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Bill C-38 and the Evolution of the National Energy Board:
The Changing Role of the National Energy Board from 1959 to 2015

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1.0 Introduction

In the politically heated environment that set the stage for the Northern Gateway Pipeline approval, the National Energy Board (NEB or Board) finds itself in uncharted waters. Over the past five years the NEB has been frequently mentioned on the front pages of newspapers while controversial pipeline projects such as the Northern Gateway, Line 9B Reversal, TransMountain Expansion and Energy East applications wind through the regulatory approval process. This is new for the NEB. From its establishment in 1959 until recently, the NEB maintained a relatively low profile.[1] Over its first 50 years, the NEB quietly fulfilled its regulatory and advisory mandate, earning a reputation as a respected quasi-judicial regulator, independent from political interference[2] and generally outside of the wider public policy debate. But the last five years have seen the NEB move to centre stage as the political storm surrounding the use of fossil fuels moved into the regulatory arena when controversial pipeline projects entered the hearing process.

The current landscape is dominated by enormous economic stakes for oil sands producers and the Canadian economy, public trepidation about the safety and reliability of transporting fossil fuels, increased expectations from Aboriginal groups, diminished public confidence in processes, growing divisions between provinces, unprecedented provincial government involvement in federal regulatory processes and accusations that foreign radicals are hijacking the process.

This polarized energy debate in Canada has provoked strong opinions on both sides of the issue. On one hand, the potential for economic growth is huge. More than 500 major resource development projects representing $500 billion in new investments are planned over the next 10 years.[3] Canada has approximately 175 billion barrels of oil reserves[4] and approximately 97% of those reserves are in the oil sands.[5] Hundreds of thousands of jobs are directly related to Canada's resource economy, billions of dollars in annual tax revenues are collected and the annual economic benefit to the Canadian economy is unparalleled.[6] On the other hand, growing concerns with environmental risks associated with transporting fossil fuels and rising public expectations that issues such as climate change, fossil fuel use and greenhouse gas emissions will be dealt with in

[1] See Peter Watson, "In the Eye of the Storm" (Speech delivered at the Economic Club of Canada Canadian Energy Summit, Calgary, 21 November 2014), online: NEB <https://www.neb-one.gc.ca/bts/nws/spch/2014/nystrm/index-eng.html>.

[2] See Rowland J Harrison, QC, "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It" (2013) 50 Alta L Rev 757 at 758.

[3] House of Commons, Standing Committee on Finance, *Report on Part 3 of Bill C-38 – Responsible Resource Development*, 41st Parl, 1st Sess (June 2012) at 3 (Chair: James Rajotte, MP).

[4] Canadian Association of Oil Producers (CAPP), "About Canada's Oil sands", online: <http://www.capp.ca>.

[5] *Ibid*.

[6] *Ibid*.

regulatory review processes have led to unprecedented attention on regulators such as the NEB. All of this has placed additional pressure on the NEB to run a fair process, analyze technical applications, ensure a comprehensive environmental assessment, hear from the public and reach a decision, all within legislated timelines.[7]

The economic case for pipelines and the need to reach markets for growing oil sands production was framed in 2011 by then Natural Resources Minister Joe Oliver on the eve of the Northern Gateway Pipeline hearings:

> We believe that we have to have access to Asian markets for our energy products, for our oil and gas. That is clearly in our national interest. We'll survive without it, but not nearly in the same way … It's nation-building, without exaggeration.[8]

At the same time, the need for an efficient regulatory process for pipeline approvals was underscored by Prime Minister Stephen Harper:

> We have to have processes in Canada that come to a decision in a reasonable amount of time and processes that cannot be hijacked … In particular, growing concern has been expressed to me about the use of foreign money to really overload the public consultation phase of the regulatory hearings, just for the purpose of slowing down the process … This is something that is not good for the Canadian economy, and the government of Canada will be taking a close look at how we can ensure that our regulatory processes are effective and deliver decisions in a reasonable amount of time.[9]

Against this backdrop, the Conservative government introduced Bill C-38, the *Jobs, Growth and Long Term Prosperity Act*[10] as part of the 2012 Budget ("Bill C-38" or "2012 amendments"). This omnibus budget implementation legislation reflected the government's focus on streamlining regulatory processes to facilitate economic growth and jobs. The Bill included a new *Canadian Environmental Assessment Act* (CEAA 2012),[11] along with significant changes to the *Navigable Waters Protection Act*,[12] *Fisheries Act*,[13] and the *National Energy Board Act* (NEBA).[14]

Taken together, the changes were sweeping and substantial, overhauling approval processes for major energy projects at a time when politically controversial pipeline projects were entering NEB hearings.

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[7] Watson, *supra* note 1.

[8] Peter O'Neil, "Oil industry's 'nation-building' Northern Gateway pipeline won't be stopped by protesters: Joe Oliver", *The National Post* (6 December 2011), online: <http://news.nationalpost.com/news/canada/oil-industrys-nation-building-pipeline-wont-be-stopped-by-protesters-natural-resources-minister>.

[9] Trish Audette, "Harper concerned foreign money could hijack Gateway Pipeline", *The Edmonton Journal* (6 January 2012).

[10] *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

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

[12] *Navigable Waters Protection Act*, RSC 1985, c N-42.

[13] *Fisheries Act*, RSC 1985, c F-15.

[14] *National Energy Board Act*, RSC 1985, c N-7 [NEBA].

This paper will explore how these legislative changes and the torqued political debate surrounding the development and transportation of crude oil is changing the role of the NEB. It will examine how environmental activists strategically targeted the hearing processes of the NEB and how the Federal government responded with Bill C-38, a "legislative fix" to this activity. It will consider how Bill C-38, in turn, led to more demands for public consultation in the process, parallel provincial processes, more litigation and judicial review and a growing lack of public confidence in the integrity of the process and of the NEB itself. Finally, it will explore how all of this may have led to an evolving activist regulator, sensitive to public opinion far and beyond its role as originally conceived.

In order to understand the nature of these developments, this paper will examine the historical roots of the NEB, its role over the past 56 years and how that has evolved as a result of Bill C-38 amendments and the current political storm. It will examine Bill C-38 and conclude that those changes, in and of themselves, did not fundamentally change how the NEB conducts its business or its independence. Instead, the evolving role of the NEB is more connected to building public trust in its role as a regulator and repairing a public perception of a gutted process than to anything that Bill C-38 itself changed. All of this will be examined through four case studies of oil pipeline projects before the Board before and after the 2012 amendments.

From environmental activists to an activist regulator, the stage has been anything but dull and has been full of unintended outcomes.

2.0 Role and History of the NEB

To understand the historical role of the NEB, the nature of its independence and the extent that Bill C-38 amendments may have changed this role, it is important to appreciate the events leading to its creation in 1959. While Bill C-38 was a response to environmental activism and growing concerns that regulatory processes were becoming inefficient and an arena to debate broad environmental policy issues, the *National Energy Board Act* of 1959 was a response to concerns at that time that energy exports would undermine eastern energy supply needs and a preference to move those politically charged debates to a venue outside of Parliament.

The political climate that led to the formation of the NEB involved accusations of political interference and waste of taxpayer dollars, debates which some suggest led to the defeat of the St. Laurent Liberal government and the rise of John Diefenbaker's Progressive Conservatives. The government's solution at the time was legislation to establish a national energy regulator to shelter energy infrastructure decisions from raw politics. This required turning a degree of decision-making power over to an independent quasi-judicial regulator whose decisions would not be based on political expedience.

The NEB came into existence in 1959, built on the recommendations of two Royal Commissions in the wake of what has become known as the Great Pipeline Debate of 1956.[15] The Great pipeline debate followed the discovery of a major oil field in Leduc, Alberta in 1947 and an unprecedented pace of both oil and gas production in Alberta that required finding export markets outside of the province.[16] While natural gas was discovered as early as 1883 in Alberta,[17] it wasn't until the Leduc oil discovery that there was sufficient supply of both oil and gas reserves to generate an interest in energy exports. This search for markets ignited a new political dynamic in Canada and in Canadian-United States relations in the 1950s.[18] Alberta producers were looking to build pipelines to connect to markets in the United States (US) at the same time that demand for both oil and gas was growing domestically in eastern Canada. The Canadian government wanted oil and gas pipeline infrastructure built to serve eastern Canadian needs before exports would be permitted.[19] This set the stage for the NEB.

2.1 Oil Pipelines

Following the discovery of oil in Leduc in 1947, the Federal government passed the *Pipe Lines Act*[20] in 1949. The new legislation modeled after Canadian regulation of railways, asserted Federal jurisdiction over pipelines that crossed inter-provincial and international boundaries. Immediately following proclamation of the new legislation, Parliament passed special charter Bills to incorporate five pipeline companies, including Interprovincial Pipe Line Company (IPL) which subsequently became Enbridge Pipelines Inc. in 1998.[21] Within a short thirty-eight days after the *Pipe Lines Act* passed, the federal Board of Transport Commissioners, the regulatory authority under the new legislation, approved construction of IPL's pipeline from Edmonton to Regina.[22] Approval to continue the line to Superior, Wisconsin, where oil could then be moved to eastern Canadian refineries in Sarnia Ontario via the Great Lakes by tanker was granted, but not without political debate regarding an all Canadian route. The Diefenbaker opposition at the time demanded that an all Canadian route to the east be followed to ensure that sufficient oil supply remained in Canada before any exports were allowed. C.D. Howe,

[15] Alastair R Lucas & Trevor Bell, *The National Energy Board: Policy, Procedure and Practice* (Ottawa: Law Reform Commission of Canada, 1977) at 5.

[16] Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Vancouver/Toronto: Douglas & McIntyre, 2000) at 1-7.

[17] Barry D Fisher, "The Role of the National Energy Board in Controlling the Export of Natural Gas from Canada" (1971) 9:3 Osgoode Hall LJ 553 at 554.

[18] *Ibid* at 2-3.

[19] Lucas & Bell, *supra* note 15 at 5.

[20] *Pipe Lines Act*, SC 1949, c 20, RSC 1952. Later repealed and replaced by the *National Energy Board Act*, SC 1959, c 46.

[21] Enbridge, "Historical Highlights", online: <http://www.enbridge.com/AboutEnbridge/CorporateOverview/Historical-Highlights.aspx>.

[22] Gray, *supra* note 16 at 3.

the Liberal government Trade Minister at the time, favoured the preferred route of IPL which went through the US, was 120 miles shorter and saved over $10 million in construction costs.[23] While the political parties positioned themselves for the pending federal election, IPL quietly and quickly built the pipeline, completing it in late 1950.[24]

2.2 Gas Pipelines

The political debate around the first oil pipeline from Alberta to Eastern Canada was trivial compared to what followed when two competing proposals for gas pipelines surfaced in 1951. One proposal was by Western Pipe Lines to build a pipeline to Winnipeg then south to the US.[25] This was primarily an export pipeline to the US. The second proposal was from Canadian Delhi Oil, which later became TransCanada Pipelines.[26] This route was an all-Canadian route from western Canada to Montreal. The Federal Liberal government, which previously supported the shorter IPL oil pipeline route through the US, was now committed to an all-Canadian route for a gas pipeline, even though producers and pipeline proponents suggested that the much longer all Canadian route through the rocky terrain of northern Ontario would be uneconomic.[27] Both gas pipeline proposals were rejected by Alberta's regulator, the Oil and Gas Conservation Board (OGCB) in 1952 and again in 1953 because they were not economically viable.[28] With no prospects for a pipeline proposal going forward, Alberta's Premier Ernest Manning and the Federal Government's Trade Minister C.D. Howe intervened to force a merger of the two competing proposals in 1954, under the name TransCanada Pipe Lines.[29] This new company was then granted an export licence from the OGCB in 1954. However, there were still no commercial underpinnings to actually build the pipeline.

The Federal government insisted on an all-Canadian route for the natural gas line. However, western Canadian producers and eastern Canadian refiners could not agree to long term contracts that were needed for TransCanada to obtain financing to build it. The northern line, simply, was not economic. But the US route was not politically acceptable. To bridge that gap, the Federal government decided to finance and own the costly northern Ontario section of the line that was considered to be uneconomic. To implement this plan, the government had to set up a Crown corporation and pass enabling legislation in the House of Commons. The intent of the Liberal government was to avoid characterizing the plan as a subsidy to TransCanada, but rather, as a government

[23] *Ibid* at 5.
[24] Enbridge, "Historical Highlights", *supra* note 21.
[25] Fisher, *supra* note 17 at 556.
[26] *Ibid*.
[27] *Ibid* at 557.
[28] Earle Gray, *The Great Canadian Oil Patch* (Toronto: Maclean Hunter, 1970) at 185-186.
[29] Fisher, *supra* note 17 at 557.

enterprise to help complete a national undertaking.[30] The *Northern Ontario Pipe Line Crown Corporation Act*[31] was introduced in 1956 with Trade Minister C.D. Howe proclaiming that government backstopping was needed for a nation building project: "Once again, as in the days of railway building, the difficult and sparsely populated Pre-Cambrian shield appeared to present an almost insurmountable barrier to economic transportation between Western and Central Canada".[32]

The Diefenbaker Progressive Conservatives were opposed to the plan. The project would cost the federal government $118 million to build, together with a government loan to TransCanada. What followed is still considered one of the most famous debates and confrontations in the history of Canada's Parliament, ultimately contributing to the defeat of the Liberal government and the election of John Diefenbaker. When confusion about the TransCanada plan itself and the nature of government funding began to dominate Parliamentary debate, the government used parliamentary closure to end the debate and push the legislation through the House in less than 15 days,[33] leading to what some have described as pandemonium and the most raucous debate in Parliament to that date.[34] One year later, in June 1957, John Diefenbaker took over as Canada's 13th Prime Minister. According to public opinion polls at the time, the biggest factor in the defeat of the Liberal government of 22 years was the pipeline and the government's use of parliamentary closure.[35]

2.3 The Creation of the NEB

In the days following the great pipeline debate, Diefenbaker advocated for a Canadian energy board to be established.[36] The idea was to give decision making power to an independent quasi-judicial board, rather than leaving it to politicians, a theme that still dominates pipeline politics 56 years later.

Two Royal Commission reports calling for a Canadian energy board were published within months after the 1957 election. The Report of the Royal Commission on Canada's Economic Prospects ("The Gordon Commission")[37] recommended that an energy authority be established that would have responsibility of "approving, or recommending

[30] Gray, *supra* note 16 at 7.
[31] *Northern Ontario Pipeline Crown Corporation Act*, SC 1956, c 10.
[32] Canada, *House of Commons Debates*, 21st Parl (15 March 1956).
[33] Yves Yvon J Pelletier, "Time Allocation in the House of Commons: Silencing Parliamentary Democracy or Effective Time Management" (Paper presented for the Institute on Governance's 2000 Alf Hales Research Award, November 2000) [unpublished].
[34] Gray, *supra* note 16 at 7.
[35] *Ibid*.
[36] Canada, House of Commons, *Debates*, 22nd Parl, 5th Sess, Vol 1 (11 February 1957) at 1159.
[37] Canada, Royal Commission on Canada's Economic Prospects, *Final Report* (Ottawa: The Commission, 1957) (Chair: Walter L Gordon).

for approval, all contracts or proposals respecting the export of oil, gas and electric power by pipeline or transmission wire, including where necessary or desirable, the holding of public hearings in connection therewith."[38]

The Royal Commission on Energy ("The Borden Commission") was appointed by Diefenbaker to investigate the Liberal government's financing of the TransCanada Pipeline and to make recommendations on the formation of a federal energy regulator. The Borden Commission tabled its own report[39] with recommendations similar to the Gordon Commission, recommending that a national energy board be established that would require "anyone wishing to construct an oil or gas pipeline or one intended for the transportation of petroleum products or by-products of the processing of gas, subject to the jurisdiction of the Parliament of Canada, obtain a certificate of public convenience from such a Board."[40] The report contained wide-ranging recommendations concerning the formation and role of a national energy board, including recommendations regarding the independence of the board, how it reported to Parliament, how it conducted its hearings and how it followed a public interest mandate. Legislation was tabled in May 1959 and the *National Energy Board Act*[41] was passed in July 1959.

Even C.D. Howe, who appeared to appreciate having his own decision making power during the great pipeline debate eventually agreed with the new legislation. The bitter pipeline debate convinced him that a quasi-judicial process for energy projects of national significance would be preferable than a losing political battle.[42]

2.4 The Powers and Independence of the 1959 NEB

The 1959 *National Energy Board Act* set up a board with two primary powers and duties: advisory and regulatory. The advisory duty required the Board, when requested by the responsible Minister (then the Minister of Trade), to prepare studies, reports, and investigate any matter related to energy.[43] The regulatory function set out the NEB's role in granting certificates of approval for interprovincial and international pipelines, issuing licenses for export of oil and gas and approving tolls.[44]

During the House of Commons debates, questions were raised regarding the independence the new board would have from political control.[45] Accusations that the

[38] *Ibid* at 146.
[39] Canada, Royal Commission on Energy, *First Report* (Ottawa: Royal Commission, 1958) (Chair: Henry Borden).
[40] *Ibid* at Recommendation 15.
[41] *National Energy Board Act*, SC 1959, c 46.
[42] Canada, House of Common, *Debates* (22 May 1959).
[43] *National Energy Board Act*, 1959, *supra* note 41, ss 22(1)-(2).
[44] *Ibid*.
[45] Harrison, *supra* note 2 at 767-768.

new Board would simply be a "political stooge of the government in power"[46] were made, in which Diefenbaker replied:

> That is the reason for this type of legislation … to assume that the decision will be made by a board which, when set up, will hold office during good behavior for a period of seven years and which can only be removed by the governor in council upon an address by the House of Commons and the senate. There is not much of a stooge about a board whose members will be placed in the same position as the civil service commissioners, who cannot be removed except by a vote of parliament, in other words, to make sure that this board will operate to the benefit of all Canadians, it will operate beyond any suggestion of control in any way.[47]

The 1959 *National Energy Board Act* affirmed federal authority over international and interprovincial pipelines and set up a process where the Board granted approval before construction of any federally regulated pipeline. However, all certificates of approval were still subject to Cabinet confirmation. Cabinet could still overrule a Board approval. To justify this kind of override, Diefenbaker said that vesting final authority in Cabinet was essential to ensure that the Board's decisions remained consistent with government policy:

> This is intended to ensure that the decisions of the board which affect the national interest are consistent with general government policy. At the same time we have sought to assure the security of tenure and independence of the board and its staff. This balance between independence and responsibility to parliament is always somewhat difficult to achieve; we believe that here we have proposed a satisfactory equilibrium.[48]

Although the intent of the legislation was to shelter the government from pipeline politics by turning decision making authority over to an independent, quasi-judicial authority with technical expertise, final decision making authority was retained by the government in the event that the Board's decisions were wildly inconsistent with government policy. Thus the NEB was born and its enabling legislation relating to pipeline approvals was not significantly altered until 2012.

3.0 2012 – A Mood for Regulatory Change

In the beginning of 2012 it was clear that both the energy industry and the federal Government believed that regulatory processes for approval of new pipeline infrastructure were too cumbersome. Industry was advocating for regulatory change that "enhances both economic growth and environmental performance, reduces process duplication and overlap within and amongst governments, focuses regulatory attention on key issues from a risk-based perspective, sets and keeps appropriate timelines, and

[46] Ottawa, House of Commons, *Debates*, 24th Parl, 2nd Sess, Vol IV (22 May 1959) at 3935.
[47] Ottawa, House of Commons, *Debates*, 24th Parl, 2nd Sess, Vol IV (26 May 1959) at 4020 [emphasis added].
[48] Ottawa, House of Commons, *Debates*, *supra* note 46 at 3931.

encourages and enables responsible environmental outcomes."[49] It was also apparent that the Northern Gateway pipeline was becoming a showdown between opponents of the project on the one hand and proponents and supportive governments on the other hand. As the 10 January 2012 start of the Joint Review panel community hearings approached, the Federal government was clearly concerned with the direction the process was taking.[50] Within the Joint Review Panel of the NEB and CEAA process, the hearing order allowed for opportunities for the public to make oral presentations, file letters of comment and seek formal intervener status.[51] As the process unfolded, 4,554 applications to make an oral presentation were received by the Joint Review Panel,[52] 221 applications for registered intervener status were submitted,[53] and another 5,582 people had already filed letters of comment.[54]

An examination of some of the applications for oral presentations revealed form letters and included children, fake names such as "Captain Jack Sparrow", "John A. MacDonald" and "I.P. Freely." It also included Venezuela's state owned oil company, CITGO, and people from foreign countries who had never even heard of the pipeline project.[55]

One environmental group, the Dogwood Initiative, claimed to have signed up more than 1400 of the applicants through their "mob the mic" initiative.[56] The Dogwood Initiative was reported to have received funding from US Foundations opposed to the

[49] Letter from CAPP, CEPA, CGA, CPPI to Natural Resources Minister Joe Oliver and Environment Minister Peter Kent (12 December 2011) obtained through Access to Information Request, NRCan-RNCan_A-2013-00450 at 0192.

[50] Federal Access to Information Request A201200339_2013-06-20_13_37_33. Federal Access to Information Requests reveal the government's focus on promoting job creation, economic growth and prosperity. Internal Natural Resources Canada documents on Responsible Resource Development state that "the Minister of Natural Resources through the plan for RRD which seeks to modernize Canada's regulatory system for project reviews by delivering on four key objections: (i) making the review process for major projects more predictable and timely; (ii) reducing duplication and regulatory burden; (iii) strengthening environmental protection; and (iv) enhancing consultations with Aboriginal peoples. Taken together, the measures will strengthen accountability and ensure a more effective and efficient regulatory system that is responsive to the needs of Canadians."

[51] NEB, Enbridge Northern Gateway Project Joint Review Panel, Hearing Order OH-4-2011 (5 May 2011), online: <http://docs.neb-one.gc.ca>.

[52] NEB, Enbridge Northern Gateway Project Joint Review Panel, Request to make Oral presentation File, online: <http://docs.neb-one.gc.ca>.

[53] NEB, Enbridge Northern Gateway Project Joint Review Panel, Intervenors file, online: <http://docs.neb-one.gc.ca>.

[54] NEB, Enbridge Northern Gateway Project Joint Review Panel, Letters of comment file, online: <http://docs.neb-one.gc.ca>.

[55] Ezra Levant, "Opening up Gateway hearing to 'anyone' – literally any person, any child, any foreign citizen – just a waste of time and money", *Toronto Sun* (10 December 2011), online: <http://www.torontosun.com/2011/12/09/fire-pipeline-bureaucrat>.

[56] Dogwood Initiative, News Release, "The No Tankers Network just Helped sign up the Largest Group of People Ever in Canadian History to speak at a Pipeline Hearing" (11 October 2011).

pipeline project and oil sands expansion.[57] This chain of foreign funding was examined by the House of Commons Standing Committee on Natural Resources which heard testimony about foreign funding of anti-oil sands initiatives. Vivian Kraus, a Vancouver based researcher on foreign funding by American charitable foundations testified that:

> In 2009 the Bullit Foundation paid the Tides Foundation to get the Dogwood Initiative "to expand outreach campaign to mobilize urban voters for a federal ban on coastal tankers ... And the Brainerd Foundation, another American foundation, paid the Dogwood Initiative "to help grow public opposition to counter the Enbridge pipeline …" They're doing what they're paid to do.[58]

Against this backdrop, Natural Resources Minister Joe Oliver penned his famous open letter to Canadians on 9 January 2012, the eve of the commencement of the Northern Gateway community hearings:

> Those groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to undermine Canada's national economic interest. They attract jet-setting celebrities with some of the largest personal carbon footprints in the world to lecture Canadians not to develop our natural resources. Finally, if all other avenues have failed, they will take a quintessential American approach: sue everyone and anyone to delay the project even further. They do this because they know it can work. It works because it helps them to achieve their ultimate objective: delay a project to the point it becomes economically unviable.[59]

The campaign to slow down regulatory approvals for projects linked to the oil sands was also manifesting in other projects. The Enbridge Line 9 Reversal Phase 1 project, filed on 8 August 2011, sought approval from the NEB to reverse an existing pipeline from Sarnia to Westover Ontario.[60] The relatively small $16.9 million proposal was to reverse the flow of an existing portion of Line 9 to move western crude from Sarnia to Westover. It would normally be the practice of the NEB to review the project by a simple environmental screening process on a timely basis. However, on 5 December 2011, the NEB decided that "upon reviewing the Application and all other submissions"[61] that a public hearing would be held. The "other submissions" included hundreds of letters to the

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[57] Vivian Kraus, "Three US Charities Re-wrote or Removed grants to tackle the Canadian oil industry or thwart exports to Asia" (23 February 2011), online: <http://fairquestions.typepad.com/rethink_campaigns/2011/02/usa-foundations-re-wrote-info.html>.

[58] House of Commons, Standing Committee on Natural Resources, (7 December 2010) 3rd Sess, Parliament, Evidence of Committee Proceedings.

[59] Natural Resources Canada, News Release, "An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national economic interest" (9 January 2012), online: <http://www.nrcan.gc.ca>.

[60] NEB, Enbridge Line 9 Reversal Phase 1 Project, OH-005-2011, Application of Applicant (8 August 2011).

[61] NEB, Enbridge Line 9 Reversal Phase 1 Project, OH-005-2011, Hearing Order (5 December 2011) [Hearing Order].

NEB, many of which appeared to be form letters objecting to the project and an 26 August 2011 letter from five environmental organizations expressing concerns with plans to ship oil sands crude through the line.[62] The hearing process established by the NEB for Phase 1 set a delayed hearing schedule for the fall of 2012. The decisions would follow several months later.[63] That length of time was unprecedented for an application of this type.

In the days surrounding Joe Oliver's January 9th, 2012 open letter, the commencement of the Northern Gateway Community Hearings and the Line 9 Reversal Phase 1 Hearing order, it was clear that the Conservative government believed that environmental activists were using whatever means available to slow down NEB approvals. The process needed to be fixed.

This targeting of regulatory processes to slow down the oil sands can be traced back to 2008, when a now well-known power point presentation sponsored by the Rockefeller Brothers Fund brought together a group of Canadian environmental organizations to launch a campaign with the backing of multiple environmental non-government organizations (ENGOs). In a 48-page PowerPoint presentation that was leaked to the media,[64] $7 million per year was requested to fund the campaign. The strategy was clear: to stop pipeline expansions by raising the negatives, raising the costs, slowing down the regulatory processes, enrolling key decision makers and litigating wherever possible.[65] Two years later, in 2010, it was apparent from a review of publicly available US Internal Revenue Service and Revenue Canada tax returns that environmental groups in Canada had already received approximately $190 million from US organizations such as the Moore Foundation, Hewlett Foundation, Packard Foundation, Pew Charitable Trust and Rockefeller Brothers Fund.[66]

The Federal government was clearly frustrated. What followed were substantial amendments to the *National Energy Board Act* that set off a wave of reaction from every corner of the country that eventually evolved into a direct assault on the NEB itself. Ironically, 53 years after the NEB was created in 1959 to depoliticize the process by putting decisions before a quasi-judicial regulator, a different political climate in 2012 led to substantial legislative amendments to attempt to take the politics out of the quasi-judicial NEB process itself.

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[62] NEB, Enbridge Line 9 Reversal Phase 1 Project, OH-005-2011, Letter to Enbridge (5 December 2011).
[63] Hearing Order, *supra* note 61.
[64] Michael Northrop, Program Officer Rockefeller Brothers Funds, Presentation by *The Tar Sands Campaign* (July 2008), online: <http://www/cnews.canoe.ca>.
[65] *Ibid*.
[66] Canada, Royal Canadian Mounted Police, *Critical Infrastructure Intelligence Assessment: Criminal Threats to the Canadian Petroleum Industry* (Ottawa: RCMP, 24 January 2014) at 9.

4.0 Bill C-38

Approximately two months after Joe Oliver's famous open letter, the *Jobs, Growth and Long Term Prosperity Act* (Bill C-38)[67] was introduced in Parliament on 29 March 2012 as part of Budget 2012. The omnibus budget bill contained sweeping changes to the *National Energy Board Act* under the umbrella of the government's new "Responsible Resource Development" policy.[68] Emphasizing the underlying need for regulatory reform, Finance Minister Jim Flaherty's speech to the House of Commons on 29 March 2012 highlighted:

> Recently it has become clear that we must develop new export markets for Canada's energy and natural resources, to reduce our dependence on markets in the United States. The booming economies of the Asia-Pacific region are a huge and increasing source of demand, but Canada is not the only country to which they can turn. If we fail to act now, this historic window of opportunity will close.
>
> We will implement responsible resource development and smart regulation for major economic projects, respecting provincial jurisdiction and maintaining the highest standards of environmental protection. We will streamline the review process for such projects, according to the following principle: one project, one review, completed in a clearly defined time period. We will ensure that Canada has the infrastructure we need to move our exports to new markets.[69]

A sweeping series of regulatory amendments were introduced under Bill C-38. The changes to the role and processes of the NEB were substantive and were the first major overhaul of the legislation in 53 years. Four of the key amendments to the *National Energy Board Act* under Bill C-38 that this paper will examine are:

- Final Decision Making Authority: Under Bill C-38 amendments, the decision making role of the NEB was reduced to merely *recommending* approval or disapproval. Cabinet could either accept or reject that recommendation.[70] Under the amendments, Cabinet now has final decision making authority for both approval and denial. Under the original legislation, the Governor in Council (Cabinet) could deny final approval for a pipeline that the NEB approved, but could not approve a pipeline if the NEB rejected it.
- Mandatory Time Limits: Under Bill C-38 amendments, time limits were imposed on the NEB's review of a pipeline approval application under both sections 52 and 58. Under the amendments, the NEB must complete its review within a timeline imposed by the NEB Chair, not to exceed 15 months from receipt of an

[67] *Jobs, Growth and Long-term Prosperity Act*, *supra* note 10.

[68] Natural Resources Canada, "Responsible Resource Development", online: <httpp://www.eap.gc.ca/en/content/r2d-dr2>.

[69] Hon Jim Flaherty Budget Speech, "The Budget Speech: Economic Action Plan 2012 Jobs, Growth and Long-Term Prosperity" (29 March 2012), online: Government of Canada <http://www.budget.gc.ca/2012/rd-dc/speech-discours-eng.html>.

[70] NEBA, *supra* note 14, s 52(1).

application deemed complete.[71] There were no timelines under the previous legislation.

- Public Participation in Review Process: Under Bill C-38 amendments, public participation in the NEB process was restricted to individuals who are either directly affected or offer relevant information or expertise. Previous rules did not restrict participation.
- Scope of Review: Under Bill C-38 amendments, the NEB's decision making scope was narrowed to take into account all considerations that are relevant and *directly related* to the pipeline application.[72] Previously the scope allowed the NEB to take into consideration all considerations that it desired. Under the new legislation, the Board does not consider issues such as upstream or downstream impacts of pipeline development, Greenhouse Gas emissions or climate change.

Taken together, Bill C-38 changed some aspects of how the NEB performed its role. From the point of view of some ENGOs, "the changes cast a dark shadow over the NEB hearing process"[73] by reducing public participation, shortening timelines and allowing Cabinet final approval regardless of the NEB process.[74] From the point of view of the Canadian Energy Pipeline Association, "this announcement is very good news for the pipeline industry … we strongly support this positive move towards a more effective, efficient and timely regulatory process."[75]

4.1 Final Decision Making Authority

Bill C-38 changed the role of the NEB from making a decision to making a "recommendation" for new pipeline infrastructure. Section 52 of the *National Energy Board Act*, as amended by Bill C-38 now reads:

> s. 52(1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out
>
> (a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline will be required by the present and future public convenience and necessity, and the reasons for that recommendation.[76]

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[71] *Ibid*, ss 52(4)-(5).

[72] *Ibid*, s 52(2).

[73] Ecojustice, "Legal Backgrounder: The National Energy Board Act (1985)" (September 2012), online: <http://www.ecojustice.ca/blog/files>.

[74] *Ibid*.

[75] Canadian Energy Pipeline Association, News Release, "Canadian Energy Pipeline Association: Regulatory Reforms Focus on Issues Important to the Pipeline Industry" (29 March 2012), online: Marketwire <http://www.marketwired.com/press-release/Canadian-Energy-Pipeline-Association-Regulatory-Reforms-Focus-on-Issues-Important-1638170.htm>.

[76] NEBA, *supra* note 14, s 52 [emphasis added].

The 2012 amendments take away the power of the NEB to deny a project application. Instead, the NEB now makes a recommendation to Cabinet, and Cabinet makes the final decision. Previously, the legislation stated that the Board made a "decision". If that decision was to approve, Cabinet needed to confirm it before a certificate could be issued by the NEB. If the Board's decision was to deny, it was final and not subject to any override by Cabinet. The 2012 amendments make Cabinet's powers parallel for both approvals and denials. In House of Commons Debates on Bill C-38, Natural Resources Minister Joe Oliver explained the change:

> We are also ensuring that there is clear accountability in the system. The federal cabinet will make the go, no-go decisions on all major pipeline projects, informed by the recommendations of the National Energy Board. This is already the case for the vast majority of decisions across government, including under CEAA.
>
> We believe that for major projects that could have a significant economic and environmental impact, the ultimate decision-making should rest with elected members who are accountable to the people rather than with unelected officials. Canadians will know who made the decision, why the decision was made and whom to hold accountable.[77]

This speech in the House of Commons is hauntingly similar to those made by the Diefenbaker government in 1959 when it said that a national energy board "is intended to ensure that decisions of the board which affect the national interest are consistent with general government policy."[78]

This change that has been viewed by many to diminish the Board's authority and some observers have suggested that taking away the Board's ability to reject the Northern Gateway Pipeline was at the heart of the amendments, especially since the Federal government had previously trumpeted the project as being within the national interest.[79]

But does this amendment really fundamentally alter the Board's role? The very foundation of the Board in 1959 suggested that there would always be a balance between government policy and the Board's decision making power. It was never the intended role of the Board to make public policy decisions that require choices that affect the broad national interest.

It is also not clear that the Board ever had a truly independent final decision making role in its 56 year history. The powers conferred upon it in 1959 left the final decision to the Cabinet. Cabinet could say no to a pipeline that the board said yes to. It was always a political decision in the end. It is also clear that the government regularly weighed in and strongly expressed its opinion on countless projects before the Board. And the Board listened. Some might call it political interference. Others might suggest it reflects the fundamental way in which the board was initially set up in 1959 to balance the decision

[77] Canada, House of Commons, *Debates*, 41st Parl, 1st Sess (2 May 2012).
[78] *Supra* note 48.
[79] *Supra* notes 8 and 9.

making powers of those politically accountable and those technically competent to measure the merits of a particular application.

A historical example of how political influence weighed into the Board's approval process can be found in the initial application to build Line 9 by Interprovincial Pipelines (IPL now Enbridge) in 1974. In the early 1970s, rising crude oil prices coupled with concerns about stability of supply led to apprehension in Eastern Canada that there would be a shortage of oil for Montreal refineries.[80] At the time, Montreal refineries were supplied with feedstock primarily from the Middle East. By 1973, instability in the Middle East led to Arab nations imposing embargoes and cutting back production, which in turn drove up price and led to supply instability. In Canada, there were no crude oil pipelines that could supply Quebec refineries with western Canadian crude. The IPL mainline went as far as Sarnia Ontario but there weren't any pipelines from Sarnia to Montreal. The government of Pierre Elliott Trudeau was determined that a west to east pipeline to link Sarnia to Montreal needed to be built. In December 1973, Trudeau stated in the House of Commons:

> … Without a pipeline the government is unable to guarantee a market in Canada for Canadian oil at a level sufficient to ensure the development of the oil sands and other Canadian sources of supply. The federal government is taking all necessary measures to ensure that construction begins in the earliest possible moment in 1974 … Of course, before construction can begin the National Energy Board must, under the law, hold hearings and be satisfied that the proposed rates will best serve the public interest and that adequate compensation will be paid for the rights of way. The government has asked the Board to carry out all proceedings in a manner as expeditious as the law will permit.[81]

In what, by today's standards, would lead to outcries of political interference, a meeting was convened by the Minister of Energy Mines and Resources with Chair of the National Energy Board, the President of IPL, the Deputy Minister, financial analysts and the Minister's staff.[82] The purpose of the meeting was to find a way to ensure that the pipeline would be economically viable and that approval and construction would be expedited in order to have oil flowing by 1975. The federal government had already decided that a new line was in the public interest and even facilitated meetings with IPL and the NEB to talk about details of the application.

In an accelerated timeline by any standards, IPL filed its application for Line 9 with the NEB on 23 March 1974. The application was deemed complete by the NEB five days later and a hearing was scheduled to start less than six weeks later. In its opening statement at the hearing, IPL went so far as to say that the Government had already determined that it was in the public interest and had concurred with a proposed route.[83]

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[80] Lucas & Bell, *supra* note 15 at 79-80.
[81] *Hansard*, 6 December 1973 at 8479.
[82] Lucas & Bell, *supra* note 15 at 80-81.
[83] *Ibid* at 94.

The implication was that the NEB was there to merely facilitate the approval and hear evidence about the engineering, financial and environmental background.[84] In what, by today's standards, would be an outrage, legal counsel for IPL suggested that the decision had already been made that Line 9 would be built:

> We are dealing with an application to extend an existing pipeline system to serve a new market which extension the Government of Canada has already declared to be in the national interest, to provide a measure of security of oil supplied to Eastern Canada. The national interest having been established, the evidence to be introduced will be directed primarily to matters of design, location, proposed methods of construction and economic feasibility.[85]

For decades prior to Bill C-38, it was clear that the final authority that Cabinet retained for pipeline approvals wasn't a mere formality, but actually was "part of a joint Cabinet-NEB policy making process … where the consequence of any particular application, whether for facilities or export is the opening up of major new energy markets, domestic or foreign, or major new sources of energy supply, the "go" or "no go" decision becomes a matter of government policy."[86] Even 40 years ago, it was generally understood that Cabinet typically decides whether a project is in the national interest and the Board's role was to focus on the technical details of an application.[87]

This type of joint decision making was acknowledged by Roland Priddle, who was chair of the NEB from 1986-1997:

> Tribunals like the NEB have to take account of the policy environment created by the government of the day, while observing strict independence and objectivity in regard to treatment of specific applications. To do otherwise would be to thwart the operation of the democratic process.[88]

A more pronounced sort of deference of the Board to Government policy was acknowledged by Marshall Crowe, chair of the NEB from 1973-1977:

> … the National Energy Board, while it is creature of the Federal Government in a legislative and parliamentary sense, is an independent board which has an area of responsibility assigned to it by Parliament and within that area of responsibility we have considerable authority and jurisdiction, but we do not speak for the Government of Canada as such. The Government has its own views on policy matters and reaches its own decisions on policy: the Energy Board operates within a more limited sphere and I might just say that broadly speaking, the things that the National Energy Board has responsibility for are the export of oil, natural gas, and electric power … In addition to this regulatory role, the National Energy Board is also by statute, an advisor to the Government on energy policy generally. So from that point of view, we do get involved directly with the

[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid* at 37.
[87] *Ibid*.
[88] Roland Priddle, "Reflections on National Energy Board Regulation 1959-98: From Persuasion to Prescription and on to Partnership" (1999) 37:2 Alta L Rev 524 at 543.

> Government - in development of policy, but in an advisory role: general policy decisions are the responsibility of the Government rather than the Board.[89]

The relationship of the Federal Cabinet and the Board was described in 1971 as a "strange mix of independence and direct control."[90] It was broadly recognized that the Board was required to act independently while complying with its legislation. However, "the Cabinet maintains ultimate control over these functions since it is required to approve all certificates and licences."[91] The Chair of the board at that time, Dr. Robert D. Howland, commented that he "felt a duty to take note of Government policy as stated in the House of Commons and … the Board takes note of Cabinet approval of licences and considers this approval of the criteria enunciated in the Board's Reports."[92]

So what, if anything, has changed under the Bill C-38 amendments? Under the revised rules, the NEB would now only make a "recommendation". Although Cabinet makes the final "decision", the NEB must still include in its recommendation any terms and conditions that a certificate of approval would be subject to:

> s. 52.(1)(b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.[93]

This, no doubt, recognizes the technical expertise within the Board. If the Cabinet doesn't agree with the Board's recommendation or with any of the conditions, it may then direct the Board to reconsider, but it can't change the conditions. It can also direct the Board to take into account any other factor Cabinet considers appropriate:

> 53.(1) After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.
>
> (2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.[94]

This leaves the Board with clear guidance and direction from the government regarding what the government's "go no-go" wishes are, especially when taking into account any additional factors that the Board must consider. The Board may then either

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[89] Marshall A Crowe, "Canadian Energy Developments: Address to the Section of Natural Resources Law, American Bar Association Annual Meeting, Montreal, Canada, August 12, 1975" (1976) 9 Natural Resources Law 1 at 1 [emphasis added].
[90] Fisher, *supra* note 17 at 593.
[91] *Ibid* at 593.
[92] *Ibid* at 594.
[93] NEBA, *supra* note 14, s 52(1)(b).
[94] *Ibid*, ss 53(1)-(2).

confirm its recommendation or conditions or change them.[95] If the Board's recommendations or conditions are still not in alignment with the government's preferences after reconsideration under section 53, Cabinet can then direct the board to either approve or deny a certificate, regardless of the Board's recommendation.[96] If Cabinet's direction is to approve the certificate, it must be on the terms and conditions that the NEB set out it its reconsideration report:

> 54.(1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order
>
> (a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or
>
> (b) direct the Board to dismiss the application for a certificate.[97]

This type of process appears to be no different than the "strange mix of independence and direct control" described in 1971.[98]

It is unclear yet whether the NEB will have deference to the political direction under section 53 or feel pressured to make a particular decision based on the political preference of the government of the day. The Federal government has yet to use the reconsideration powers under section 53. To date, the government has accepted the Board's recommendations and conditions in each application that has been completed, noticeably so in its approval of the Northern Gateway Pipeline.

The Northern Gateway Pipeline was the first pipeline that the NEB recommended for approval under the new section 52 process. After three and a half years of hearings, the Joint Review Panel of the NEB and the Canadian Environmental Assessment agency issued its report which stated that "we recommend approval of the Enbridge Northern Gateway Project, subject to the 209 conditions set out in Volume 2 of our report. We have concluded that the project would be in the public interest."[99] Six months later, Cabinet accepted the board's recommendation for approval on 17 June 2014, subject to each and every one of the Board's conditions, with no changes whatsoever.[100] Again, this tends to show the "strange mix of independence and direct control" described in 1971.[101]

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[95] *Ibid*, s 53(5).
[96] *Ibid*, s 54(1).
[97] *Ibid*, s 54(1).
[98] Fisher, *supra* note 17.
[99] NEB, Enbridge Northern Gateway Pipeline Project Joint Review Panel, OH-4-2010, "Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project" (19 December 2013) at 71, online: <http://doc.neb.gc.ca>.
[100] NEB, Enbridge Northern Gateway Pipeline Project Joint Review Panel, OH-4-2010, Letter and Certificates to the Northern Gateway Pipeline Project (18 June 2014), online: <http://doc.neb.gc.ca>.
[101] Fisher, *supra* note 17.

Gaeton Caron, the Chair of the Board at the time of the 2012 amendments, did not believe that the shift in the final decision making authority affected the Board's independence:

> There was concern expressed by some at the time Bill C-38 was debated, and when it passed, that the Board had lost some independence. I do not share that view. The Board is created by statute. The statute requires that it be independent in the action it takes on specific cases. Post Bill C-38, the Board conserves its entire independence in the way it assesses the merits of projects. What has changed with Bill C-38 is what happens after the Board has completed its work. This change was adopted democratically by the people Canadians elected to represent their interests in Parliament. This change is not about how the Board looks at the public interest. For the Board and its staff, nothing has changed, saving for the wording of the Board's disposition, and the covering page of the decision, in keeping with the wishes of Parliament.[102]

Regardless of whether the role of the Board was actually changed by the amendments to section 52, political opposition and environmental groups opposed to oil sands development have persistently said it has. They continue to criticize the NEB, suggesting that the process has been gutted. Few have stated it more directly than British Columbia NDP Member of Parliament Peter Julian during the Northern Gateway Pipeline review process:

> They're gutting the environmental review process. They've put the NEB in a straitjacket and even if the NEB comes up with a decision that is in keeping with the public interest and responds to what the public hearings indicated, the Conservatives in cabinet can now throw that out and impose their own decision.[103]

Perhaps it was these types of criticisms that led the chair of the NEB to suggest in November 2014 that the Board is completely independent of government, stating:

> The NEB is also independent from government in our regulatory decision-making role. We report to Parliament – the elected representatives of Canadians. The only way the Government can tell us what to do is to get changes to our Act passed through Parliament or to make orders to us through the ways set out in the NEB Act. Otherwise, if any government in Canada – provincial, federal or municipal – wants to tell us something about a project, they have to apply to participate in a hearing, just like everyone else, and provide us with the evidence and arguments that they feel are relevant.[104]

He has more recently stated that the NEB is not in the government's pocket and that "our interaction with the Minister of Natural Resources (Greg Rickford, who appointed

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[102] Gaeton Caron, "Preparing for the Future of Federal Energy Regulation in Canada: What is the Past telling us", Energy Regulation Quarterly (15 September 2014), online: <http://energyregulationquarterly.ca>.

[103] Les Whittington, "Harper moves the Streamline BC Pipeline Review Process", *Toronto Star* (3 August 2012), online: <http://www.thestar.com/news/canada/2012/08/03/harper_moves_to_streamline_bc_pipeline_review_process.html>.

[104] Watson, *supra* note 1.

him) is essentially nil. In my eight months here, I haven't witnessed anything inappropriate."[105]

However, this view is somewhat at odds with what previous Board chairs have stated and is with over 50 years of NEB practice. And it is also at odds with his own practice which has included meeting with local government officials outside of the regulatory process, including the Mayor of Montreal.[106] But in an environment where the NEB is facing intense public criticism, it may be the exact kind of dialogue that could pacify public discontent and build trust in the regulator. It is what the public wants to hear. If the public believes that the Board has the technical expertise and impartiality to deliver decisions in the public interest, it does not want government interference. Even if the Board's decisions are only recommendations.

Although the critics of the NEB allege that the Board has lost some of its independence from the Federal government by virtue of the changes to its final decision making authority, it appears that the Board's more recent reaction is to assert its independence in a way that separates itself from past practice. According to the current Board Chair, Peter Watson, the Board decides and government does not interfere. The reality, in fact, probably lies somewhere in between Peter Watson's claim that the Board is completely independent of government influence and critics of the Board who echo the criticisms of those who 56 years ago said that the Board is merely a "political stooge of the government in power."[107]

4.2 Mandatory Time Limits

Under Bill C-38 changes, the NEB is now subject to mandatory time limits to complete the review process. The NEB must now submit its report and recommendation within the time limit specified by the Chair of the Board, which cannot be longer than 15 months after an application has been deemed complete.[108] This time limit applies to applications under section 52 for new pipelines over 40 km and for applications under section 58 for pipelines or extensions of pipelines less than 40 km or associated works or facilities. The amendments also impose a three month time limit for Cabinet to make a decision after the Board submits its recommendation.

Within the 15 month legislated timeline, the NEB must ensure a fair process, analyze technical and scientific evidence, complete a comprehensive environmental impact assessment, hear from intervenors, public participants and Aboriginal communities and prepare a Report and reasons for their recommendation. By comparison, the Northern

[105] Carol Goar, "A Regulator who likes tough Questions", *Toronto Star* (17 April 2015), online: <http://www.pressreader.com>.
[106] See Line 9B case study at 49, below.
[107] *Supra* note 46.
[108] NEBA, *supra* note 14, ss 52(4) and 58(4).

Gateway Pipeline hearings, which were already underway when Bill C-38 was proclaimed, took over three and half years from filing on 26 May 2010 to the panel report being released on 19 December 2013. Under the new rules, that process now has to be completed in less than half that amount of time. Based on the time that it took to complete the Northern Gateway hearings, there could be a conflict between the mandatory timelines and the Board's requirement to ensure a fair process, remain master of its own process and meet its statutory mandate.

In anticipation that timelines could slip, Bill C-38 built several mechanisms into the legislation to ensure that applications are concluded in 15 months. The Chair of the Board was given specific authority under sections 6(2.1), (2.2) and (2.3) to:[109]

- Issue directives to members of the Board to deal with an application in a timely manner;[110]
- Take any action that is "appropriate to ensure that a time limit is met".[111] This includes removing panel members, authorizing one or more members to deal with the application, or increasing or decreasing the number of members dealing with an application; and
- Designate a single member, including the Chairperson, as the sole member to deal with the application.[112]

In addition to the authority that the Chair was given, the Minister of Natural Resources has new powers under section 52(8).[113] If the Minister believes that the Chair should be doing more to move a section 52 application along, the Minister can order the Chair to take specific actions under sections 6(2.1) or 6(2.2). These new measures authorize the Minister to issue ministerial directives that could interfere in procedural matters of the Board to ensure that time limits are met.

These new provisions are quite powerful. They could be used by the Chair or the Minister to replace an entire panel with a single board member. On its face, these new powers appear contrary to principles of procedural fairness which generally require that panels be masters of their own processes.[114] While issuing directives to speed up the process may not directly undermine the independence of the Board in reaching a particular decision, some consider such a practice "objectionable on the broader ground that they devalue the integrity of the process and may, therefore, indirectly bring into

[109] *Ibid*, s 6.
[110] *Ibid*, s 6(2.1).
[111] *Ibid*, s 6(2.2).
[112] *Ibid*, s 6(2.3).
[113] *Ibid*, s 52(8).
[114] Rowland J Harrison, QC, Lars Olthafer & Katie Slipp, "Federal and Alberta Energy Project Regulation Reform: At What Cost Efficiency?" (2013) 51 Alta L Rev 249 at 262.

question the independence of the relevant tribunal in that process."[115] The ability of the Minister to step into the process could also be considered a direct interference with procedural independence.

Ministerial directives, however, are not new to energy regulators. For instance, the *Ontario Energy Board Act*[116] provides for ministerial directives to be issued to the Ontario Energy Board in areas such as energy conservation, alternative and renewable energy uses, load management, amendments to conditions in licences already issued by the Board and whether the Board holds or doesn't hold a hearing.[117] In particular, these directives can be used to change a decision the board has already made.[118]

Legislated timelines also are also not new to energy regulators. For example, Alberta's *Responsible Energy Development Act*[119] includes provisions regarding mandatory time limits. However, the legislation itself does not impose time limits on the Alberta Energy Regulator (AER) nor does it allow the Minister to interfere in the process. Instead, it authorizes the AER to set its own time limits and authorize procedures to achieve that by regulations under the *Alberta Energy Regulator Rules of Practice*.[120] While this appears to remove criticism of interference from the political level, there could remain concerns about the ability to hold a fulsome hearing in particular applications, based on specified timelines.

The Bill C-38 amendments to the NEB go much further than the examples noted above, authorizing the Minister to directly intrude into the Board's process and the Chair to take extraordinary steps. However, to date, neither the Minister nor the Chair of the Board has exercised their authority under these provisions. In fact, the new Chair of the Board, Peter Watson, while acknowledging that some believe that the legislated timelines strike at the heart of the Board's independence, said that he will "not hesitate to seek an extension to a hearing beyond the 15 months if we need to get additional information to make our decision - or if we believe we need more time for intervenors to be fairly and properly heard.[121]

The Board has demonstrated that it will take the time that it needs to determine matters that are not subject to any mandatory timeline or ministerial directive. For instance, while there was a 15 month time limit to review the entire application, hear from experts, the public, Aboriginal communities and municipalities regarding a broad range of issues on the Enbridge Line 9B Reversal application, the Board is taking a

[115] Rowland J Harrison, "Tribunal Independence: In Quest of a New Model" (2014) 2 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca>.
[116] *Ontario Energy Board Act*, SO 1998, c 15.
[117] *Ibid*, ss 27-28.
[118] *Ibid*, ss 28.1(1) to 28.3(2).
[119] *Responsible Energy Development Act*, SA 2012, c R-17.3.
[120] *Alberta Energy Regulator Rues of Practice*, Alta Reg 99/2014, s 41.
[121] Watson, *supra* note 1.

significant amount of time to make post approval decisions,[122] demonstrating action on safety and transparency. The pipeline, which was approved by the Board on 6 March 2014[123] and was to be in service by mid-October 2014, was first delayed by four months, waiting for the Board to review 22 pages of information relating to a condition of approval,[124] a significant amount of time given that the timeline to hear the entire application was 15 months. Having satisfied the condition of approval, Enbridge applied for Leave to Open on the same day but was delayed an additional four months before conditional Leave was granted.[125] The Leave to Open was conditional upon Enbridge conducting a hydrostatic test on sections of the line,[126] an additional process that could take 6-12 months to complete. Some might suggest that had the requirement for a hydrostatic test been determined at the same time as the initial questioning of condition 16 over eight months earlier, significant time could have been avoided. But, during those eight months, Peter Watson was consulting with Canadians, including over 50 municipal leaders in Ontario and Quebec.[127]

It is probably safe to assume that the chair of the Board will not lightly use any of the powers granted to him as Chair under sections 6(2.1) and 6(2.2) of the *National Energy Board Act*. He has also not shown an inclination to facilitate the government's desire to get natural resources to market in a competitive timeline, concerns expressed by former Natural Resources Minister Greg Rickford that "market diversification, market access, and product diversification are imperatives. If we miss this opportunity, particularly over the medium term, in the development of these resources and the infrastructure required to support their transportation, we will be missing out on an excellent opportunity for this country."[128] The NEB has shown that it will take whatever time it deems necessary to complete its reviews and demonstrate that it is listening to public concerns, notwithstanding any amendments under Bill C-38 or government concerns with regulatory efficiencies.

4.3 Public Participation in Review Process

Prior to Bill C-38, the *National Energy Board Act* allowed the Board to accept any "interested person" to participate in the review process under section 53:

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[122] See Line 9B Case study at 48-49, below.

[123] NEB, Enbridge Pipelines Inc. Line 9B Reversal and Line 9 capacity Expansion Project, OH-002-2013, Reasons for Decision, (6 March 2014), online: <http://www.neb-one.gc.ca>.

[124] NEB, Enbridge Pipelines Inc Line 9B Reversal and Line 9 capacity Expansion Project, Letter from Board to Enbridge, OH-002-2103 (6 February 2015), online: <http://www.neb-one.gc.ca>.

[125] NEB, Enbridge Pipelines Inc Line 9B Reversal and Line 9 capacity Expansion Project, OH-002-2013, Leave to Open Reasons for Decision, (18 June 2015), online: <http://www.neb-one.gc.ca>.

[126] *Ibid*.

[127] See Line 9B case study at page 43 below.

[128] House of Commons, Natural Resources Committee, 41st Parl, 2nd Sess, No 40 (25 November 2014).

> 53. On an application or a certificate, the Board shall consider the objections of any interested person, and the decision of the Board as to whether a person is or is not an interested person for the purpose of this section is conclusive.[129]

Bill C-38 amendments limit public participation to those who are directly affected or have relevant information or expertise**.** Section 55.2 of the new legislation outlines the NEB's new test:

> 55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, it its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.[130]

The term "interested person" under the previous legislation was not defined, leaving wide discretion to the NEB. Typically this definition was applied with a liberal interpretation, which allowed for broad opportunities for the public to be heard.[131] Bill C-38 significantly narrowed the qualification for participation, providing statutory guidance to the NEB that their reviews must be kept to the project itself and not become a venue for the public to voice their disapproval of government policy on things such as climate change and growth of the oil sands. The amended rules for public participation compliment the amendments (discussed below) that narrow the scope of review to matters directly related to the pipeline. The new rules are also directly related to the Board's ability to conclude hearings within the legislated timelines. Limiting participants and the scope of review to matters directly related to the pipeline project itself allows the Board to keep a strict focus on evidence specific to the project rather than hearing weeks, perhaps months, of unrelated background.

4.4 Scope of Review

Prior to the 2012 amendments, subsection 52(1) of the *National Energy Board Act* directed the Board to take into account "all considerations that appear to be relevant".[132] By contrast, Bill C-38 directs the Board to take into account "all considerations that appear to be directly related to the pipeline and to be relevant":

> 52(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:
>
> (a) the availability of oil, gas or any other commodity to the pipeline;
> (b) the existence of markets, actual or potential;

[129] NEBA, *supra* note 14, s 53 [emphasis added].
[130] *Ibid*, s 55.2 [emphasis added].
[131] For instance, the Northern Gateway hearings had over 4,500 applications for oral presentation accepted by the Board.
[132] NEBA *supra* note 14, s 52(10).

> (c) the economic feasibility of the pipeline;
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
> (e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.[133]

Neither of the two amendments, to rules of standing or to scope of review, appears to affect the actual independence of the Board. Within its own process, the Board's determination of who is directly affected and what issues are directly related to the pipeline are decisions for the Board itself to make and are conclusive. The amendments themselves provide the Board with the statutory tools necessary to keep a focused review. They provide a broad framework, but within that framework the Board operates independently.

Notwithstanding the clear intention of the amendments, environmental groups and pipeline opponents have challenged the restrictions to standing and scope of review in both the Line 9B and TransMountain reviews.[134]

4.4.1 The Sinclair Case – Line 9B

The Federal Court of Appeal recently considered the Board's authority to restrict participation and exclude climate change in *Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board* (Sinclair Case).[135] In the Sinclair case, the applicants brought a judicial review application challenging:

- the Board's process to determine eligibility to participate in the Line 9B Reversal Project hearing;
- the Board's denial of participant rights to the Applicant, Donna Sinclair, on grounds of (a) administrative law unreasonableness and (b) breach of freedom of expression under section 2(b) of the *Charter of Rights*;[136] and
- the Board's ruling that issues such as the environmental effect of development of the oil sands and climate change would not be considered in the hearing.

In confirming the Board's right to exclude larger, general issues such as the environmental effects associated with the oil sands and climate change, the Court concluded that broad latitude should be given to the Board to set its own criteria regarding what it will consider and what it won't. After noting that the Board's main

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[133] NEBA, s 52(2).

[134] See Line 9B case study at page 43 below and TransMountain expansion case study at page 51 below.

[135] *Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board, The Attorney General of Canada and Enbridge Pipelines Inc* (2014), FCA 245 [*Forest Ethics and Sinclair*].

[136] *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982 c 11).

responsibilities under the *National Energy Board Act* focus on the pipeline itself and that the Board does not even regulate the upstream facilities in the oil sands, the court determined that it was reasonable for the Board to exclude climate change from its consideration. Interpreting section 52(2) for the first time, the court said:

> Subsection 52(2) of the Act empowers the Board to have regard to considerations that "to it" appear to be "directly related" to the pipeline and "relevant". The words "to it", the imprecise meaning of the words "directly" and "related" and "relevant", the privative clause in section 23 of the Act, and the highly factual and policy nature of relevancy determinations, taken together, widen the margin of appreciation that this Court should afford the Board in its relevancy determination.[137]

The court also ruled that Forest Ethics did not have standing to bring a judicial review application and Donna Sinclair, who did not reside anywhere near the pipeline, did not have a right to participate. The court went so far as to say that Forest Ethics, which had no prior involvement in the Line 9B application before bringing an application for judicial review, was a classic "busy body" that "asks the court to review an administrative decision it had nothing to do with."[138]

With respect to the Board's decision to deny standing to Sinclair, the court said that she could not raise a Charter of Rights argument before the court because she had not raised it before the Board. The court also deferred to the Board's decision to deny standing on procedural grounds, saying that the standard of review is correctness, with some deference to the Board's choice of procedure. In accepting the Board's choice as reasonable, the court said:

> Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in-center for anyone to raise anything, no matter how remote it may be to the Board's task of regulating the construction and operation of oil and gas pipelines.[139]

In reaching its decision, the Federal Court of Appeal said that Parliament sent a clear signal that the NEB hearing process needed to be more efficient and focused and that the Board was thereby justified in creating a process that required "rigorous demonstration" of the capacity to contribute to the Board's decision.[140] The court also sent a clear signal that it would not be easily influenced to override decisions made by the Board.

[137] *Ibid* at para 69 [emphasis added].
[138] *Ibid* at para 33.
[139] *Ibid* at para 76.
[140] *Ibid* at para 77.

4.4.2 Forest Ethics v TransMountain Expansion Project

Forest Ethics also brought a Leave to Appeal Application challenging a ruling of the NEB in the TransMountain Expansion Project.[141] On 6 May 2014, Forest Ethics and several individual applicants filed a Notice of Motion asserting that section 55.2 of the *National Energy Board Act* violated their right to Freedom of Expression under section 2(b) of the Charter. The Board ruled against them,[142] concluding that an "untrammeled right of the public" to "open public expression" would render the Board unable to efficiently and effectively hear evidence that it needed to assess whether a project was in the public interest.[143] The Board decision was appealed to the Court of Appeal[144] and on 23 January 2015, Justice Nadon of the Federal Court of Appeal dismissed the application for leave to appeal without reason.[145] That decision has since been appealed to the Supreme Court of Canada. In its press release announcing the appeal to the Supreme Court, Forest Ethics accused the NEB of "being under the undue influence of the oil industry" and that "the process is undemocratic, unfair and biased."[146]

Overall, the amendments to standing and scope of review do not appear to have had a significant impact on the independence of the board to be the master of its own process. The courts, to date, have given broad latitude to the NEB to determine its own process and procedures. However, these two amendments have attracted perhaps the most vocal and public criticism of the Board since the 2012 amendments came into effect. Opponents of pipelines and oil sands expansion had a known strategy to stack approval processes as a means to slow down oil sands expansion.[147] The more participants that speak to climate change and upstream environmental affects in a regulatory process, the longer it will drag out. When these issues become an integral part of a review process, timelines will be affected, the workload of the NEB panel will be impacted and the process will become longer and more complicated. Not surprisingly, having failed in the political, regulatory and Court of Appeal process, opponents have now turned their sights on the NEB itself, suggesting it is flawed. Following its losses in court, Forest Ethics launched a hostile public relations campaign against the board, saying:

> The National Energy Board was established to conduct public hearings in order to assess whether or not an infrastructure proposal such as that made by Kinder Morgan is in the public interest, and in the past, it has done so. But in 2012, at the urging of the oil industry, the Harper Government

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[141] NEB, TransMountain Pipeline Expansion Project, OH-001-2014, Notice of Motion, online: <http:// www.neb-one.gc.ca>.

[142] NEB, TransMountain Pipeline Expansion Project, OH-001-2014, Ruling 34, Letter from NEB (2 October 2014), online: <http://www.neb-one.gc.ca>.

[143] *Ibid*.

[144] *Lynne M Quarmby and Others v National Energy Board and Others*, Docket No 14 at 62.

[145] *Ibid*, J & O Biij, vol 288 at 32.

[146] Mark Hume, "Environmental advocates take NEB fight to Supreme Court", *The Globe and Mail* (23 March 2015), online: <http://www.theglobeand mail.com>.

[147] *Pew Foundation*, *supra* note 66.

> amended the NEB Act so that its hearings would be completed in an unreasonably short period of time, and would curtail the public's right to meaningfully participate. The NEB has interpreted this new legislation as giving it the mandate to almost completely frustrate the public's right to effectively participate in its hearings. As a result NEB hearings have lost their essential purpose. If the public cannot be heard the public interest cannot be assessed.[148]

However it is by no means a diminishment of the role of the NEB when issues that are not related to a pipeline project itself are not included in the review process for that project. Not everyone agrees with the assessment of environmental groups such as Forest Ethics. A study recently prepared by C.D. Howe suggested that "while issues such as energy security, greenhouse gas emissions and energy efficiency are important to society and relevant to the energy sector and the national economy, these overarching social and environmental issues should be dealt with by governments in setting energy policy, not as part of the regulatory review process.[149]

5.0 Bill C-38: No Real Impact on the Independence of the NEB

On many levels the Bill C-38 amendments led to improved efficiency, avoiding duplication, streamlining the process and ensuring timely reviews. On another level, however, the changes led to a public perception of a diminished role of the NEB in order to align the Board's processes with government objectives.[150] At the heart of all of these criticisms is a perception that the NEB's independence was compromised. But, the NEB was never really set up to be completely independent of the government. Government agencies, boards and commissions ("boards") always have a degree of independence from governments, but the degree of independence varies considerably from board to board. Federal boards and agencies are established by legislation which sets out the mandate, role, structure, decision making process and how appointments are made. Their functions vary from administrative, advisory, regulatory or quasi-judicial. Each agency is different in the role it plays and in how it reports to and interacts with the government or the responsible Minister.

Unlike judicial independence, the degree of independence of a board from government is set by enabling legislation. Some boards are meant to be more independent than others. In describing the nature of independence of a board or tribunal, the Supreme Court of Canada in *Ocean Port Hotel Ltd v British Columbia*[151] stated that:

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[148] Ben West, "Constitutional Challenge Launched against Flawed NEB Kinder Morgan Pipeline Review", Forest Ethics (6 May 2014) [emphasis added], online: <http://forestethics.org.ca>.

[149] Joseph Doucet, "Unclogging the Pipes: Pipeline Reviews and Energy Policy", *CD Howe Institute* (2012), online: <http://www.cdhowe.org.ca>.

[150] Harrison, Olthafer & Slipp, *supra* note 114 at 250.

[151] *Ocean Port Hotel Ltd v British Columbia*, 2001 SCC 52, [2001] 2 SCR 781 [emphasis added].

> Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.[152]

As a quasi-judicial regulator, the NEB has always had a "degree of independence, but not absolute independence."[153] Former NEB Board Chair, Gaeton Caron describes the degree of independence from the government as:

> We do not decide our own budget. We do not appoint our own Board members. We must follow the laws of the land, such as the *Financial Administration Act*, and the *Public Service Employment Act*. We do not decide what changes to our legislation are considered by Parliament, this being the role of the Government or of Private members' Bills … When public policy has become an Act of the Canadian Parliament, the NEB must comply with the legislation. For policies that are not found in legislation, it is appropriate for the regulator to be informed in its decision-making by these policies but the regulator is not bound by them. This is as a result of the regulator being a quasi-judicial entity (just like the courts) but also because of the different role of policy vs. regulation.[154]

Independence of a board has often been described in two different ways: (1) whether the Board's decisions are final and not subject to political review; or (2) whether the Board's decision making processes are independent from political interference.[155]

There is a significant difference between the two descriptions. While the NEB operates at arms-length from the government, it does not set public or government policy. It is supposed to follow and implement the mandate set by Parliament. However, the NEB sets its own processes. As described by former Chair Gaeton Caron, "as an independent regulator separate from government, we are required to carry out our business and make decisions free from political influence".[156] The NEB's independence is therefore based more on its ability to arrive at its conclusions free of political interference than on the finality of its decisions. In addition to the independence of a board from the government, there is another type of independence, the independence of a board from the industry it regulates and from special interest groups.

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[152] *Ibid* at paras 22-24. [emphasis added].

[153] Gaeton Caron, Chair and CEO of the NEB, "Independence of the Regulator: The Canadian Story" (Speech delivered at Economic Club, 12 May 2012) [emphasis added], online: NEB <http://www.neb-one.gc.ca>.

[154] *Ibid*.

[155] Harrison, *supra* note 2 at 780.

[156] Gaeton Caron, Chair of NEB, "Regulating in the Public Interest: University of Calgary School of Public Policy Master of Public Policy Speakers Series" (Speech delivered at School of Public Policy, 16 October 2012), online: NEB <http://www.neb-one.gc.ca>.

Independence of a board from the industry it regulates is compromised if there is regulatory capture. The capture theory was first studied by Marver Bernstein in his 1955 book, *Regulating Business by Independent Commission*.[157] The regulatory capture theory was later examined by George Stigler, a Nobel Prize winning economist, in 1971. He maintained that if an industry, firm or interest group is able to capture the regulator by whatever means, the regulator can then be swayed to make biased decisions in their favour.[158] In his study of the theory, George Stigler examined the ways in which unrelated industries and interest groups are able to influence and use government regulatory power to advance their agendas. While the theory focuses on the connection between the demands for regulation from large firms versus consumers, it is also applicable to quasi-judicial regulators who oversee a particular industry. The theory holds that if a regulator is captured by the industry it regulates, more development and higher rates of economic return are expected. If a regulator is captured by anti-development special interests, the opposite will occur. Stigler's theory predicts that, when there is a conflict between these two groups, large firms or industry will usually win because they have much more political power.

The NEB is under growing criticism that it is captured and is just another instrument of the industry that it regulates and that is decisions are either foregone conclusions or rigged to facilitate the companies it regulates. The Canadian Association of Energy Pipeline Landowners (CAEPLA) has recently suggested that the NEB is captured, describing the concept:

> "Regulatory capture" are two words that describe what happens when an industry that is supposed to be regulated by an impartial government body, is able to exert so much influence over that body, that the regulator is literally taken captive. When this happens, rather than giving appropriate consideration to the legitimate interests of all stakeholders, the regulator becomes an extension of the industry or business that it is supposed to monitor and impartially judge or discipline.[159]

Criticisms of regulatory capture reached a boiling point in the TransMountain Expansion application following the withdrawal of an intervenor who suggested that the process was captured by the industry and was rigged with a pre-determined outcome.[160]

But are these criticisms of the Board justified? Has anything really changed as a result of Bill C-38? An examination of each of the four main amendments under Bill C-38 has shown that the role of the Board has not fundamentally changed as a result of the

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[157] Marver Bernstein, *Regulating Business by Independent Commission* (Santa Barbara, CA: Greenwood Publishing Group, 1977).

[158] George Stigler, "The Theory of Economic Regulation" (1971) 2:1 Bell Journal of Economics and Management Science 3.

[159] Canadian Association of Energy Pipeline Landowner Association (CAEPLA), "CAEPLA – Regulatory Capture", online: <http://www.landownerassociation.ca.

[160] See case study on TransMountain at 53-54, below.

streamlining of the process. But this is not the public view. The public tends to believe it is a "rigged game", a "gutted process" and a regulator that is captured. There appears to be a growing divide between what Bill C-38 has actually changed and what special interest groups believe or would like to the public to believe has changed. This difference is fundamental. It is fundamental because the NEB is now taking unprecedented steps to assert their independence from both the government and industry it regulates.[161] The next section will examine a new activist approach by the regulator in the wake of Bill C-38. This evolving role may have unintended impacts on the ability of oil producers to gain access to growing export markets in a competitive timeframe, one of the key objectives of government policy.

6.0 The Evolving Role of the NEB

While Bill C-38 itself may not have fundamentally changed the role of the Board from its mandate over the past 56 years, what appears to have changed are expectations from stakeholders and the public regarding what an energy regulator should be doing. Opposition to pipelines and the oil sands has now migrated from challenging the federal Conservative government and other federal, provincial and municipal leaders, to challenging the legitimacy of the NEB itself. Opponents have made a convincing case that the NEB should be considering issues such as climate change and fossil fuel use. Municipal and community leaders have grown vocal, protests are common and the Board is sensitive to these views. While the Board has maintained its position that its mandate does not include climate change and its project reviews will hear only from those directly affected, it appears to now be taking measures outside of the review process to respond to these exact concerns and issues.

As the amendments started to be better understood, criticism of the Board's independence became common. These criticisms, real or perceived, are at the heart of the Board's new approach to building public trust. In its annual report tabled in Parliament on 4 May 2015,[162] the NEB articulated a new path, stating that "this is the beginning of a new era for the Board", that "we are here to serve the Public" and that "we want to make certain that Canadians know they have a regulator they can rely on."[163] A repeated theme about listening to the public is carried throughout the entire report. The Board's strategic priorities under new Chair Peter Watson differ from previous years, where the Board focused on its regulatory roles, energy development and trade. The new strategic priorities have now shifted towards an additional focus on communications and engagement with the public, with an emphasis on the need to reach out to Canadians beyond the scope of regulatory processes and being open to making changes based on public expectations. With an emphasis on safety and consultation, the Board has taken a

[161] See discussion regarding NEB actions at 40-41, below.
[162] NEB, "2014 Annual Report to Parliament", (5 May 2014), online: <http://www.neb-one.gc.ca>.
[163] *Ibid*.

number of unprecedented steps, displaying a tendency to be more activist and conscious of safety, transparency and accountability. Examples include:

- A cross country engagement initiative to visit every province to talk to Canadians about things such as how the NEB can improve pipeline safety. The NEB has been meeting directly with municipal and provincial officials, Aboriginal groups, environmental organizations and other community and academic leaders.[164]
- Setting up NEB offices in Montreal and Vancouver to consult with Canadians about pipeline issues and to build relationships with the public, landowners and Aboriginal communities.[165]
- A speaker's tour by NEB chair Peter Watson titled "In the Eye of the Storm".[166] This included an unprecedented appearance on a political talk show by the Chair of the NEB[167] and meetings with public officials such as the mayor of Montreal and other municipal leaders.
- Throughout this tour, Peter Watson's message has consistently emphasized that the NEB is committed to opening pipeline safety issues to new levels of public scrutiny, has increased inspections, will increase transparency regarding emergency response plans, is pushing industry to advance its compliance and is auditing safety management practices of pipeline companies.
- The Board's report on Compliance Verification Activities[168] noted an overall increase in inspections, emergency exercises and audits over 2013, citing a total of 353 compliance activities in 2014 compared to 303 in 2013. The Board issued six Administrative monetary Penalties (AMPs) in 2014, compared to 0 in 2013.
- After hearing concerns from municipal leaders across the country, NEB Chair Peter Watson announced on 27 April 2015 that the NEB will review industry practice around disclosure of pipeline emergency response information.[169] It will launch a public consultation process to solicit public views about emergency management and response including the type, and level of emergency management information. The stated purpose is that it "builds confidence in the NEB's regulatory oversight."[170] A final report is expected by September 2015.

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[164] NEB, News Release, "NEB Chair Announces Cross-Canada Engagement Initiative" (25 November, 2014), online: <http://www.neb-one.gc.ca>.

[165] NEB, News Release, "NEB to open regional offices in Vancouver and Montreal" (16 January 2015), online: <http://www.neb-one.gc.ca>.

[166] Stephen Ewart, "NEB Ventures into the eye of the Storm", *The Calgary Herald* (20 January 2015), online: <http://www.calgaryherald.com>.

[167] CTV Question Period, 30 November 2014 broadcast, online: <http://www.ctvnews.ca/polopoly_fs/1.2126110!/httpFile/file.mp3>.

[168] NEB, "2014 Annual Report to Parliament", *supra* note 162.

[169] NEB News Release, "Engaging with Canadians on Emergency Response" (27 April 2015), online: <http://www.neb-one.gc.ca>.

[170] *Ibid*.

- An interactive web based map that shows each pipeline incident reported to the Board since 2008 was launched on 13 April 2015.[171] In announcing the new tool, the NEB stressed that it demonstrates the NEB's increasing commitment to transparency."[172]
- A number of tough rulings and positions have been taken by the board in current pipeline application processes.[173] This includes delaying Leave to Open for the Line 9B application, based on concerns expressed by municipal leaders along the Right of Way and ordering a hydrotest of Line 9B some 15 months after the project was approved.

The NEB's more recent focus on transparency, public consultation and pipeline safety aligns with Bill C-46, the *Pipeline Safety Act*,[174] which was passed by the Federal government in June 2015. This Bill enacts a series of amendments to the *National Energy Board Act* to implement a suite of measures to strengthen pipeline spill prevention, preparedness and response as well as liability and compensation.

What is apparent is that the Board is now focused on improving its reputation as a tough regulator committed to ensuring that pipeline operators meet the highest standards of safety and accountability. The Board is moving in this direction at a time when the public has grown increasingly skeptical of the regulator's independence and tenacity as a regulator. Does this necessarily appease pipeline opponents? Probably not. However, it might set a level of comfort and assurance with the broad public in the middle of the spectrum, who are not opposed to pipelines in general, but are uncomfortable with the environmental risks.

The following case study of four crude oil pipeline projects before the Board since the Bill C-38 amendments in 2012 will provide context around how Bill C-38 has evolved and how growing public and stakeholder expectations have impacted the perception of the Board's role. This has now impacted the Board's procedures and how they approach public consultation. A view into how the review process for these projects unfolded shows that the NEB is weighing into unusual territory, making rulings and decisions on constitutional division of powers, Charter of Rights violations, controversial administrative processes and procedures and a growing discomfort by stakeholders and municipalities about how the Board's handles issues before it. Some stakeholders have challenged the Board's authority to make decisions within its own processes. Others have resorted to protesting and civil disobedience.[175] Decisions made by the Board have been

[171] NEB, News Release, "National Energy Board Launches Online Pipeline Incident Map" (13 April 2015), online: <http://www.neb-one.gc.ca>.
[172] *Ibid*.
[173] See Line 9B case study at 50, below.
[174] Canada, Bill C-46, *Pipeline Safety Act, An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act*, 2nd Sess, 41st Parl (granted Royal Assent on 18 June 2015 and will be proclaimed in force in one year from Royal Assent).
[175] See Line 9B case study, protestors occupying pump station at 45, below.

interpreted by project opponents to be decisions of a regulator captured by the industry it regulates. Other decisions are simply litigated. All of this has, no doubt, led to the Board's more activist approach where it is now attempting to deal with matters that have been removed from review processes under Bill C-38, by consulting directly with the public outside of those project reviews.

7.0 Case Study 1: Enbridge Line 9B Reversal Project

7.1 The Application and Process

One of the first applications to be filed with the NEB following Bill C-38 was the Enbridge Line 9B Reversal project ("Line 9B"). The application was filed a year after the previous Line 9 Reversal Phase 1[176] application to reverse the flow of the line from Sarnia to Westover Ontario. The Line 9B application sought approval to reverse the rest of the line, from Westover to Montreal.

The original Line 9 was approved in 1974 to carry Alberta crude to Montreal refineries and was reversed in 1991 to carry offshore oil from Montreal to Sarnia refineries. The re-reversal application, filed on 29 November 2012, was to return the flow to its original direction, once again servicing Montreal area refineries with western Canadian crude.[177] The reversal involved replacing pumps and valves and other equipment needed to reverse the line. All of the work would take place within existing facilities and rights of way. No new right of way or pipeline was required.[178] It was supposed to be a simple straight forward facilities application under section 58 of the *National Energy Board Act*. It was anything but simple.

Notwithstanding the limited scope of the actual work involved in the project, the NEB directed that the application would proceed to a public hearing.[179] Rules for public participation and a list of issues to be considered were posted in a procedural update on the NEB website four months after the application was filed.[180] This was the first time that the NEB dealt with the new section 55.2 standing rules and the new scope of factors under section 52(2) of the *National Energy Board Act*. In order to be considered for participation, interested parties were required to complete an Application to Participate

[176] *Supra* note 60.
[177] NEB, Enbridge Line 9B Reversal Project, OH-002-2013, Project Application (29 November 2012), online: <http://www.neb-one.gc.ca>.
[178] *Ibid* at 49.
[179] NEB, Enbridge Line 9B Reversal Project, OH-002-2013, NEB letter of decision on Process (20 December 2012), online: <http://www.neb-one.gc.ca>.
[180] NEB, Enbridge Line 9B Reversal Project, OH-002-2014, NEB Procedural Update No 1, List of Issues and Application to Participate form (4 April 2013) [Procedural Update No 1], online: <http://www.neb-one.gc.ca>.

form within 15 days.[181] The Application form itself was *10 pages long* and that was only for the Board to determine if an applicant was eligible to even submit a Letter of Comment. The rules were clear that the new legislation limited participation to only those "directly affected" or with "relevant expertise". The Board encouraged interested parties to submit a resume to help convince the Board of their qualifications. Specific guidelines on what "directly affected" meant were published, requiring participants to have something close to a commercial property or financial interest in the pipeline or its right or way. Some would suggest that this process was deliberately designed to discourage participation.

The scope of factors to be considered was equally restrictive and clearly excluded issues related to the oil sands and climate change. Specifically, the Board stated that it would not hear from the public regarding environmental and socio-economic effects related to the oil sands or any consideration of renewable energy because "these issues are not within the Board's mandate to regulate, and are not part of the Project as proposed by the Applicant. Discussion or consideration of alternatives to fossil fuels, or to the development of the oil sands, bear on broader policy questions that are beyond the jurisdiction of the Board and separate from the proposed Project."[182]

7.2 Public Reaction

As public criticism of the project grew, opposition political parties expressed outrage at the process itself. It didn't take long before the NEB's 10 page application form became highly politicized. Green Party Leader Elizabeth May immediately led the charge, stating:

> If local residents along the Number 9 pipeline wish to speak before the NEB hearings, or even submit a letter, they are required to fill out a 10 page form, and are also encouraged to submit references and a resume! This is an NEB effort to meet the new requirements imposed by the horrific overhaul of the Canadian Environmental Assessment Act that took place last year in the Omnibus Budget Bill (C-38).[183]

These concerns were shared by the NDP party and came up at the Parliamentary standing Committee on Natural Resources when Montreal area Line 9B right of way MP, Jamie Nichols, called on Natural Resources Minister Joe Oliver to justify the NEB's 10 page application form:

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[181] Previous work on Line 9B, public participation and standing was prepared by the author for course work, Sonya Savage, *Public Participation in Environmental Impact Assessments: The Conservative Government's Responsible Resource Development amendments* (Law 623, Environmental Impact Assessment, University of Calgary Faculty of Law, 31 March 2014) [unpublished].

[182] Procedural Update No 1, *supra* note 180.

[183] Elizabeth May, "Pipelines to the East", online: The Green Party of Canada <http://www/sgigreen party.ca>.

> Mr. Jamie Nicholls: Okay, but you've tightened the process of public consultation for the public. People now have to submit [10] ten page documents to participate in the public process, the public review, by the NEB. Can you let us know what recourse Canadians, people in my riding, will have to share their views with the panel if they're not selected by the NEB to testify?[184]

The 10 page application form resulted in fewer participants than in pre Bill C-38 applications such as the Northern Gateway Pipeline. The Board received only 177 applications to participate and of those, 169 were granted standing.[185] Fewer participants most certainly made meeting legislated timelines more manageable. But the overall restrictive hearing process may have moved the opponents outside of the regulatory process, resulting in public protests, blockades, parallel provincial assessments, litigation, and ultimately eventually leading to unusually tough NEB board decisions to appease a skeptical public who did not participate in the hearing.

By April 2013, a protest group along the right of way in Hamilton called "swamp Line 9" was formed to encourage direct action to stop the Line 9B reversal. The group stated that they had to resort to civil insurrection because there was a "rigged game", the Conservatives had taken "spectacular measures" to remove the usual environmental oversights, there was only "meaningless opportunities for public engagement" and the approval of the application by the NEB was a foregone conclusion.[186] The Swamp Line 9B group, comprised of environmental activists, protestors from the Occupy and Idle no More movements, occupied an Enbridge pumping station along the right of way for over a week until Enbridge obtained an injunction and the Hamilton police arrested 18 protestors on 26 June 2013.[187]

This was only the beginning. The NEB hearings commenced on 8 October 2013 in Montreal.[188] The hearings opened with riot police prepared to handle protestors. On the first day of the hearings in Montreal, a group of protestors wearing gas masks entered the hearing room and held up signs to highlight that climate change and downstream impacts were left out of the discussion.[189] After protestors stormed into the hearing room on Day 2 of the hearings in Toronto, the NEB shut the hearings down and issued a Procedural Update that stated "the end of today's hearing raised concerns with respect to the security of participants. As a consequence, the reply argument of the applicant Enbridge Pipelines

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[184] House of Commons, Standing Committee on Natural Resources, Committee Evidence, 41st Parl, 1st Sess (16 April 2013) Jamie Nichols.

[185] NEB, Enbridge Line 9B Reversal Project, OH-002-2013, NEB Procedural Update No 2 – Ruling on Participation and Updated Timetable of Events (22 May 2013), online: NEB <http://www.neb-one.gc.ca>.

[186] Swamp Line 9, "Swamp Line 9 – stopping the Expansion of Enbridge's Line 9", online: <http://swampline9.tumblr.com>.

[187] Daniel Nolan, "Police move in on Enbridge protestors, arrest 18", *Hamilton Spectator* (26 June 2013) online: <http://www.thespec.com>.

[188] NEB, Enbridge Line 9B Reversal Project, OH-002-2013, NEB Procedural Update No 3 – Final Argument Dates and Locations (16 August 2013), online: <http://www.neb-one.gc.ca>.

[189] Michael Toledana, "How Activists Shut down the Line 9 Pipeline Hearings" (21 October 2013), online: <http://www.vice.com>.

Inc. has been postponed to a future date to be determined."[190] The hearings never resumed and reply evidence was ultimately filed in written form. In its history, this was the first time that an NEB hearing process had to be shut down because of protest activity.

7.3 Reaction from Provincial and Other Levels of Government

As complaints of a "gutted review process" continued, both the Quebec and Ontario provincial governments were pressured to commence their own process to assess the Line 9B project, even though the project was under the exclusive federal jurisdiction of the NEB. Although both governments had applied and became intervenors, organized opposition to the project suggested that the federal process was not thorough and was inadequate to protect the environment. In November 2013, the Quebec provincial government announced that it would hold its own public consultations. Although it had no legal authority to conduct a review of a federally regulated pipeline project, Quebec announced that it would set up a Parliamentary Commission to hold two weeks of public hearings and ultimately submit a report to the National Assembly.

To the disappointment of environmental groups, the Quebec parliamentary commission ultimately came out in favour of the project. However, it imposed a further 18 conditions, including creating an oversight committee composed of federal, provincial and Enbridge representatives and a direction that Enbridge provide Quebec with inspection data so that Quebec could run their own independent assessment of the integrity of the line. All of these conditions were, technically, under the exclusive jurisdiction of the NEB.[191]

On the same day that the Quebec government announced its Parliamentary Commission, the Ontario government said that the Ontario Energy Board would hold public consultations on the next federally regulated oil pipeline project that went through the province. Although it chose not to hold separate hearings on Line 9B, Ontario announced it would for TransCanada's Energy East Project. The separate Ontario review was meant to "provide an opportunity for all Ontarians, including First Nation and Metis communities and stakeholders to share their views on the pipeline proposal."[192]

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[190] NEB, Enbridge Line 9B Reversal Project, OH-002-2013, Final Argument Update (18 October 2013), online: <http://www.neb-one.gc.ca>.

[191] Assemblee Nationale Quebec, "Commission de l'agriculture, des pêcheries, de l'Énergie et des ressources naturelles" (décembre 2013).

[192] Ontario Ministry of Energy, News Release, "Ensuring Energy East Pipeline benefits Ontario: Ontario Energy Board to hold Consultations, Prepare Report" (13 November 2013).

7.4 Litigation and NEB Rulings

On 13 August 2013, Forest Ethics Advocacy filed an application to the Federal Court challenging Bill C-38 restrictions to public participation and scope of review in the Line 9B application ("the Sinclair case").[193] The application called on the court to strike down section 55.2 of the *National Energy Board Act* because it violated freedom of expression under section 2(b) of the Charter of Rights and Freedoms. Ultimately, the litigation failed and the Federal court of appeal agreed with the NEB, calling Forest Ethics a "classic busy body."[194]

The National Energy Board eventually approved the Line 9B reversal project on 6 March 2014, with 30 conditions.[195] One of those conditions addressed growing public criticisms of the consultation process by requiring Enbridge to file a report every 12 months detailing the status of ongoing public education and consultation activities with municipalities, Aboriginal groups and other stakeholders.

Although the regulatory process itself met the 15 month legislated timeline with 13 days to spare, it took the Board over four months to determine whether Enbridge had met condition 16. This delay followed intense scrutiny by Quebec and Ontario municipalities. Enbridge had completed construction, but needed confirmation from the Board that the 30 conditions of approval had been met ahead of the NEB granting Leave to Open the pipeline. In September 2014, just one month prior to the scheduled in service date, Montreal mayor Denis Coderre informed the NEB that he was not satisfied that Enbridge had met condition 16, which dealt with the placement of valves near major water crossings. Calling upon the NEB and Natural Resources Minister Greg Rickford to withhold approval to open the line until his concerns were met, Coderre went on a public rant, saying:

> Transportation by oil and gas pipelines should be more strictly regulated. It should be subject to the rules that apply to the transport of hazardous materials, which is not the case right now. Until that happens, the NEB must ensure that Enbridge respects all the conditions set out in its order before giving authorization to operate Pipeline 9B.[196]

In an apparent response to the Mayor's criticisms, the NEB sent a scathing letter to Enbridge asking for additional information about its water course crossings and emergency response measures under condition 16 (valve placement) and condition 18 (watercourse crossing).[197] Enbridge provided 22 pages of additional information to the

[193] *Forest Ethics and Sinclair*, *supra* note 135.
[194] *Ibid*.
[195] NEB, Enbridge Line 9B Reversal Project, OH-00202013, Reasons for Decision (6 March 2014), online: <http://www.neb-one.gc.ca>.
[196] Michelle Lalonde, "Pipeline Still lack Safeguards, Coderre said", *Montreal Gazette* (14 September 2014) online: <http://www.montrealgazette.com>.
[197] NEB, Enbridge Line 9B Reversal Project, OH-002-2103, Letter from Board to Enbridge (6 October 2014), online: <http://www.neb-one.gc.ca>.

Board two weeks later.[198] It took the Board almost four months to review that information, ultimately verifying that the condition had been met.[199]

During the four months it took the Board to assess Condition 16, the chair of the Board met with Montreal Mayor Denis Coderre and dozens of other municipal leaders. Although it would appear unusual for the Board to meet with a public official about a project outside of the project proceedings, the meeting seemed to have appeased the mayor. Together with the Board's tough action on safety and transparency and an announcement that the NEB would open a satellite office in Montreal, the mayor responded:

> Last September, the Mayor advised the NEB's CEO of his dissatisfaction with Enbridge's responses on the measures it intended to deploy in crossing bodies of water and dealing with emergencies, two conditions the NEB set when approving the project. In a letter published in the media, Mr. Watson said the metropolitan region's municipalities were right about their concerns and told Enbridge to resolve the problem … With increasing numbers of oil transport projects, the local presence of NEB officials is excellent news. This presence guarantees greater attentiveness to and constructive interactions with the community. Montréal has always shown leadership in monitoring and supervising the pipeline project. We are very proud that the NEB recognizes this leadership.[200]

The 300,000 barrel per day line, meant to be in service by November 2014 continues to be delayed with no estimated in service date.[201] Following months of delay to assess condition 16, the Board finally granted a conditional Leave to Open on 18 June 2014, conditional on Enbridge conducting hydrostatic testing on segments of the line prior to operating.[202] The hydrostatic test would pump water through the line at high pressure to locate any possible pin holes or weaknesses. This was something that Mayor Coderre had requested but Enbridge reported that process would pose engineering risks. When the Board ultimately ordered the test, it was 15 months after the project was approved and eight months after it requested information on condition 16. It was after Board Chair Peter Watson met with over 50 municipal leaders in Quebec in February 2015[203] and after he published an editorial in the Montreal Gazette on 26 March 2015 saying the "if the Board is not convinced that the project will be safe and operated in a manner that

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[198] NEB, Enbridge Pipelines Inc Line 9B Reversal Project, OH-002-2103, Letter to Board from Enbridge (23 October 2014), online: <http://www.neb-one.gc.ca>.

[199] NEB, Enbridge Pipelines Inc Line 9B Reversal Project, OH-002-2103, Letter from Board to Enbridge (6 February 2015), online: <http://www.neb-one.gc.ca>.

[200] Ville de Montreal, News Release, "Meeting with the National Energy Board's CEO – Montreal Is Delighted to Host an NEB Office" (16 January 2015), online: Newswire <http://www.newswire.ca>.

[201] Roberto Rocha, "Energy Board approves two conditions for Pipeline Approval but sets more", *Montreal Gazette* (6 February 2015) online: <http://www.montrealgazette.com>.

[202] NEB, Enbridge Pipelines Inc Line 9B Reversal Project, OH-002-2103, Leave to Open (16 June 2015), online: <http://www.neb-one.gc.ca>.

[203] Peter Watson, "No room for error on Pipeline Safety", *Montreal Gazette* (26 March 2015), online: <http://www.montrealgazette.com>.

protects communities and the environment, Enbridge will not be allowed to operate that pipeline. Canadians expect and deserve nothing less."[204] Some would suggest that it is unusual to conduct a review of a Leave to Open application by way of Letter to the Editor, while others would say that it was a technical decision and that the level of scrutiny and the hydrostatic test itself are needed to ensure that pipeline defects that could lead to potential leaks are discovered. Regardless, the Line remains out of service 15 months after its approval by the NEB and Enbridge has suggested that the tests might not be concluded and the line not opened until late in 2015, a full year after the scheduled in service date.[205] On 30 July 2015, Suncor CEO Steve Williams stated that he was "disappointed by the NEB process" because it has taken "too long."[206] As the owner of a Montreal refinery that currently imports oil, Suncor intends to ship Alberta crude on the reversed Line 9B.

While the 15 month time limit to hear the Line 9 application was met by the NEB, the process has continued for a further 15 months after the review was completed, with no definitive end in sight.

8.0 Case Study 2: Kinder Morgan TransMountain Expansion

8.1 The Application and Process

The Kinder Morgan TransMountain Pipeline Expansion project ("TransMountain") filed a 15,000 page application with the NEB on 17 December 2013, seeking to twin an existing pipeline between Edmonton and Burnaby, BC.[207] Most of the pipeline would follow along an existing right of way, alongside a pipeline that was in operation since 1953.[208] Within two weeks of the filing, the NEB published an Application to Participate notification on New Year's Eve, giving interested parties about six weeks to submit an application to participate. Unlike the complicated 10 page application form for the Line 9B Reversal project, the TransMountain process involved a three page simple form to be filled out. Like the Line 9B process, the NEB was clear that only those directly affected or with relevant information would be allowed to participate.[209]

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[204] *Ibid*.

[205] Lauren Krugel, "Enbridge Executive says he hope Line 9 begins Shipping Oil this Year", *Times Columnist* (8 July 2015), online: <http://www/timescolumnist.com>.

[206] Geoffrey Morgan, "Enbridge Inc hits Headwind on Line 9 Project", *The Financial Post* (31 July 2015), online: <http://business.financialpost.com>.

[207] NEB, TransMountain Expansion Project, OH-001-2013 Application (17 December 2013), online: <http://docs.neb-one.gc.ca>.

[208] *Ibid*.

[209] NEB, TransMountain Expansion Project, OH-001-2013, Application to Participate Notification (31 December 2013), online: <http://docs.neb-one.gc.ca>.

A 19 page Hearing Order was issued on 2 April 2014 setting out key timelines and steps in the process. The Order emphasized that under the new 15 month timeline, a decision must be made by 2 July 2015.[210] The List of Issues stated: "the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of the oil sands, or the downstream use of the oil transported by the pipeline."[211] The list of approved intervenors and those allowed to write Letters of Comment was published at the same time as the Hearing Order. Of the 2,141 applications to participate,[212] 468 applicants were denied, including 26 academics from the University of British Columbia and other Universities who studied climate change.[213] 400 intervenors were accepted. The remaining applicants were allowed to write Letters of Comment.

The review process allowed for two rounds of information requests (IRs) to TransMountain from intervenors, which was an opportunity for intervenors to ask written questions. TransMountain was required to respond, in writing, to those question within a set timeline. Within this process, intervenors could ask subsequent questions once they received written answers to their initial questions, a process that some might suggest was a weak form of an opportunity to cross-examine TransMountain. This awkward and time consuming written process took approximately nine months. In addition to the written IR process, the Board set dates for two separate oral hearings, neither of which allowed intervenors an opportunity to directly cross examine TransMountain. The first oral hearing would hear oral Aboriginal traditional evidence. The second would hear oral final arguments from TransMountain and then from intervenors. The oral hearings are now set for the fall of 2015.

During the course of the review process, the NEB asked more than 1,000 questions in the IR process. Intervenors asked over 16,000 questions. The city of Burnaby asked more than 625 questions and the city of Vancouver more than 445. In answer to the questions, TransMountain provided more than 50,000 pages of information.[214]

Part way through the process, TransMountain determined that a re-route in Burnaby was preferred after hearing from stakeholders that digging up streets and twinning the line in urban areas was not desirable. A seven-month extension of the review process in order to obtain additional geotechnical and environmental studies was directed by the NEB when TransMountain advised of the re-route. The re-route through Burnaby

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[210] NEB, TransMountain Expansion Project, OH-001-2013, Hearing Order Ruling on Participation (2 April 2014), online: <http://docs.neb-one.gc.ca>.
[211] *Ibid*.
[212] *Supra* note 209.
[213] NEB, TransMountain Expansion Project, OH-001-2014, Notice of Motion by Lynn Quarmby et al (6 May 2014) at para 36, online: <http://docs.neb-one.gc.ca>.
[214] TransMountain, "TransMountain Files Final Round of Information Requests", online: <http://www.transmountain.com>.

Mountain led to intense public opposition as well as injunction applications, litigation and large public protests and occupations.[215]

8.2 The Public Reaction

In a similar approach to the "mob the mic" project spearheaded by the Dogwood Initiative for Northern Gateway,[216] environmental groups encouraged and channeled public participation in the review process. Although faced with the new "interested party" definition, organized opposition stressed that "directly affected" could include personal use, which was not well defined. Local newspapers encouraged the public to apply for status as an interested party on the basis of personal use, which could include recreational use, location of children's school, potential effects on local water supply, and whether individuals use the sea, which could be affected by a marine spill.[217]

Public protests against TransMountain have dominated the headlines since September 2014, when TransMountain cut down trees on Burnaby Mountain as part of the assessment work directed by the NEB. This led to a heated legal and constitutional battle between the city of Burnaby and the NEB. Protests reached an apex in November, when TransMountain obtained an injunction ordering the protestors out of certain areas where survey work needed to be done.[218] The underlying injunction application also sought damages for trespass, nuisance, assault, intimidation, intentional interference with contractual relations and conspiracy. The British Columbia (BC) Supreme Court granted the injunction and ordered protestors to remove themselves from the property, leading to civil disobedience and widespread refusal to abide by the court order and further anger directed at the NEB. More than 100 protestors, including Grand Chief Stewart Philip of the Union of BC Indian Chiefs, prominent university professors, senior citizens and David Suzuki's grandson were arrested in the days following the injunction.[219]

The independence of the Board and impartiality of its process have repeatedly been questioned since the day that Kinder Morgan filed its application with the NEB. However, nothing has been as sharp as the criticism launched by former CEO of BC Hydro, Marc Eliesen. An energy executive with 40 years of experience in the energy sector, including as a director of Suncor's board and former Deputy Minister, Eliesen was accepted as an intervenor in the review process. In his letter withdrawing as an

[215] See below at page 55-60.
[216] See Gateway "mob the mic", above at page 12.
[217] Editorial, "NEB Participation Guide for Kinder Morgan TransMountain Expansion Hearings", *Langley Today* (19 January 2014), online: <http://langleytoday.ca>.
[218] *TransMountain Pipeline ULC v Gold*, 2014 BCSC 2133 (CanLII).
[219] CBC, "Kinder Morgan Pipeline Protestors on Burnaby Mountain defy Injunction", *CBC* (17 November 2014) online: <http://www.cbc.ca>.

intervenor,[220] Eliesen called the review process "fraudulent" and a "public deception", a process that was rigged with a "pre-determined outcome." He suggested that the regulator was "captured" by industry and that its decisions "reflect a lack of respect for hearing participants, a deep erosion of the standards and practices of natural justice that previous boards have respected, and an undemocratic restriction of participation by citizens, communities, professionals and First Nations either by rejecting them outright or failing to provide adequate funding to facilitate meaningful participation."[221] In response to the withdrawal, Board chair Peter Watson penned a defensive editorial in the Vancouver Sun emphasizing the rigorous and thorough process that had over 10,000 IRs by 400 intervenors.[222] This hasn't stopped the torrent of criticism. More recently, well known economist Robyn Allan, withdrew from the hearings because issues such as climate change and the development of the oil sands were not part of the discussion and because "the Panel is not an impartial referee. The game is rigged; its outcome pre-determined by a captured regulator. The NEB's integrity has been compromised. Its actions put the health and safety of the Canadian economy, society and environment in harm's way."[223]

8.3 Reaction from Provincial and Other Levels of Government

As the review unfolded, several mayors, including the mayors of Vancouver, Burnaby, New Westminster, North Vancouver, Victoria, Squamish and Bowen Island declared their non-confidence in the NEB's review process.[224] In doing so, they called upon the Federal government to put the process on hold and for the Provincial government to establish a provincial process with public hearings. Citing the elimination of oral cross examinations from the hearing process and that "the proponent has failed to answer the majority of questions submitted by municipalities and other intervenors" the mayors suggested that the NEB process is no longer a credible process from a scientific standpoint.

The mayors' declaration came on the heels of a resolution passed on 31 March 2015 at the Federation of Canadian Municipalities and the Union of B.C. Municipalities,[225] which also called into question the NEB's hearing process. Leading up to the Mayor's declaration, thousands of written information requests were asked by municipal

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[220] NEB, TransMountain Expansion Project, OH-001-2013, Letter of Withdrawal (3 November 2014), online: <http://docs.neb-one.gc.ca>.

[221] *Ibid*.

[222] Peter Watson, "NEB Takes its Obligations Seriously", *Vancouver Sun* (6 November 2014), online: <http://www.vancouversun.com>.

[223] NEB, TransMountain Expansion Project, OH-001-2013, Letter of Withdrawal (19 March 2015), online: <http://docs.neb-one.gc.ca>.

[224] City of Vancouver, News Release, "Mayors Stand together against Kinder Morgan Pipeline Proposal" (31 March 2015), online: <http://vancouver.ca>.

[225] BC Union of Municipalities (UBCM), "2014 Report of Resolutions" (September 2014), online: <http://www/ubcm.ca>.

intervenors, many of which were related to emergency planning and spill response measures. TransMountain took the position that sections of its emergency response plans should not be publicly disclosed for commercial and security reasons. Some of the information withheld included information about remote emergency shutdowns, staffing at facilities, shut off valve locations and evacuation zone maps, information that the cities felt was necessary to evaluate whether spill response plans were sufficient.

Early in the process, the Province of British Columbia filed a Notice of Motion with the NEB requesting a more fulsome response from TransMountain to its questions.[226] In its ruling, the NEB noted that TransMountain had provided "somewhat limited justification" for holding back elements of its emergency plan, but ruled that "sufficient information has been filed." Other municipalities have since filed their own Notice of Motions with the NEB seeking further and better answers from TransMountain to their IRs. Several municipalities have also filed similar Notice of Motions, requesting the right to cross examine and asking the NEB to amend the Hearing Order to allow a process that included cross examination. This includes the city of Burnaby and Port Moody.

8.4 Litigation and NEB Rulings

The TransMountain project has been a hotbed of litigation, with opponents challenging the authority and legitimacy of the NEB and its processes at every possible step. In several of these cases, the NEB was asked to rule on constitutional issues and issues of law such as freedom of expression under the *Charter of Rights* and jurisdictional authority under sections 91 and 92 of the Constitution. These types of questions and issues are not exactly an area of expertise that would be expected from a national energy regulator whose Board members are typically appointed for their expertise and experience in energy related matters, not areas of constitutional and administrative law.

8.4.1 City of Burnaby Constitutional Challenge

Following initial consultations with stakeholders, TransMountain sought to alter the pipeline right of way to avoid urban disturbances from construction in Burnaby. The partial new route involved a tunnel through Burnaby Mountain. In order to assess the route, the NEB directed TransMountain to complete geotechnical, engineering and environmental assessments and file the results by 1 December 2014.[227] To complete the assessment work, access to the Burnaby Mountain Conservation area was required, trees needed to be cut and vegetation cleared.

[226] NEB, TransMountain Expansion Project, OH-001-2013, Notice of Motion from British Columbia (4 July 2014), online: <http://docs.neb-one.gc.ca>.

[227] NEB, TransMountain Expansion Project, OH-001-2013, Procedural Direction #4 (15 July 2014), online: <http://docs.neb-one.gc.ca>.

When TransMountain informed the city of Burnaby of the specific work that needed to be done, it was told that it would not be allowed to do that work because it breached city bylaws.[228] In particular, Burnaby Parks Regulation Bylaw 1979 prohibited any person from damaging, destroying or polluting any personal property, tree, shrub, plant, turf or flower in any park. This led to a question of law regarding whether the city could enforce its bylaws in a way that obstructed work required for a federally-regulated pipeline. To break the standoff, TransMountain applied to the NEB for confirmation that section 73(a) of the *National Energy Board Act*[229] allowed access to lands within the intended right of way regardless of the city's bylaws. On 19 August 2014, the NEB confirmed that section 73(a) did, in fact, give TransMountain the authority to enter the lands to make surveys and examinations notwithstanding the city's bylaws.[230] The next day, TransMountain informed the city of its intention to immediately start work on Burnaby Mountain. However, the city refused to stand down and maintained is position that any rights under section 73 of the *National Energy Board Act* were subject to compliance with the city's bylaws.

Under the NEB's authority, TransMountain commenced work regardless of the city's direction and was soon issued an Order to Cease. The city stationed city workers on site to ensure that work stopped, setting up a showdown between the NEB and TransMountain on one side and the city on the other. To break the deadlock, TransMountain filed a Notice of Motion with the NEB on 3 September 2014 requesting an order under sections 12, 13, and 73(a) of the *National Energy Board Act* directing that Burnaby comply with section 73(a) and not deny or obstruct access to the site.[231] This led to a Notice of Constitutional Question asking the Board to affirm that it had legal authority to declare bylaws inoperative in the context of a conflict with section 73(a) of the *National Energy Board Act*.[232]

In further defiance of the Board's authority, the city attempted to by-pass the Board and filed a motion in the BC Supreme Court seeking an injunction and a declaration that

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[228] By law 7331, City of Burnaby, bylaws 1979, *Burnaby Parks Regulations Bylaws (1979) and City of Burnaby, bylaws 4299, Burnaby Street and Traffic Bylaws* (1969).

[229] *National Energy Board Act*, s 73(a):

> 73. A company may, for the purposes of its undertaking, subject to this Act and any Special Act applicable to it
>
> (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site for the pipeline, and set out and ascertain such part s of the land as are necessary and proper for the pipeline.

[230] NEB, TransMountain Expansion Project, OH-001-2013, Ruling #28 (19 August 2014), online: <http://docs.neb-one.gc.ca>.

[231] NEB, TransMountain Expansion Project, OH-001-2013, Notice of Motion by TransMountain (3 September 2014), online: <http://docs.neb-one.gc.ca>.

[232] NEB, TransMountain Expansion Project, OH-001-2013, Notice of Motion by TransMountain (26 September 2014), online: <http://docs.neb-one.gc.ca>.

the NEB did not have constitutional authority to issue an order to the city that limited that city's enforcement of bylaws.[233] The Supreme Court denied the injunction on 17 September 2014 and said that that "the matter is properly before the NEB" and went on to say that if the city didn't like the conclusion of the NEB, it could then appeal to the court, but not until the NEB heard the matter before it.

On 23 October 2014, the NEB issued Ruling No. 40, stating that it had authority to determine a constitutional question relating to its own jurisdiction. The Board went on to rule that the bylaws were inoperative and inapplicable to the extent that they impaired TransMountain from exercising its powers under section 73(a) of the *National Energy Board Act*.[234] Applying the doctrine of Federal paramountcy, the bylaws were rendered inoperative in relation to TransMountain's necessary work. The Board cited the Supreme Court decision in *Cuddy Chicks Ltd v Ontario (Labour Relations Board),*[235] asserting that if a tribunal has jurisdiction over the subject matter, the parties, and the remedy, it may rule the bylaws invalid "for the purpose of the matter before it." The Board then issued an order directing the city from further interfering and obstructing TransMountain.[236]

The City of Burnaby appealed the Board's decision and order as well as the BC Supreme Court's denial of its injunction to the BC Court of Appeal. On 27 November 2014, the appeal from the BC Supreme Court's injunction ruling was dismissed by Justice Neilson.[237] On 12 December 2014, the Court of Appeal dismissed Burnaby's application for leave to appeal NEB Ruling 40 regarding constitutional authority, without reasons.[238] This left NEB Ruling 40 to stand, confirming that federally regulated pipelines companies do, indeed, have power to access lands notwithstanding a city bylaw that provides otherwise. The Court of Appeal decision reflects a reluctance to question the NEB's expertise and authority. The court's deference to the NEB was emphasized by dismissing the appeal without reasons, a strong signal that the court would not hamper the NEB in exercising its statutory authority. What the court decision didn't do, however, was resolve the broader dispute between the cities, the NEB and TransMountain. In fact it may have served to fuel further anger and a sense of disenfranchisement by the city and many of its residents.

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[233] *Burnaby (City) v TransMountain Pipeline ULC and National Energy Board*, 2014 BCSC 1820.

[234] NEB, TransMountain Expansion Project, OH-001-2013, Ruling #40 (23 October 2014), online: <http://docs.neb-one.gc.ca>.

[235] *Cuddy Chicks Ltd v Ontario (Labour Relations Board),* [1991] 2 SCR 5 at paras 13-17.

[236] NEB, TransMountain Expansion Project, OH-001-2013, Order MO-122-2014 23 October 2014), online: <http://docs.neb-one.gc.ca>.

[237] *City of Burnaby v TransMountain Pipeline ULC and the National Energy Board*, 2014 BCCA 465, Neilson J.

[238] *City of Burnaby v The National Energy Board and TransMountain Pipeline ULC*, 2014 FCA, 14-A-63, Noel CJ.

8.4.2 Forest Ethics Charter of Rights Challenge to Participation Rules

On 6 May 2014, shortly after the Board published the list of participants, a Charter of Rights challenge to the new standing provisions under section 55.2 of the *National Energy Board Act* was filed with the Board by Forest Ethics Advocacy Association and these parties denied participation rights.[239] The applicants argued that section 55.2 violated their freedom of expression because it limited participation before the Board to those directly affected. The Board dismissed the application in Ruling 32, suggesting that it was not "a public place where one would expect constitutional protection for free expression" and that:

> An untrammeled right of the public to "open public expression" at the Board would undoubtedly come at the expense of the Board's statutory objectives. It would also come at the expense of a value core to the section 2(b) guarantee: truth-finding. The Board cannot efficiently, effectively, or fairly hear the evidence it needs to assess the public interest in a project if it must hear from any and all persons wishing to express an opinion on it.[240]

The Board stated that the applicants had other venues to express their views, including newspapers editorials, blogs, articles, protests, participation in town hall meetings, panel discussion and various other ways of public expression.

The applicants applied for leave to appeal the NEB's Ruling 34 to the Federal Court of Appeal. Leave to appeal was denied on 23 January 2015, without reason.[241] Again, the dismissal without reason tends to show a degree of judicial deference to the board's jurisdiction.

8.4.3 City of Vancouver – Scope of Factors – Climate Change Challenge

The City of Vancouver filed a Notice of Motion with the NEB on 16 May 2014 requesting that the List of Issues be expanded to include upstream effects of the oil sands as well as the downstream use of the oil shipped through the line.[242] The motion focused on greenhouse gas emissions and argued that the Board was required to consider broader climate change issues.

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[239] NEB, TransMountain Expansion Project, OH-001-2013, Notice of Motion by Lynn Quarmby et al (6 May 2014), online: <http://docs.neb-one.gc.ca>.

[240] NEB, TransMountain Expansion Project, OH-001-2013, Ruling #34 (2 October 2014), online: <http://docs.neb-one.gc.ca>.

[241] Refused, *Lynn Quarmby et al v National Energy Board*, NEB, leave to appeal to BC CA refused, (Court Number 14-A-62)

[242] NEB, TransMountain Expansion Project, OH-001-2013, Notice of Motion, City of Vancouver (16 May 2014), online: <http://docs.neb-one.gc.ca>.

In response to the Notice of Motion, the Board issued Ruling No. 25 on 23 July 2014,[243] dismissing the motion. In doing so, it pointed out that upstream oil sands developments fall within provincial jurisdiction and that downstream effects are regulated by the jurisdiction where used:

> The Board has the authority to determine what is relevant to it in fulfilling its mandate under the NEB Act. In the circumstances of this hearing, the Board does not consider that upstream and downstream effects, including those of GHG emissions, are relevant. The Board is mindful that the environmental and socio-economic effects of petroleum exploration and production activities in Canada are assessed in other federal and provincial processes that involve those conducting those activities, and that the end use of oil is managed by the jurisdiction within which that use occurs.

This ruling was appealed to the Federal Court of Appeal on 20 August 2014 and leave to Appeal was denied on 16 October 2014, again without reasons.

Alongside the city of Vancouver's application, Danny Harvey, a University of Toronto professor and climate scientist, launched a Charter challenge against the NEB based on the Board's refusal to consider climate change. His Charter argument was that under section 7 rights to life and security of the person: "The Charter guarantees that the government will not unjustifiably deprive Canadians of their health and well being." The two cases were dealt with under Ruling No. 25. In dismissing Professor Harvey's Charter argument, the Board cited the Supreme Court of Canada's decision in *Operation Dismantle v the Queen*[244] concluding that "a section 7 claim cannot be founded on speculation as to effects that "may" happen." Rather, the infringement must be "proven to result" from the challenged act.

To date, the TransMountain NEB process itself has been sensational in contrast to the Northern Gateway hearings. The Gateway hearings were lengthy and dominated by public and aboriginal opposition to the project itself. By contrast, the TransMountain hearings, governed by the shortened timelines and restricted scope and participation rules under Bill C-38, have been dominated by opposition to the NEB itself, as much as to the project.

With the extended timelines, the hearing is now expected to start during the fall 2015 Federal election campaign. No doubt this timing will lead to additional public and political scrutiny, as political parties target voters in cities like Burnaby and in the province as a whole.

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[243] NEB, TransMountain Expansion Project, OH-001-2013, Ruling No 25 (23 July 2014), online: <http://docs.neb-one.gc.ca>.

[244] *Operation Dismantle v the Queen*, [1985] 1 SCR 441.

9.0 Case Study 3: TransCanada Energy East Pipeline

9.1 The Application and Process

TransCanada Pipelines filed its 30,000 page application for the Energy East Pipeline ("Energy East") with the NEB on 30 October 2014.[245] The $12 billion project involves the conversion of an existing gas pipeline to oil, together with new pipeline and associated facilities to move oil from Alberta to tidewater in New Brunswick.

The NEB published a List of Issues on 6 January 2015. In keeping with section 52(2) of the *National Energy Board Act* and recent practice, the Board stated that it will "not consider matters related to upstream activities associated with the development of the oil sands, or the downstream and end use of the oil transported by the project".[246] The Application to Participate process opened on 3 February 2015, setting a one month period for interested parties to fill out an online application form to ask to submit a Letter of Comment or be an intervenor. Criteria for participation was identical to that first published in the Line 9B Reversal project, corresponding to the new section 55.2 of the *National Energy Board Act*.[247] However, unlike the Line 9B Reversal Project, there was not a 10 page application form, but a very simple two page form, even shorter than the three page form required for TransMountain. In the end, 2,276 Applications to participate were filed by the March 3rd deadline. Notwithstanding the clear direction from the Board that applicants must be directly affected and the impact of climate change would not be considered, a majority of the individual applications were from individuals, many of whom prepared a form-letter response that authorized Greenpeace to be their representative.[248]

The NEB has stated that it will post the list of approved participants when it deems the application by Energy East to be complete and issues a Hearing Order, which remains outstanding while Energy East considers re-routing to avoid a marine terminal in beluga whale habitat.

9.2 The Public Reaction

When TransCanada first announced its intention to build the Energy East pipeline in August 2013, it was celebrated as a project in the national interest by politicians of all parties in all regions. At an announcement at the Irving Refinery in New Brunswick in

[245] NEB, Energy East Project, OF-E266-2014-01-0, Application and Project Overview (30 October 2014), online: <http://www.neb-one.gc.ca>.

[246] NEB, Energy East Project, OF-E266-2014-01-0, List of Issues (6 January 2015), online: <http://www.neb-one.gc.ca>.

[247] Enbridge Line 9B Reversal Project, *supra* note 179, referenced the criteria for participation.

[248] Information came from a review of NEB, Energy East Project, OF-E266-2014-01-0, Participant forms folder, online: NEB <http://www.neb-one.gc.ca>.

August 2013, Prime Minister Stephen Harper, although prefacing his comments by saying the government will remain independent of the project and it must be approved by the regulator, said that "it's a project that will assure all of Canada will benefit from our energy industry."[249] TransCanada's announcement also came with the support of the Premiers of New Brunswick, Alberta and Saskatchewan. Even the Federal NDP expressed lukewarm support when NDP energy critic Peter Julian said that the NDP can support it in principle because it would refine Canadian oil in Canada, decreasing dependence on crude imported to eastern refineries.[250] NDP support was tempered by comments that the Harper government needed to reverse rules that limited public participation in energy regulatory hearings.[251]

It did not take long, however, for public and environmental opposition to voice intense opposition to the project. Within months, several environmental organizations had already set up "Stop Energy East" campaigns and websites, including The Council of Canadians,[252] 350-org,[253] Environmental Defence, Greenpeace and separate coalitions including one claiming to protect the Nippising and Trout Lake watersheds.[254] Some of these organizations directed their online letter writing campaign to the NEB, asking their supporters to send form letters to newly appointed NEB chair Peter Watson.[255] By the time the Energy East pipeline was announced, organized opposition to pipeline expansion had already moved towards targeting the regulator rather than just the project itself.

9.3 Reaction from Provincial and Other Levels of Government

By November 2014, after months of environmental opposition and public disagreement between TransCanada and eastern Canadian gas utilities concerned with effects on gas consumers related to a segment of the line in Ontario that would be taken out of gas service and placed into crude oil service, the province of Quebec stepped in, saying it needed more control of the process. In a letter dated 18 November 2014, Quebec's Minister of Environment wrote to TransCanada setting out seven conditions that had to be satisfied before Quebec could "approve" the pipeline.[256] Three days later, Quebec Premier Philip Coulliard met with Ontario Premier Kathleen Wynne to sign a joint

[249] Michael Tutton, "Pipeline to New Brunswick will help Energy Security, Harper says", *The Globe and Mail* (8 August 2013), online: <http://www.globeandmail.com>.
[250] Les Whittington, "Stephen Harper endorses Energy East pipeline proposal", *Toronto Star* (2 August 2013), online: <http://www.thestar.com>.
[251] *Ibid*.
[252] The Council of Canadians, "Energy East: Our risk, their Reward", online: <http://www.canadians.org>.
[253] 350 Org, "Stop the Energy East Pipeline", online: <http://www.350.org>.
[254] Stop Energy East North Bay, online: <http://www.http://www.stopenergyeastpipeine.ca>.
[255] The Council of Canadians, "Action Alert – NEB we need a fair pipeline review", online: Council of Canadians <http://www.canadians.org>.
[256] CBC, "TransCanada must fulfill 7 conditions before receiving approval in Quebec", *CBC* (20 November 2014), online: <http://www.cbc.ca>.

agreement on conditions of approval for the Energy East pipeline. The two provinces laid out seven conditions of approval:

- Comply with the highest available technical standards for public safety and environmental protection;
- Have world-leading contingency planning and emergency response programs;
- Consult local and Aboriginal communities;
- Take into account the contribution to greenhouse gas emissions;
- Provide demonstrable economic benefits and opportunities to Ontario and Québec;
- Provide financial assurance demonstrating capability to respond to leaks and spills; and
- Ensure that interests of natural gas consumers are taken into account.[257]

Notwithstanding that there were already 30,000 pages of evidence filed in the NEB proceedings and, constitutionally, the pipeline fell within exclusive federal jurisdiction, the two eastern provinces were determined to take some measure of control of the regulatory approval process. Within that provincial process, the provinces insisted there must be a focus on meeting the needs of eastern gas consumers and a consideration of climate change and greenhouse gas emissions.

Saskatchewan Premier Brad Wall was quick to condemn the eastern Premiers' conditions, taking the unusual step of writing his own editorial in the National Post on 26 November 2014 supporting Energy East and the NEB process:

> However, despite the obvious benefits and the NEB process, Ontario and Quebec have announced a joint position that at best moves the goal posts for approval and at worst lays out new barriers. A motion from the Quebec National Assembly asks for the assessment of "upstream" greenhouse gas (GHG) emissions to be considered during the review of the project.
>
> This request is unprecedented. In its most recent ruling on the Northern Gateway proposal, the National Energy Board ruled — correctly, from Saskatchewan's point of view — that environmental impacts should focus on the pipeline infrastructure itself.[258]

Former Alberta Premier Jim Prentice immediately said that he would meet with the eastern premiers to better understand their positions and concerns. After private discussions with Prentice, Wynne and Coulliard, the Eastern Premiers clarified that an examination of climate change contributions from Energy East would be limited to greenhouse gas emissions in Ontario and Quebec from the pipeline project itself, rather

[257] Office of the Premier of Ontario, News Release, "Agreements reached at Quebec-Ontario Joint meeting of Cabinet Ministers" (21 November 2014), online: Government of Ontario <http://www.new.ontario.ca>.
[258] Brad Wall, "Get behind Energy east", *The National Post* (26 November 2014), online: <http://www.news.nationalpost.com>.

than the oil sands, which fell within Alberta's jurisdiction.[259] Instead of focusing on jurisdictional issues, Prentice emphasized that he was sure that the NEB would deal with all of the conditions and concerns that Quebec and Ontario had. While it appeared to be a small victory for Prentice and for the NEB, environmentalists were quick to condemn Wynne and Coulliard for backing down.

Around the same time, the city of Winnipeg approved a budget of $1 million to study the impact of Energy East as the city is concerned that a spill could impact the Shoal Lake watershed from where the city obtains its water supply.[260] The city applied for intervenor status in the hearings and the conclusions of the study will determine whether the city opposes the project outright.

9.4 Litigation and NEB Rulings

On 23 September 2014, the Quebec Superior Court granted a temporary injunction that stopped TransCanada from conducting exploratory work in the St. Lawrence River until after a critical period for beluga whale reproduction had passed.[261] TransCanada intended to study the area near Cacouna to build a marine terminal and a permit authorizing the work from the Quebec Department of Environment had already been granted. That permit was challenged and overruled by the Superior court, which found that there was a failure to consider the impact on beluga whales that calve in the area and that that there was no evidence that the Minister took account of the precautionary principle.[262]

The injunction was sought by environmental groups including the David Suzuki Foundation and the Canadian Parks and Wilderness Society and was effective only for three weeks, until calving season ended. TransCanada had intended to continue exploratory work but within short order, COSEWIC recommended that the Beluga whales be upgraded from a threatened species designation to an endangered species[263] under the Federal *Species at Risk Act*.[264] Given the potential for enormous public backlash and the risk associated with disturbing critical habitat of an endangered species

[259] Adrianne Morrow, "Wynn Drops main climate change requirement in considering Energy East", *The Globe and Mail* (3 December 2014), online: <http://www.theglobeandmail.com>.
[260] Kristin Annable, "City to Study Energy East Pipeline's path near Shoal Lake, Brady", *The Winnipeg Sun* (25 November 2014), online: <http://www.winnipegsun.com>.
[261] *Centre Quebecois Du Droit De L'Environment Fondation David Suzuki Nature Quebec Societe Pour La Nature Et Les Parcs Du Canada France Oinne Pierre Belond v Oleoduc Energie Est L Tee TransCanada Pipeliness Ltee Procureur General Du Quebec*, Quebec Superior Court, 500-17-082462-14 7, Judgement, 23 septembre 2014.
[262] *Ibid*.
[263] COSEWIC, News Release, "Southern Beluga now Endangered" (4 December 2014), online: <http://www.cosewic.gc.ca>.
[264] *Species at Risk Act*, SC 2002, c 29.

once that habitat is defined,[265] TransCanada announced it would stand down on all work in Cacouna until further assessment.

The NEB process has months left to unfold and a Hearing order setting out the process and identifying participation status has yet to be granted. With huge public interest, a federal election looming, over 2,000 applications to participate in the process as either an intervenor or to write a Letter of Comment, and the NEB chair actively seeking input from municipal leaders, the process can be expected to be controversial.

10.0 Case Study 4: Enbridge Northern Gateway Pipeline Project

10.1 The Application and Process

The review process for the Northern Gateway Pipeline ("Northern Gateway") commenced prior to the Bill C-38 amendments in 2012. Following the process in place prior to Bill C-38, a Joint Review Panel (JRP or "Panel") was established on 4 December 2009 to assess the project under both the *National Energy Board Act* and the *Canadian Environmental Assessment Act*. The project application was filed with the JRP on 27 May 2010 and the Panel issued a Hearing Order setting out the steps in the review process as well as participation options on 5 May 2011,[266] almost a full year after the application was filed.

While the changes under Bill C-38 have generally been viewed as measures meant to address environmental activists opposed to oil sands development that planned to delay the review processes for the Northern Gateway, the accelerated timelines and rules for public participation actually did not apply to the Northern Gateway hearings because the JRP process was already underway. Transition rules under the new legislation ensured that the process and the decision making procedures continued under the new legislation, including the section 52 final decision of Cabinet. However, the timelines and rules for public participation were already established by the time the 2012 amendments came into force and were not altered.

In stark contrast to the process for TransMountain, there were three options for the public and interested parties to present their views to the JRP: as an intervenor, through an oral presentation or by providing a Letter of Comment. The Panel began hearing oral evidence from intervenors on 10 January 2012 in Kitimat, BC and continued for six

[265] *Ibid*, s 58.

[266] NEB, Enbridge Northern Gateway Project Joint Review Panel, OH 4-2011, Hearing Order (5 May 2011), online: <http://www.neb-one.gc.ca/>.

months in 16 different communities.[267] Through this process, the Panel heard from 389 witnesses on behalf of 60 intervenors. Oral statements were also allowed from those who wanted to simply make a comment. This process commenced in March 2012 and concluded nine months later.[268] In total, 1,179 people expressed their views through this process. Finally, Letters of Comment were allowed in the process, without pre-screening. Over 9,500 Letters of Comment were received in the process.

Intervenors were given the opportunity to cross examine Northern Gateway witnesses, with hearings in three different communities. This process went on for eight months, from September 2012 to May 2013. Finally, the Panel heard Final Arguments from the Applicant and intervenors in both a written and an oral process that started on 17 June 2013.

As the process unfolded, there were 180 sitting days for oral hearings in 21 communities, 175,000 pages of evidence was filed, 9,500 letters of comment received, 1,179 oral presentations made, 268 participants allowed to cross examine and 389 witnesses put forward by intervenors.[269] The process was extensive.

The JRP released its report and recommendation for approval subject to 209 conditions on 19 December 2013. The findings and recommendations were provided to the Governor in Council and the final decision whether to approve or reject the project was left with Cabinet. In describing its role, the Panel stated that "Our role was to conduct an independent, science-based, open, and respectful hearing process."[270] In its concluding remarks, the panel stated "our task was to design and implement a rigorous process that would result in recommendations to the Governor in Council based on a thorough and independent analysis of all aspects of the project."[271] The decision was comprehensive, set out in a 417 page decision, with an 81 page separate summary document.

While opponents of the project criticized the conclusions, there were very few complaints about the process itself. There was no litigation challenging participation rules or the process of hearing evidence. The process was so thorough that the Federal Cabinet accepted all of the JRP's recommendations in full on 17 June 2014, with very little comment other than to say that that "The Panel's rigorous science-based review included

[267] NEB, Enbridge Northern Gateway Project Joint Review Panel, OH 4-2011, Joint Review Panel, Backgrounder (19 December 2013), online: <http://www.neb-one.gc.ca/>.
[268] *Ibid*.
[269] NEB, Enbridge Northern Gateway Project Joint Review Panel, OH 4-2011, Joint Review Panel, Northern Gateway by the Number (19 December 2013), online: <http://www.neb-one.gc.ca/>.
[270] NEB, Enbridge Northern Gateway Project Joint Review Panel, OH 4-2011, Joint Review Panel, Connections: Report of the Joint Review Panel of the Enbridge Northern Gateway Project, Volume One at 8 (19 December 2013), online: <http://www.neb-one.gc.ca/>.
[271] *Ibid* at 76.

feedback from over 1,450 participants in 21 different communities, reviewing over 175,000 pages of evidence and receiving 9,000 letters of comment."[272]

On the other hand, while the process was exhaustive, it took more than four years, from the filing date in May 2010, for a decision in June 2014.

10.2 The Public Reaction

Unlike applications that were heard after Bill C-38 came into force, the public discontent and criticisms stemming from the Northern Gateway project were not typically directed at the JRP or the NEB. The criticisms were not about the process, but about the project itself or about the scientific basis of the panel's conclusions. As a result, the Federal government did not find itself defending the process and the JRP did not find itself having to justify its independence or impartiality. In fact, the government's speaking points following its approval of the project focussed mainly on the vigorous scientific review of an independent process. In a way, the thorough process gave the Federal government political cover from having to justify their decision to approve the JRP's recommendations. Natural Resources Minister Greg Rickford, in the days and weeks following approval, meticulously followed a script while he deferred to the JRP and answered questions in the House of Commons in a consistent manner: "Mr. Speaker, our decision is based upon the conclusions of an independent, science and fact-based review panel.[273] Even the Prime Minster weighed in on the process:

> Let me just speak to the fact that the inquiry panel held 180 days of hearings, It heard from 1,500 participants, received more than 9,000 written submissions and reviewed almost 200,000 pages of evidence.[274]

While the review process was not criticized, the public opposition to the project itself was intense. Much of that opposition was aimed at the prospect of hundreds of oil tankers navigating the BC coastline each year to export crude oil to markets in the Asia Pacific. In addition, the opposition from First Nations dominated the project review. However, this opposition appeared to be directed at the project itself, the Federal Conservatives and an alleged failure by the Crown to consult and accommodate Aboriginal interests.

10.3 Reaction from Provincial and Other Levels of Government

Coastal First Nations opposed to the project, and in particular to oil tankers in the waters they claim Aboriginal title to, were remarkably effective in working with opposition

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[272] Government of Canada, Natural Resources Canada, New Release, "Government of Canada Accepts Recommendation to Impose 209 Conditions on Northern Gateway Proposal" (17 June 2014), online: <http://www.news.gc.ca>.

[273] Canada, House of Commons, *Debates*, 41st Parl, 2nd Sess, Vol 147 (18 June 2014), Hon Greg Rickford.

[274] *Ibid*, Right Hon Stephen Harper.

Members of Parliament to try to impose a tanker ban.[275] On 7 December 2010, Nathan Cullen, the NDP Member of Parliament for Skeena Bulkley Valley, tabled a motion in the House of Commons to ban tanker traffic in BC's northern coastal waters. The motion narrowly passed a vote in Parliament, which at that time was a minority Parliament. The Conservative minority government of Stephen Harper unanimously opposed the motion. Though non-binding on the government and of no legal effect, the motion was symbolic to coastal First Nations opposed to the project. One week after the non-binding motion passed, Joyce Murray, the Liberal Member of Parliament for Vancouver Quadra, introduced Private Members Bill C-606, *An Act to amend the Canada Shipping Act, 2001 (prohibition against the transportation of oil by oil tankers on Canada's Pacific North Coast)*.[276]

In response to the NDP motion and Bill C-606, Art Sterrit, for the Coastal First Nations stated:

> Our nations have always protected these waters, and it's time for Ottawa to join us. Our laws do not permit crude oil tankers into our waters or oil pipelines through our lands – it's that simple. An oil spill would destroy jobs, and destroy our Nations' livelihoods and cultures. A legislated tanker ban from Parliament is the best way to support us in keeping our coast safe.[277]

Bill C-606 came close to being voted on at second reading, where it might have passed in the minority Parliament at the time. It was placed on the Order of Precedence on 14 February 2011 and was scheduled to come to a vote on second reading on 28 March 2011. However, the Conservative minority government at the time was defeated in a confidence motion on the budget and the writ dropped on March 25th, killing the Bill only days before it might have passed second reading.

More recently, Nathan Cullen submitted his own Private Members' Bill C-628[278] to amend the *Canada Shipping Act* to ban oil tankers in Hecate Strait, Dixon Entrance and generally the northwest coast. It was defeated by the majority Conservative government at second reading on 2 April 2015 by a vote of 141 to 120.

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[275] Previous work on crude oil tanker bans on the west coast of British Columbia was prepared by the author for course work, Sonya Savage, *Oil Tanker Spill: The Development of the Canadian Legal Regime for Prevention, Response and Liability*, (Law 645, Pollution Control and Waste Management Law, University of Calgary Faculty of Law, 31 March 2014) [unpublished].

[276] Canada, Bill C-606, *An Act to amend the Canada Shipping Act, 2001 (prohibition against the transportation of oil by oil tankers on Canada's Pacific North Coast)*, 40th Parl, 2010 (first Reading 14 December 2010).

[277] First Nations Fisheries Council, Press Release, "First Nations Leaders Applaud Politicians for Supporting Tanker Ban" (14 December 2010), online: First Nations Fisheries Council website: <http://fnfisheriescouncil.ca>.

[278] Canada, Bill C-628, *An Act to amend the Canada Shipping Act, 2001 and the National Energy Board Act (oil transportation and pipeline certificate)*, 2nd Sess, 41st Parl, 2014, (defeated at Second reading 2 April 2015).

As political pressure from Environmental organizations, Aboriginal groups and communities continued to mount, on 23 July 2012, BC Premier Christy Clark issued a statement requiring five conditions to be met before the province would support any heavy oil pipeline.[279] The fifth condition was that BC receives a fair share of fiscal and economic benefits, presumably from Alberta. The other four conditions were successful completion of the environmental review, world-leading marine spill response, world-leading pipeline spill response and meeting the legal requirements for aboriginal consultation.

Over the course of the review process, the Federal government took unprecedented steps to satisfy the first four conditions outlined by the Province of British Columbia and to build public acceptance for Northern Gateway. Under the banner of "Responsible Resource Development", the Conservatives:

- Commenced an overhaul of the Tanker Safety and liability regime to demonstrate that Canada had a world-leading prevention, response and liability regime in place. An expert panel on tanker safety was appointed in March 2013[280] to explore the rules relating to Canada's ship sourced oil spill preparedness and emergency response on the west coast. The panel tabled its report on 15 November 2013 with recommendations for improvements and to strengthen the Polluter Pays principle.[281]
- Announced eight new specific measures totaling $120 million meant to enhance safety along the Douglas Channel.[282]
- Appointed Aboriginal Special Representative Doug Eyford to engage with Aboriginal communities on behalf of the government to determine how Aboriginal communities can benefit from energy resource development to the west coast.[283] His report was completed only weeks ahead of the JRP decision on Gateway.[284]

[279] BC, News Release, "BC outlines requirements for heavy oil pipeline consideration" (23 July 2012), online: <http://www.bcliberals.com>.

[280] Transport Canada, News Release, "Harper Government strengthens world-class tanker safety system" (13 March 2013), online: newswire: <http://www.newswire.ca>.

[281] Government of Canada, Tanker Safety Expert Panel, News Release, "A Review of Canada's Ship-source Oil Spill Preparedness and Response Regime – Setting the Course for the Future" (15 November 2013), online: newswire: <http://www.newswire.ca>.

[282] Natural Resources Canada, News Release, "Harper government announces first steps towards World-Class Tanker Safety System" (18 March 2013), online: <http: //www.gc.ca.>

[283] Natural Resources Canada, News Release, "Minister Oliver Announces Douglas Eyford as Special Federal Representative" (19 March 2013), online: <http://www.nrcan.gc.ca>.

[284] Douglas Eyford, "Forging Partnerships Building Relationships: Aboriginal Canadians and Energy Development" (29 November 2013), online: Natural Resources Canada <http://www.nrcan.gc.ca>.

- Announced a review of the Federal Pipeline Safety Regime in June 2013,[285] with further details in May 2014[286] just ahead of the GIC decision on Northern Gateway. This led to Bill C-46, the *Pipeline Safety Act*, which was passed in June 2015.[287]
- Spent $12 million on an advertisement campaign for Responsible Resource Development, focused heavily on BC.[288]
- Dispatched key Federal Ministers to BC to take steps to build social license, making key safety and liability announcements, funding announcements, skills and trade announcements.[289]

There was no doubt that the Federal government wanted to see Northern Gateway built. Although very similar to Pierre Trudeau's outright support for the original Line 9 in 1973,[290] this is now 40 years later, at a time when an organized and well-funded environmental opposition challenges political support for anything that facilitates the expansion of the oil sands. While early accusations that the Federal government had already pre-judged the application and then Minister of Natural Resources Joe Oliver's famous foreign radicals open letter[291] torqued up the opposition, in the end, public criticisms were not directed at the review process. Instead, that criticism was directed at the Federal government and the project itself.

10.4 Litigation and JRP Rulings

Just as public opposition has not been directed at the review process itself, the litigation arising from the Northern Gateway hearings has likewise not been directed at the process. Instead, the litigation has been directed at an alleged failure to consult and accommodate First Nations, the GIC approval itself on the grounds that it failed to provide reasons and on technicalities of the JRP decision.[292]

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[285] Natural Resources Canada, News Release, "Harper Government Announces Latest Steps to Enhance Canada's Pipeline System (26 June 2013), online: <http://www.nrcan.gc.ca>.

[286] Natural Resources Canada, News Release "Minister Rickford Announces Latest Actions to Enhance Canada's world class Pipeline Safety System" (14 May 2014), online: <http://www.nrcan, gc.ca>.

[287] Canada, Bill C-46, *Pipeline Safety Act, An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act*, 2nd Sess, 41st Parl (granted Royal Assent on 18 June 2015 and will be proclaimed in force in one year from Royal Assent).

[288] Canada, House of Commons, Standing Committee on Natural Resources, 41st Parl, 2nd Sess, Vol 007 (27 November 2013).

[289] Chris Hall, "Harper Cabinet readies major BC Pipelines push: BC First Nations leaders to meet with key federal officials", *CBC* (14 September 2014), online: <http://www.cbc.ca>.

[290] *Supra* note 81.

[291] *Supra* note 59.

[292] For a good summary, see Nigel Banks, "Enbridge's Northern Gateway Project: cabinet approval but complex court proceedings" (September 2014) 2 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca>.

Nine applications challenging Cabinet's GIC approval were filed under section 55 of the *National Energy Board Act* within the application deadline.[293] Most of these applications challenge the validity of the Order in Council on grounds that Cabinet did not provide reasons in support of their approval, which is required by s.54(2) of the *National Energy Board Act*. Some of the applications were directed to the JRPs conclusion that effects on the woodland caribou and grizzly bears were justified in the circumstances, but with reasons that the applicants did not feel to be sufficient. Others claim that the Crown did not fulfill its duty to consult and accommodate First Nations. Notably, unlike the post Bill C-38 challenges seen in TransMountain and Line 9, these applications are not directed at the review process.

Although approved more than a year ago, the future of the Northern Gateway Pipeline continues to be in question as Aboriginal opposition to the project remains unresolved. More recently, Prime Minister Justin Trudeau's election platform indicated that a Liberal government would formalize a tanker moratorium off the northwest coast of BC.[294] He joined the Green Party and the NDP in outright opposition to the project. Although the JRP review process was considered to be thorough and complete, it has not served to build the necessary Aboriginal and political support to allow the project to proceed.

11.0 Conclusions

These four recent cases involving applications for pipeline approvals before the NEB in the last five years have been dominated by public opposition to oil sands development,

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[293] Litigation filed includes: *Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*, 14-A-41; *Gitxaala Nation v Attorney General of Canada, Northern Gateway Pipelines Inc and Northern Gateway Pipelines Limited Partnership*, 14-A-42; *Kitasoo Xai'Xais Band Council on behalf of all members of the Kitasoo Xai'Xais Nation and Heiltsuk Tribal Council on behalf of all members of the Heiltsuk Nation v Her Majesty the Queen and Northern Gateway Pipelines Limited Partnership*, 14-A-43; *Federation of British Columbia Naturalists carrying on business as BC Nature v Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*, 14-A-44; *Unifor v Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*, 14-A-4; *Haisla Nation v Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc*, 14-A-46; *Gitga'at First Nation v Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*, 14-A-47; *The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation v Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc*, 14-A-48; *Martin Louie, on his own behalf and on behalf of all Nadleh Whut'en, and Fred Sam, on his own behalf, on behalf of all Nak'Azdli Whut'en, and on behalf of the Nak'Azdli Band v Attorney General of Canada and Northern Gateway Pipelines Inc on behalf of Northern Gateway Pipelines Limited Partnership, Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v Attorney General of Canada, National Energy Board and Northern Gateway Pipelines Inc*.

[294] Liberal Party, "A New Plan for Canada's Environment and Economy" (June 2015), online: <http://www.liberal.ca>.

increased demands for opinions to be heard and growing interest by municipalities and provinces to be part of the NEB review or to run their own process. More protests, litigation and judicial review continue. It has more recently become dominated by concerns about the legitimacy of the NEB itself.

The Line 9B application, the first to proceed following Bill C-38 changes, was dominated by concerns that the new process under Bill C-38 was too restrictive and excluded public participants. It led to public protests, municipal opposition, criticisms of a "gutted process", Charter of Rights litigation and a separate Quebec Parliamentary commission. While the 15 month timeline to review the project was met, the NEB has now spent over 15 additional months reviewing conditions, meeting with municipal leaders and imposing additional requirements such as hydrostatic testing.

The TransMountain application has been dominated by bitter disputes between municipalities and the company that have now evolved to disputes between those municipalities and the Board itself, criticism of the Board as a "captured regulator" and litigation challenging Board rulings on Charter of rights and constitutional and jurisdictional issues. It has culminated in municipalities declaring their non-confidence in the process and in the NEB itself.

The Energy East application has been dominated by jurisdictional disputes between the Premiers of Quebec and Ontario and the Premiers of Alberta and Saskatchewan. Eastern provinces have attempted to bring the project into broader climate change discussions despite the NEB's refusal to hear these issues. Provinces have set up parallel review processes. Municipalities are concerned with the safety and reliability of the aging pipeline infrastructure to be converted from a gas to oil service. The NEB is now consulting outside of the process with municipalities and the public about some of the issues, such as climate change, that it has been specifically excluded from the process itself. The review process has only barely begun.

In contrast, the Northern Gateway application, that commenced under the pre Bill C-38 rules and wasn't governed by the tightened timelines and restrictive rules of participation, wasn't dominated by concerns and criticisms about the process itself. The process was praised by the Federal cabinet when it approved the project. While opposition to the project was intense and multiple applications for judicial review have been filed, that opposition has been directed at concerns with the project itself, Aboriginal consultation, oil tankers and environmental concerns. Opposition was generally not focused on the process.

Throughout the three years since Bill C-38 was implemented, a trend has developed in which opponents of pipeline projects move from challenging political leaders and the project itself to targeting the regulator. Perhaps some of that is warranted, particularly in light of some nonsensical rulings from the Board such as requiring a 10 page application form and a resume for participants who simply wanted to write a Letter of Comment on

the Line 9B application. A lot of the criticism of the Board, however, appears to be directed at the perceived gutting of the process at the hands of Bill C-38. Although the changes may not have materially affected the actual legal role and function of the Board, the general view of the public is that it has and that the NEB is a captured regulator that has pre-judged the approval of pipeline projects before it. To counter those concerns, the Board has now taken unprecedented steps to demonstrate that "we are here to serve the Public" and that "we want to make certain that Canadians know they have a regulator they can rely on."[295] As a Board under attack, it has taken measures to improve its image, levied huge administrative monetary penalties on pipeline companies, delayed the in service date of Line 9B opening to appease Quebec municipalities and pursued an "Eye of the Storm" public speaking tour.

The extent to which public opposition to the NEB and its process has grown and evolved because of the Bill C-38 amendments is difficult to gauge. That opposition may have materialized as controversial pipeline project applications wound through the process, with or without the 2012 streamlining amendments. The environmental opposition had well laid out plans to stack hearing processes to delay projects by dragging out the hearings with thousands of participants talking about a range of objections, relevant or not, to the project itself. But it is not certain whether that opposition would have attacked the process or the regulator if that process was actually being used to advance their agenda. While this paper has examined the Bill C-38 amendments and concluded that those amendments, in and of themselves, have not significantly impacted how the Board operates and makes its decisions, the fact remains that opponents to pipeline projects believe that the NEB process has been gutted. They are not afraid to organize protests, occupy facilities, mobilize municipal leaders and litigate where possible. Recent pipeline reviews are now dominated as much by criticisms of the process as they are of the projects themselves. Rightly or wrongly, this appears to have started when the Line 9B hearings commenced in late 2012, culminating in the most recent vote of non-confidence in the NEB on 31 March 2015 by several BC municipalities. The TransMountain hearings are in disarray, as political opposition to both the project and the process mounts and the Energy East hearings have only just begun.

Underlying the Board's campaign to build public trust appears to be a desire to demonstrate that the Board remains independent, is not a "captured" regulator, and is world class, transparent and connected to Canadians. As noted previously, Peter Watson has been on a cross country engagement tour, has opened new NEB offices in Quebec and BC, where criticisms of the NEB have been the strongest, has appeared on political talk shows, written letters to the editor, and has made some recent unprecedented decisions.

[295] *Ibid.*

A regulatory board such as the NEB derives its legitimacy from its independence and its ability to make impartial, science-based decisions. To maintain this impartiality a Board cannot be seen to take a public position on any particular decision before it. It needs to stick to science and its technical expertise. But the NEB makes its decisions, now more so than ever, within an environment where public opinion is demanding to be heard on a range of issues from concerns about the environment, including climate change to concerns about pipeline integrity and safety. Increasing demands to be heard, in a process that is not designed to hear concerns unless they are directly related to a pipeline project itself, has resulted in a public that is becoming more and more disillusioned with how the NEB is making decisions. Former Board chair Gaeton Caron describes this dilemma as follows: "clearly a regulatory body like the NEB must keep a safe distance from manifestations of support or opposition with respect to matters before it when they are expressed outside the hearing process. At the same time, public opinion is somewhat related to how we define the public interest."[296]

In an effort to calm these growing public concerns, current Board Chair Peter Watson has been on a public relations tour to talk to people and listen to their views. He is doing this outside the formal review process of any particular energy project on the basis that "people need to have confidence in the NEB and believe in the Board's ability to enforce rules and regulations that are in place to protect Canadians and the environment."[297] He is enhancing the Board's profile in safety and reliability and regulating the operations of pipeline companies. He appears to believe that to remain relevant the Board needs to commit to spend more time consulting with community leaders and the public, to listen to their views and to ensure them that pipelines are safe and the regulator is trustworthy.

There are two ways that the Board's new activist approach could be judged over time. The new developing role could eventually be viewed favourably, suggesting that measures to build trust and appease negative public opinion are needed to mend the Board's tarnished image in order to give legitimacy to the projects it approves. If the public does not have confidence in a regulator, it will not have confidence in any decisions that it makes. Based on this view, a regulator who is in tune with the public mood and is seen to be listening and in sync with current public concerns will render decisions that are better accepted. Given that public participation in the process is restricted to those directly affected, if the Board wishes to consult with the public at large, it needs to do so outside of specific review projects. To some, this is not a bad thing. As a rule, people generally want to be heard and want to have an opportunity to share their ideas on issues that impact them.[298] This ultimately legitimizes the process. It

[296] Caron, 2012 presentation, *supra* note 156.

[297] Watson, *supra* note 1.

[298] Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in resource Development" in Donald N Zillman, Alastair R Lucas & George Pring, eds, *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University, 2002) 77 at 102.

generally then becomes "easier and more natural for citizens to accept a decision, and even to tolerate certain levels of nuisance or changes, if they have taken part in making that decision."[299] It also has the potential to increase public confidence in the regulator and even in the government.[300] It allows the public to believe that they are shaping important issues of public policy. Whether or not the regulator is in a position to decide those matters of broad public policy, the fact that issues can be raised may lead to a better outcome. People want to be heard.

On the other hand, the Board's embrace of a more activist role negatively could be judged negatively as time unfolds. The Board is moving beyond its historical mandate and eventually questions might be raised as to why a truly independent and quasi-judicial regulator needed to be concerned about public perception and confidence. The impartiality of quasi-judicial process is based on its ability to render impartial science-based decisions, free from influence and not bound by public opinion. The NEB, as a respected national regulatory tribunal has historically remained divorced from the broader public policy agenda, leaving that agenda to elected politicians who can be held accountable. The Board has traditionally stuck to its area of expertise. In hindsight, if its role gradually changes and the NEB becomes a forum for expression of public opinion both inside and outside of its review processes rather than a quasi-judicial forum to determine technical merit, its role as an impartial regulator making decisions based on solid evidence and science could be questioned. There is a potential that the NEB could venture too far into the arena of building public confidence by engaging the public, implementing policies that the public demands and making decisions based on the public mood rather than their technical expertise. When decisions are made based on the principle of "who shouts the loudest is heard the last", bad decisions can be made. In its 56 year history, the Board has not ventured into that area. Nor was it ever intended to.

In the short term, the NEB's evolving role that includes listening, hearing concerns and broadly consulting may help address the immediate problem of public lack of confidence. It may soften the sometimes militant dialogue underway in both the Energy East and TransMountain applications. However, in the long run, the NEB could become prone to losing some of its objectivity and technical based decision making emphasis as it spends more and more time outside of the four walls of its review processes. While the Board has been rigorous to not to appear to be "captured" by the industry it regulates, it is possible that it may lean too far in the other direction in its attempt to get a handle on public opinion.

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[299] Rebecca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*", Occasional Paper #34, (Calgary: Canadian Institute of Resources Law, 2010) at 11.

[300] Mark S Reed, "Stakeholder Participation for Environmental Management: A Literature Review" (2008) 141 Biological Conservation 2417 at 22420.

In its 56-year history, the Board has quietly fulfilled its mandate as a quasi-judicial regulator "operating beyond any suggestion of control in any way."[301] It was initially set up in 1959 so that energy infrastructure decisions that impact Canada as a whole could be sheltered from political interference and public opinion. Its decisions were to be based on objective criteria and it was to be sheltered from the political pressure to react to whoever shouts the loudest in order to appease voters. While the current criticisms of the Board are directed at a perception that it operates under the control of and takes its cue from the Federal government or the industry it regulates, it is not unforeseeable that the Board could eventually be criticized for deferring to public opinion rather than making its decisions on science and fact based reasoning.

More recently, the former Federal Conservative government took political shelter from controversial energy infrastructure decisions, regularly saying that while market access for Canadian crude is an imperative and essential for jobs and economic prosperity, it will not endorse any specific project until it has been reviewed by the regulator. Former Natural Resources Minister Greg Rickford was consistent in the following message:

> While our government sees the imperative to act, and act quickly, we are committed to ensuring that our resources are developed in a responsible manner. Our bottom line is simple: in Canada, no project proceeds unless and until a thorough and independent review demonstrates it to be safe for the public and the environment.[302]

This view is far removed from Joe Oliver's 2012 Open letter accusing foreign radicals of hi-jacking the Canadian regulatory system.[303] It is more consistent with the role of the NEB when it was created in 1959 – a regulator that would, as conceived by Prime Minister Diefenbaker, "operate beyond any suggestion of control in any way,"[304] a regulator that would respect the balance between the role of Parliament to set policy and the role of the tribunal to discharge its responsibility set out by statute.[305] In view of the NEB's more recent approach, it appears that the NEB is now embracing a more activist role, focused more and more on being sensitive to public opinion to set the stage for broader acceptance of the decisions it renders.

While in the "Eye of the Storm" in the aftermath of the Bill C-38 amendments, there are two directions in which the NEB could move. It could remain true to its traditional role and function over the past 56 years, quietly going about its business as a quasi-judicial regulator, making decisions within its mandate, leaving public policy, public opinion and building trust for the industry and pipeline projects to the government to

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[301] Diefenbaker, *supra* note 47.

[302] House of Commons, Standing Committee on Natural Resources, 41st Parl, 2nd Sess, No 40 (25 November 2014) at 1110 (Hon Greg Rickford).

[303] Joe Oliver Open Letter, *supra* note 59.

[304] *Supra* note 48.

[305] *Ocean Port*, *supra* note 151.

address, or it could focus on repairing a tarnished image, being sensitive to public opinion while projects wind through the review process. It is difficult to predict which approach will leave the regulator in a better position to generate public respect and long term public confidence in the decisions that it renders. That question will only be answered in the years ahead, after the current applications for pipeline approvals have concluded the regulatory review process.

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