should not be made by the NEB

Several submissions to the panel suggest expanding the NEB's mandate to include climate change and consideration of how a project fits into Canada's proposed transition to a low carbon economy. Given that there is a break in the democratic legitimacy chain between elected representatives and arm's-length bodies, it does not make sense for arm's-length bodies to grapple with the big political questions of the day. Arm's-length bodies, such as the NEB, were created to grapple with difficult technical questions, not to make public policy decisions; that is what politicians are elected to do. It would undermine the fundamental tenets of representative democracy if we asked unelected regulators to make decisions that are actually value judgments.

³ NEB's 2015 Annual Report to Parliament.

The constitutional problem

We have argued for separating the public interest determination from the standard technical review (the two-part test). This would solve the constitutional problem inherent in asking the NEB to address upstream greenhouse gas (GHG) emissions in the oil sands. That is, the federal government cannot regulate oil sands emissions because the provinces have exclusive authority to make laws regarding natural resources, including oil sands.

The *NEB Act* currently requires the board to examine applications to build and operate pipelines and certain power lines that cross inter-provincial and international borders. Under these rules, it is the NEB that must recommend whether a project is in the Canadian public interest. Section 52(2) of the Act gives the board significant discretion to consider all things "...that appear to (the Board) to be directly related to the pipeline and to be relevant." While the public interest is not defined expressly, the board has described it as follows: "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."³

Given this definition, it is a matter of interpretation as to whether upstream oil and gas emissions can be considered by the NEB. On one hand, there is policy evidence to suggest that Canada's environmental values and preferences are evolving to include an increased focus on climate change. After all, the federal government set some aggressive, yet voluntary national GHG targets at the United Nations Framework Convention on Climate Change Conference (UNFCCC) in Paris in late 2015.

On the other hand, the board is currently restricted to considering things that appear to be "directly related to the pipeline." This language does not appear by historical accident; it is deliberate.

Section 92A(1)(b) of the Canadian Constitution gives provinces the exclusive authority to make laws in relation to “development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom.” The federal government has also been warned by the Supreme Court of Canada not to use environmental legislation as a “constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction.”⁴

Removing the “directly related to the pipeline” reference will have implications for the legitimacy of the NEB. It is not possible for the NEB to derive legitimate authority from federal elected officials if the issue falls within provincial jurisdiction.

Ottawa tested the extent of provincial resolve to fight this issue when it created its interim process for reviewing projects already in the regulatory process. The interim process included an assessment of upstream GHGs linked to the pipeline projects under review. This includes emissions from oil sands projects or “non-renewable natural resources projects wholly within provincial boundaries.” While the governments of Canada and Alberta remain aligned on climate strategy, we are unlikely to see this principle tested.

Climate change is not the issue in communities

If the goal of NEB modernization is as stated in the panel’s terms of reference – (a) to position the NEB as a modern, efficient and effective energy regulator, and (b) to regain trust – then broadening the mandate of the NEB to include climate change is not the answer.

Here it is useful to take a closer look at the research the Canada West Foundation and the University of Ottawa conducted into community confidence in energy authorities.⁵ At the outset of our research

project, we undertook a series of interviews with knowledgeable senior people – heads of regulatory agencies, senior policy officials, prominent members of the environmental community, Indigenous leaders and senior energy executives – who brought a wide range of perspectives.⁶ We found that, while policy concerns covered a broad spectrum of issues, climate change loomed largest amongst these people. This should not be surprising to keen observers of the national dialogue in Canada; much of the energy dialogue is fixated on discussions of climate change.

We got a big surprise, however, when we went into communities that had been through recent siting processes for energy projects. Climate change barely registered on the list of concerns. Other factors emerged as being far more important, including safety, need, distribution of benefits, local environmental impacts (e.g., water contamination), restrictive consultation/communication practices, and local involvement in decision-making. It follows that expanding the scope of the NEB’s mandate to deal with climate change is not essential to rebuilding public trust.

Keeping GHGs and climate change out of the scope of the NEB mandate is not the same as taking no action on GHGs and climate change. Rather, the argument is that GHG policy is a political/policy question and policy direction should be set by politicians. Implementing CEPA’s two-stage process would be an elegant solution to this problem. Ottawa and the provinces are actively working to reduce GHG emissions and to determine what Canada’s energy future should look like. The NEB should be empowered to deal with issues that impact directly on local communities – including detailed environmental and land issues. It is counterproductive to push the GHG debate into the NEB decision-making process, particularly now that the federal government provides ongoing opportunities to debate this big public policy issue.

⁴ Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3 at 71.

⁵ Cleland, Michael, Stephen Bird, Stewart Fast, Shafak Sajid and Louis Simard. *A Matter of Trust: The role of communities in energy decision-making*. Canada West Foundation & University of Ottawa. 2016.

⁶ A synthesis of what we heard in these interviews can be found in *Fair Enough: Assessing community confidence in energy authorities*.

LEGITIMACY IS AN ESSENTIAL COMPONENT OF REBUILDING TRUST IN THE NEB. WE CAN SHORE UP LEGITIMACY BY RESTORING EFFICIENCY AND CERTAINTY TO THE NEB PROCESS.

PROCEDURAL FAIRNESS

The other way to shore up the democratic legitimacy of arm's-length bodies involves procedural fairness. The basic idea is that people will grant legitimacy – both democratic (formal) and direct (informal) – to the NEB if decisions are made in a way that is considered to be fair. Procedural fairness relies on an open and inclusive process – ideally based on accountability, transparency and engagement. In the policing context, the word legitimacy is distinct from authority acquired by law. Legitimacy comes after the swearing-in; it must be earned directly from the people, every day. In the NEB context, this involves the meaningful involvement of interest groups, users, citizens and other stakeholders in the process; transparency – the availability of public reports about regulatory performance; and, transparency again – the requirement of officials to answer, explain and justify their actions.

Canadians believe the NEB process is fair

In 2016, the Canada West Foundation and the University of Ottawa conducted extensive research in communities that had been through recent energy siting processes. We chose to study communities where energy projects were the subject of some controversy. Figure 1 on page 11 shows the communities and projects we studied.

Our final report – *A Matter of Trust: The role of communities in energy decision-making* – provides strong qualitative (community interviews) and quantitative (polling conducted by Nanos Research) evidence about what drives community confidence in energy authorities.

We were fascinated to discover that people in Kitimat and Kitimaat Village, B.C. – at the epicentre of the contentious Northern Gateway pipeline debate – did not think the NEB process was broken. In fact, most people polled by Nanos Research were either satisfied or somewhat satisfied that the regulatory process considered all relevant issues. More specifically, our polling showed that:

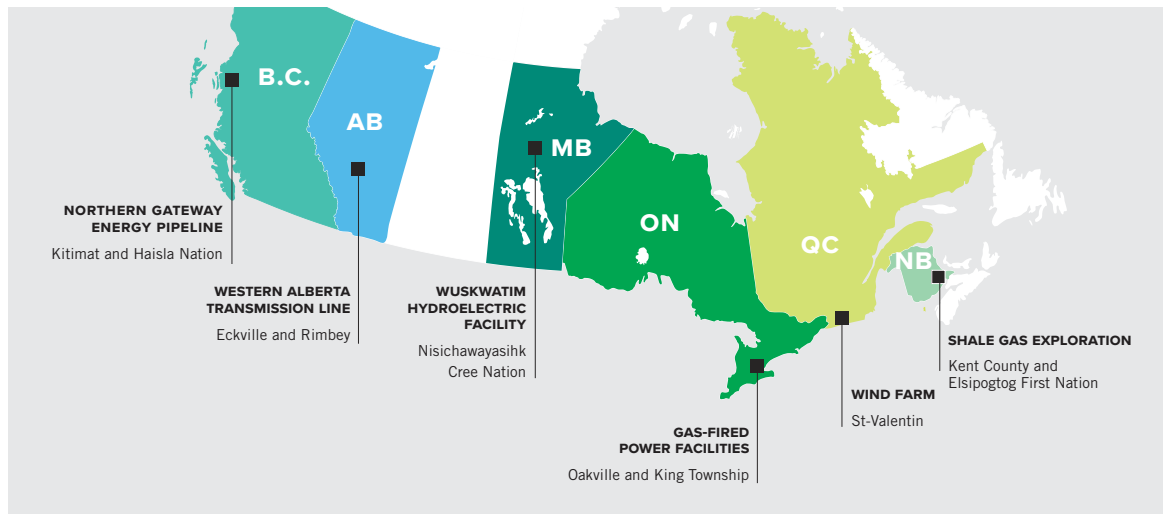
81% People believe opportunity existed to question project proponents in a public setting.

74% Information and decisions were available in a timely manner.

63% The process was respectful of the local community.

66% Early opportunities existed to learn about and influence project decisions.

FIGURE 1: COMMUNITY CASE STUDIES



These are incredible numbers, especially for a project and a process that have been heavily criticized by opponents, the national media and even other energy industry players. With numbers like these, it would be very hard to conclude that the NEB process is broken.

The level of support for the NEB process in Kitimat was higher than support for similar processes in the other communities we studied. For example, in the Olds/Rimbey area of Alberta, only 54% of people thought the process was respectful of the local community – almost 10% lower than Kitimat. The difference is even more stark when Kitimat is compared with Kent County, N.B. (shale gas exploration) and Oakville, Ont. (gas-fired power facilities) where less than 40% of the people believed that the process was respectful.

This does not mean everything is rosy. On the contrary, our polling results show that there is more confidence in the NEB process than there is in the decision itself. While the process got high marks, only 55% of people in Kitimat believed that community concerns were taken into account for the decision.⁸ Further, 54% did not trust public authorities making decisions about energy projects. The numbers dip lower from there. Less than half of respondents (46%) thought that decisions are

made that fairly distribute costs and benefits. And, only 35% of those polled thought public authorities made the right decision about the Northern Gateway Pipeline.⁹ Interestingly, after so much discussion about the pipeline, 26% of the people were unsure or did not express an opinion on this point.

Above all, this tells us that legitimacy is an essential component of rebuilding trust in the NEB. We can shore up legitimacy by restoring efficiency and certainty to the NEB process. One of the best ways to do this is to adopt the two-stage process that makes political decisions up front. Legitimacy is also served by making sure that policy decisions are handled by elected representatives, not unelected regulators. Climate change and Indigenous policy matters should be left to the politicians.

Our research also shows that people in communities that have gone through energy siting processes believe that regulatory processes are fair. Yet, they do not trust the energy authorities making the decisions. This tells us that a perception of procedural fairness does not, by itself, result in trust. Trust involves something more. The next section addresses the trust issue – and provides more clarity on what should be done to rebuild trust in the NEB.

⁸ Of those that were not satisfied, most believed that the NEB should have done more to consider local environmental impacts and the concerns of the community.

⁹ Note the decision at the time was to approve the pipeline with conditions.

A woman with blonde hair, wearing a dark blazer, is sitting at a wooden conference table. She has her hand to her chin in a thoughtful pose. In the foreground, a man's arm in a light blue shirt and a silver watch is visible, resting on the table. The background is slightly blurred, showing other people in a meeting setting.

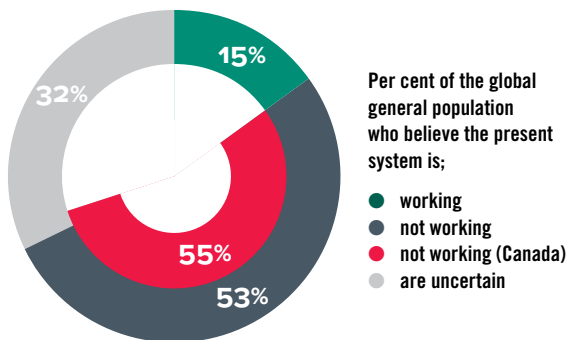
Trust requires a
RELATIONSHIP
between a trustor and a trustee, and
SOME BEHAVIOR
OR OUTCOME
that the trustor wants from the trustee.

TRUST

Trust is hard to come by these days.

The 2017 Edelman Trust Barometer – which has been measuring trust in four key institutions (government, media, business and NGOs) since 2012 – shows that trust in institutions is in crisis around the world. Globally, Edelman finds that only 15% of the general population believes the present system is working, while 53% do not, and 32% are uncertain. In Canada, 55% of people believe the system is not working. More than three-quarters of global respondents agree that the system is biased against regular people and favours the rich and powerful. Here at home, Edelman reports that most Canadians do not trust institutions to do what is right.

2017 Edelman Trust Barometer – Measuring trust in four key institutions (government, media, business and NGOs) around the world



Source: 2017 Edelman Trust Barometer

Trust is a hard concept to pin down. One scholar notes, "...The notion of trust comes in so many forms, packages, and subspecies that it seems to have been swallowed up in a conceptual quagmire."¹⁰ That said, it is quite clear that trust requires the following elements: (1) a relationship between a trustor and a trustee, and (2) some behavior or outcome that the trustor wants from the trustee.

¹⁰ Metlay, D. Institutional trust and confidence: A journey into a conceptual quagmire. In G. T. Cvetkovich & R. Lofstedt (Eds.), *Social trust and the management of risk*. 1999. 100.

THE RELATIONSHIP BETWEEN TRUSTOR AND TRUSTEE

Trust involves one person relying on another person or entity; that is, trust is relational. There is an interesting disagreement in the trust literature about when reciprocity is required between trustor and trustee (i.e., must the trustee also trust the trustor?). This debate matters in the context of the NEB, especially given the live debate about whether and how the NEB (trustee) should engage with communities and the broader Canadian public (trustor).

NEB engagement – making the distinction between staff and panel members

Need for staff engagement

During the last two years, the NEB has been working hard to engage with municipalities and Indigenous people. The idea is that the NEB needs to understand people's perspectives about pipelines and the work of the board. To do so, board staff need to meet people in their communities. In 2015, the NEB conducted a six-month national engagement tour to hear from Canadians about the NEB, pipeline safety and environmental protection. The board established new regional offices in Montreal and Vancouver and reorganized the NEB to make engagement a priority. The national engagement tour and the opening of regional offices is intended to be the beginning of a new, robust spirit of engagement – not the end.

While new means of engaging outside of formal processes are important, it is also essential to be mindful of the risk of conflict of interest or *ex parte* communications. Most communities, including rural and small town, emphasize that decision-makers

**THE BIGGEST PROBLEMS ARISE
WHEN EXPERTS THEMSELVES
FAIL TO DISTINGUISH BETWEEN
FACTS AND VALUES – WHEN THEY
ARE UNAWARE OR INATTENTIVE
TO WHERE THEIR EXPERTISE LEAVES
OFF AND THEIR VALUES BEGIN.**

need to expend resources to understand the local community and its values. This is reflected, strikingly, in the cases of Kitimat and Haisla Nation, B.C. and in St. Valentin, Que. In Kitimat and Haisla Nation, residents looked to members of the Joint Review Panel to engage informally and personally. There are almost certainly good cultural reasons for this. But there is a problem. A principal reason that arm’s-length regulators are trusted (if they are) is that they are objective, their processes are transparent and that everything informs the ultimate decision on the record.

The NEB learned this lesson the hard way in the wake of the meeting between the board chair and two panel members with former Quebec premier Jean Charest – then a TransCanada consultant. The lesson is that regulatory processes cannot function without both real, and perceived, objectivity. Clear rules are needed on conflict of interest, transparency and independence, that are aligned with the public’s expectations. And, the rules need to be enforced.

NEB staff, on the other hand, have a useful role to play in communities. Staff can provide valuable information to community members about how NEB processes work, how community members can get involved and how they can access participant funding. They can also help to demystify the process and help community members become more familiar with the NEB.

Need for panel member distance

There may be a procedural role for NEB panel members to play in case-managing hearing participants. This is not unlike the case management role played by judges in the Canadian legal system. In the legal system, case management is less about managing the cases and more about ensuring that the parties are prepared for an effective hearing. Extending the role of an NEB panel member “upstream” would help to ensure that hearings are fair and effective. It will also help to ensure that project proponents are engaging effectively with communities. This type of an arrangement should ensure that engagement starts early and is real – two of the hallmarks of successful community engagement. If there is a concern about panelists that are adjudicating the hearing playing this case management role, then it would be possible to have a NEB panelist not assigned to the case play the case management role.

PUBLIC EXPECTATIONS AND THE NEB

Trust also involves risk – risk that the trustee won’t live up to the expectations of the trustor. This uncertainty forces trustors to draw on past experiences (i.e., experiences with trust in other contexts, personal ties to the trustee, gut reactions, and known associations

between the trustee and other individuals and entities) when deciding the level of trust to place in the trustee. All of this is to say that there is some serious guess work involved in deciding whether to trust.

The federal government is betting that it knows what will make people trust the NEB. The prime minister has instructed the minister of natural resources to ensure that the NEB reflects “regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.” Put simply, the bet is that most people believe the NEB is too industry-centric, so broadening the expertise of panel members will build trust.

The federal government’s answer is too simplistic and risks making things worse by addressing the problem in the wrong way. Trustors want to trust the system, the people making the decisions and the information upon which the decision rests.

Trust in the system – regulatory capture, experts and location

One prominent criticism of the NEB is that it is “captured” by the energy industry. More specifically, the criticism is that the NEB – which is supposed to act in the public interest – instead advances the commercial interest of the energy sector that it regulates. Marc Eliesen, a former chair of Ontario and BC Hydro, argues that the NEB is “captured” and should fire its current board and relocate its headquarters to Ottawa from Calgary: “Unless these measures are undertaken, no amount of tinkering will restore credibility and public trust in the NEB.”¹¹

Regulatory capture is a serious concern and a serious charge – it needs to be proven. If the NEB is “captured” by the oil and gas sector, then that is a problem that should be fixed through the appointment process. While a quick review of the biographies of NEB members reveals significant diversity of experience, there is likely room for improvement going forward.

Experts

There are, however, more fundamental concerns about the decision to set up a battle of experts on NEB panels. In the words of Michael Gove – a prominent Leave campaigner in the United Kingdom – “People in this country have had enough of experts.”¹² There is anecdotal evidence that this is true in Canada too: How else do you explain famous actors driving the oil sands debate far more than expert reports from esteemed research bodies such as the Royal Society of Canada? In this context, will adding different sets of experts to NEB panels rebuild trust in the regulator?

This is not to say that the NEB does not need experts. Experts are essential to answer questions of fact. Yet, this expertise can be accessed through expert testimony during the hearing process; it is not necessary to stack the panel with experts to represent each area of expertise that might arise during the hearing.

There is a danger in relying too much on experts. Experts have no special claim to answer normative questions – questions that involve value judgments; these questions should be answered by elected representatives.¹³ The biggest problems arise when experts themselves fail to distinguish between facts and values – when they are unaware or inattentive to where their expertise leaves off and their values begin.¹⁴

In a parliamentary democracy, healthy institutions depend on the primacy of reason. NEB panel members need to be open both to listening to all sides of an argument and to changing their opinions as the facts require. If the role of panel members is to negotiate between pre-established interests, then our institutions will be meaningless.¹⁵ This is an important message at a time when 55% of Canadians admit that they do not regularly listen to people or organizations with whom they often disagree.

¹¹ <https://theyee.ca/News/2017/02/09/Reform-National-Energy-Board/>

¹² Gove was responding to expert claims that Brexit would damage the U.K. economy.

¹³ Harrison, Kathryn. “Regulatory Excellence and Democratic Accountability.” Penn Program on Regulation. 2015. 6.

¹⁴ Ibid

¹⁵ For a thorough discussion of the role of experts see: *The Philosophy of Expertise*, chapter 4 (Turner, Stephen. “What is the Problem with Experts?” 2006. 159-186).

Location – Ottawa or Calgary

The research conducted by the Canada West Foundation and the University of Ottawa suggests it would be misguided to move the regulator from Calgary to Ottawa. The people in the communities we studied wanted more local involvement in regulatory decision-making processes – not a shift from one distant city to another. Our research led us to conclude that new approaches to appointing panels for specific projects may be necessary. This could include temporary members who may be from affected communities (always being mindful of the importance of competence and expertise to the regulatory process).

As a practical point, reducing the actual risk that the trustee will do something against the expectations of the trustor, does not necessarily improve trust, but it makes trust less necessary. This goes to the need for the trustee (i.e., the NEB) to be both transparent and accountable. While the interaction between two NEB panel members and former premier Charest no doubt harmed the trust relationship between many trustors and the NEB (as trustee), the fact that the two panelists were removed from the TransCanada project and notes from the meeting were scanned and published online, should reduce the risk associated with the trustor/trustee relationship.

Trusted information – separating the information function from the regulatory function

The NEB's core responsibilities include energy adjudication, safety and environmental oversight, energy information and engagement. While the NEB should continue to execute the important roles of adjudication, oversight of safety and environmental performance, and engagement, there is a strong argument for removing the energy information function from the NEB. Under the current set up, the NEB collects, analyzes and disseminates the data that the regulator must subsequently assess. While it

is entirely possible to separate these functions within the NEB to ensure the integrity of the data and the assessment process, it is understandable that people might suspect a conflict of interest. This goes to trust.

Our community research – outlined in *A Matter of Trust* – shows that energy literacy is not the problem that many think it is. Broadly speaking, people in the case study communities took the time to inform themselves and approached the issues with some measure of objectivity. Yet, we found that the timing, channels, sources, and the nature and quality of the information affected community confidence in the decision-making process. We concluded that there is no ideal information strategy but “information about information” – who has it, where it is, how one gets it – matters a great deal from the outset.

It is interesting to note that the results of our research show plainly that people think energy information should come from either the federal or provincial government. This is consistent with the approach taken elsewhere. The Energy Information Agency (EIA) is a highly regarded, independent and objective energy information agency housed within the United States Department of Energy. The International Energy Agency (IEA) is an autonomous energy information agency that serves the members states of the Organisation for Economic Co-operation and Development (OECD). Both organizations are highly respected. Statistics Canada offers a highly respected, and established, independent information agency housed within the federal government.

For our report, Nanos Research polled residents across four communities that had gone through the energy infrastructure siting process, asking who should be responsible for providing information about a new energy project to community members. Residents consistently chose the federal or provincial government as the preferred entity for information dissemination, with an average of 33% of residents indicating this as their top choice – and little

differentiation of responses between communities. The difference in support for the remaining entities was much more pronounced, but an average of the responses shows the energy regulator was the lowest ranked overall mean, with 11% of residents choosing this as their first choice, compared to averages of 13% for municipal governments, 16% for energy companies, and 21% for NGOs.

From a trust perspective, this tells us that energy information would be more trusted coming from government than the regulator. Shifting the energy information function from the NEB to the federal government would likely improve the level of public trust in the regulator.

There are other practical reasons for moving the energy information function out of the NEB. Professor Michal Moore argues in a paper entitled *A Proposal to Create a Pan-Canadian Energy Information Organization (CEIO)* that Canada needs to create a pan-Canadian energy information organization that would operate as an arm of the federal and/or provincial governments. He argues that conflicting reports and the difficulties associated with assembling data from a variety of sources is problematic – and leads to a loss of confidence in the Canadian energy industry. He argues further that this loss of trust inevitably leads to limits on capital investment and long-term resource contracts.¹⁶

The CEIO, as Moore imagines it, would provide a single clearing house for public access to energy information; it would maintain up-to-date energy information and provide an official standard for energy reporting and analysis, with a single source and a standard, harmonized database. This should lower the cost of provincial and territorial data analysis, reduce response time and improve user data experiences, and ultimately eliminate overlap and competitive arrangements between ministries in the federal government.



A Matter of **TRUST**

**The role of communities in
energy decision-making**

Released November 2016

Canada West Foundation
& University of Ottawa

Michael Cleland
with Stephen Bird, Stewart Fast,
Shafak Sajid and Louis Simard

CANADA WEST FOUNDATION cwf.ca

¹⁶ Moore, Michal. "A proposal to create a pan-Canadian energy information energy information organization (CEIO)." University of Calgary School of Public Policy. 2012.

RECOMMENDATIONS TO ENHANCE THE LEGITIMACY OF THE NEB,
AND HELP IT TO REBUILD PUBLIC TRUST

01 *The panel should adopt a two-part review process that puts the political decision up front.*

02 *Climate change decisions should not be made by the NEB.*

03 *NEB staff should continue to improve engagement in local communities.*

04 *NEB panel members should not engage with communities; they should remain objective and above the fray.*

05 *NEB panel members should avoid turning into competing experts.*

06 *The NEB's energy information function should be housed elsewhere.*

CONCLUSION

For a regulatory entity that has been thrust into some of the fiercest energy debates of the day, the prospect of “building trust” can be daunting, to say the least. The National Energy Board is not broken, but it can be better. The Trudeau government has set out to make the NEB more “modern, efficient and effective.” To succeed, it must address concerns about 1) the legitimacy of the regulator and, 2) whether Canadians trust it to make important energy decisions must be addressed.

We make the following six recommendations to the panel and the minister. These recommendations will both enhance the legitimacy of the NEB, and help it to rebuild public trust:

01 The panel should adopt a two-part review process that puts the political decision up front. Separating the political decision from the regulatory decision – and making the political decision up front – enhances the legitimacy of the entire process and gives potential investors the certainty they need.

02 Climate change decisions should not be made by the NEB. Important climate policy decisions – which are value judgments – belong in the political sphere, not in the regulatory sphere. The NEB mandate should not be broadened to include consideration of upstream oil and gas emissions. There are legal and practical issues associated with expanding the NEB mandate to include such emissions.

03 NEB staff should continue to improve engagement in local communities. There is a legitimate role for NEB staff to play in communicating with people about the regulatory process and procedure. Having staff in communities should help to build trust between Canadians and the regulator.

04 NEB panel members should not engage with communities; they should remain objective and above the fray. We recommend that the role for panel members be modelled on the role of case management judges in the Canadian legal system.

05 NEB panel members should avoid turning into competing experts. Experts are necessary but we need to make sure NEB panelists do not turn into advocates for a particular world view. If opinions cannot be changed through discussion and persuasion, then our institutions will be meaningless.

06 The NEB’s energy information function should be housed elsewhere. This function should be moved into a respected, trusted federal body such as Statistics Canada, or an arm thereof – as is the case in other jurisdictions. Separating the energy information function from the NEB will avoid the perception of conflict of interest and build trust in both energy information and the NEB.

BIBLIOGRAPHY

Cleland, M., Bird, S. Fast, S., Sajid, S. and Simard, L. *A Matter of Trust: The role of communities in energy decision-making*. Canada West Foundation and University of Ottawa. 2016.

Cleland, M, Nourallah, L. and Fast, S. *Fair Enough: Assessing community confidence in energy authorities*. Canada West Foundation and University of Ottawa. 2016.

Friends of the Oldman River Society v. Canada (Minister of Transport). 1992.

Harrison, K. "Regulatory Excellence and Democratic Accountability." Penn Program on Regulation. 2015.

Maggetti, M. "Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review." 2010.

Metlay, D. "Institutional trust and confidence: A journey into a conceptual quagmire." In G. T. Cvetkovich and R. Lofstedt (Eds.), *Social trust and the management of risk*. 1999.

Moore, M. *A proposal to create a pan-Canadian energy information energy information organization (CEIO)*. University of Calgary School of Public Policy. 2012.

National Energy Board. *Annual Report to Parliament*. 2015.

Nikiforuk, A. "Time to Reform Our 'Captured' National Energy Board, Says Expert." The Tyee, February 9, 2017. <https://thetyee.ca/News/2017/02/09/Reform-National-Energy-Board/>

Turner, S. "What is the Problem with Experts?" In Selinger, E. and R. Crease (Eds.), *The Philosophy of Expertise*. 2006.



110-134 11th Avenue SE
Calgary, Alberta, T2G 0X5
cwf.ca

THE NATURAL RESOURCES CENTRE
CHAMPIONS THE RESPONSIBLE DEVELOPMENT
OF WESTERN CANADIAN RESOURCES
TO SAFEGUARD CANADA'S PROSPERITY.

