

Presentation to the National Energy Board Modernization Expert Panel

Rae and Company
Barristers and Solicitors
March 2017

The Government of Canada has requested suggestions on how to “modernize” the practices of the National Energy Board (the “NEB”). Rae and Company is a Calgary-based energy law firm. We represent non-government owners of mineral rights. This submission is from the perspective of our clients who are First Nations having hydrocarbon production on their reserve lands and from those individuals who own freehold mineral rights. We must emphasize, however, that the views expressed herein are strictly those of Rae and Company, not those of any of our clients.

We wish to focus on four areas – the NEB’s jurisdiction over federal lands, the NEB’s authority in regard to linear developments, the role of the NEB as a public relations vehicle, and the NEB’s role in protecting landowner equity interests.

1 The constitutional issue – the NEB’s jurisdiction over federal lands

As you are aware, the federal government has the jurisdictional authority over “lands reserved for Indians”. Provincial laws do not apply to federally owned mineral rights, such as those underlying national parks (natural gas is produced from Waterton National Park for example) and Indian reserves. As well, section 88 of the Indian Act is not effective to make provincial mineral rights laws applicable to Indian reserve lands.

Given these constitutional facts, **we propose that the National Energy Board be given authority over all federal mineral lands, including national parks and**

Indian reserves. The NEB already has jurisdiction over hydrocarbon resources in the North and, to a lesser extent, to offshore mineral lands. Its expertise arising from this present jurisdiction can therefore be readily extended to the NEB assuming the role of regulator on Indian reserve mineral lands and on national park lands.

Some may argue that Indian Oil and Gas Canada presently regulates oil and gas activities on Indian reserve lands. This is an incorrect assumption that has proven costly to Canada's First Nations.

Indian Oil and Gas Canada handles the federal government's proprietary interest on reserve lands. As such it is supposed to carry out Canada's fiduciary/trustee role protecting the First Nations' beneficial interests in their reserve lands. Because of this trust-like role, it cannot also act as a quasi-judicial regulator in arbitrating among other all those other parties having interests on Indian reserve lands. When it distorts or forgets the distinction between the two roles, in the past the interests of First Nations have suffered and have been subordinated to the interests of outsiders. That is why the NEB should be given the regulator's role on federal Indian reserve lands.

Our firm represented a First Nation that was placed in the incongruous position of hosting one of the longest natural gas transmission lines in Alberta running through its reserve, yet that line remained under provincial jurisdiction at a time when many much smaller lines were transferred to the jurisdiction of the NEB. This type of irrational inconsistency should be eliminated.

2 The NEB's jurisdiction over linear projects

Under Canada's constitution the federal government's role over interprovincial trade has been marked as much by the absence of a federal government presence, as much as by the federal government's active assertion of jurisdiction. The decades of juridical debate in the courts as to when a pipeline was interprovincial and when it was local, is a good example of Canada's tortured view of interprovincial trade and interprovincial undertakings. The result has been over a century of judicial and political decisions that reflect, to put them in the best light, our geographically and culturally diverse country.

By 2017 the federal government in general and the NEB in particular have limited authority over energy transmission projects. The federal government has all but abandoned authority over interprovincial and international electrical energy transmission. Others presenting before you have pointed out the recent British Columbia political and legal challenges to the NEB's authority over interprovincial hydrocarbon transmission facilities.

The federal government must therefore clarify the authority of the National Energy Board over all forms of interprovincial energy transmission, including electrical transmission lines, pipelines, railways and truck transport.

3 Can the NEB fill both the role of a regulator and that of a public relations vehicle for energy projects?

For many years the primary roles of the NEB were to advise the federal government and to act as a quasi-judicial regulator of oil and gas activities in specified jurisdictional areas. In recent years however, the federal government has attempted to foist upon the NEB the responsibility for making decisions that are essentially value judgments which are political in nature. This has been very unfair to the NEB.

The situation has been exacerbated when the federal government has also asked the NEB to carry out the public relations aspects of these political decisions. Not only was the NEB asked to make political decisions, but it was also asked to “sell” these decisions to the public.

A very telling example of this is the NEB’s frequent practice of allowing “comments” from the general public on specific energy projects. These comments have been allowed and even solicited in public forums, but without any of the trappings and protections of a typical quasi-judicial hearing. The veracity of the comments could not be challenged and the comments could not be included in the reasons for the NEB’s ultimate decision. What then was the point of allowing these “comments”? We would submit that the purpose was simply to allow members of the public to vent and to divert the commenters away from the more appropriate public forums where they should have been allowed their say, that is, in Parliament and its ancillary institutions.

After the conclusion of many of these hearings in which this commenting was allowed, and after these commenters have ultimately realized that they were speaking to deaf ears, this we would submit is a prime reason why there is the present level of frustration among the general public with the NEB. Allowing comments at the NEB’s hearings has simply perpetrated a fraud on those members of the public who submitted their comments in good faith.

We recommend that the National Energy Board refocus on its quasi-judicial functions and abandon the public relations role that has been unfairly foisted upon it in recent years.

4 The role of the NEB in regard to equity rights of landowners

Due to constitutional realities, the NEB often finds itself as the sole arbiter of the competing rights of an energy development proponent and those of a private landowner. This simple fact has been lost amongst the recent “big picture” controversies surrounding energy projects. **The NEB must therefore expressly acknowledge its role in addressing the equity rights of landowners, both surface landowners and mineral rights holders.**

This panel’s draft mandate includes the following: “For example, the Panel shall review the structure, role, and mandate of other regulators (e.g., Alberta Energy Regulator) to identify potential best practices and guide its review”.

Should the NEB emulate the role of the Alberta Energy Regulator? We would caution against this. While the AER has great expertise in a number of areas, for those outside the oil and gas sector it unfortunately carries the image of a regulator that has been captured by those it is intended to regulate, specifically the oil and gas industry. The AER’s restrictions on who may have “standing” before it – freehold mineral rights owners in general do not have standing -- is a prime example of how the AER has strayed from the role of a truly impartial regulator.

To some extent this loss of credibility on the part of the AER has in recent years also leaked over into the NEB, which is also now facing credibility issues. With the Alberta regulator it is now too late to reverse this trend in attitudes; the AER is not the model the NEB should follow.

We trust our thoughts are of some assistance to the panel in its review of the National Energy Board and we thank you for allowing us to appear before you.

L. Douglas Rae
Rae and Company
March 2017.