

Canada's National Energy Board & the Need for Its Reform

*Background notes for a proposed resolution calling for an
evaluation and review of the structure and mandate of the
National Energy Board*

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OTTAWA'S NATIONAL ENERGY BOARD

PROCEDURAL SECRECY AND A CULTURE OF UNACCOUNTABILITY

Ottawa's National Energy Board (NEB) has been in continuous operation for more than fifty years. Established during the administration of John Diefenbaker, it was created not long after the goings-on of Parliament had been dominated by what was known as "the Great Pipeline Debate." This debate had centered on the construction of Canada's first national pipeline, control of the pipeline, and the route it would take to move natural gas from western Canada to the markets of eastern Canada. Some wanted an all Canadian route. Others preferred a less difficult and less expensive US route.

The debate occurred throughout the spring of 1956. It literally turned Parliament into bedlam. It led to the fall of the Liberal government of Louis St. Laurent, the rise of John Diefenbaker as a national political figure, and to what was then an unprecedented Progressive Conservative majority government.

Following on the heels of the Great Pipeline Debate, two other events occurred that led to the creation of the NEB. They were the Royal Commission on Canada's Economic Prospects and the Royal Commission on Energy.

The Royal Commission on Canada's Economic Prospects had been initiated by the St. Laurent government. Its purpose was to make recommendations about the Canadian economy, and about Canada's economic future. Chaired by Walter L. Gordon, its 1956 and 1957 reports expressed concern for Canadian sovereignty, and questioned the policy of allowing Canada's natural resources and other business enterprises to be controlled by foreign interests, particularly US corporations.

The Royal Commission on Energy (Borden Commission) had been established by the government of John Diefenbaker. The most important issue with which it had to deal was the demand by Alberta energy producers to build a pipeline from Alberta to Central Canada. The National Energy Board was proposed by the Borden Commission as a newfound agency to administer this new federal energy and pipeline policy. It was thought that its creation would also move contentious aspects of the pipeline debate outside the walls of the House of Commons.

National Energy Board Established

Established in 1959, the NEB received sweeping powers. Roughly twenty years after it was established, the Law Reform Commission of Canada looked into the NEB's operations. Although referred to as an "energy regulator" or "energy board," it was already apparent that the NEB and its board members, who seemingly viewed themselves as Canada's energy czars, believed the NEB to be a development facilitator rather than an unbiased regulator.

At the time, the NEB's chairman didn't see a conflict in going on a fishing junket with the very interests that would later appear before his quasi-judicial board, seeking regulatory permissions and privileges.¹

The MMS and the NEB

Most Canadians are aware of the recent disaster in the Gulf of Mexico that occurred as a result of a deep water BP oil well. Due to that crisis, the US government re-evaluated its regulatory mechanisms. The outcome of that re-evaluation, was to split the US federal regulator, known as the Mineral Management Service (MMS), into multiple parts.

A press release issued by the US government at the time stated, in part:

WASHINGTON, DC - Secretary of the Interior Ken Salazar today signed a Secretarial Order that will lead to the fundamental restructuring of the Minerals Management Service and the division of its three conflicting missions into separate entities with independent missions.

“The Minerals Management Service has three distinct and conflicting missions that – for the benefit of effective enforcement, energy development, and revenue collection – must be divided,” said Secretary Salazar. “The reorganization I am ordering today is the next step in our reform agenda and will enable us to carry out these three separate and equally-important missions with greater effectiveness and transparency. These reforms will strengthen oversight of offshore energy operations, improve the structure for revenue and royalty collections on behalf of the American people, and help our country build the clean energy future we need.”

One Regulator Cannot Discharge Three Contradictory and Competing Mandates

The US split was undertaken because it was determined that one regulator cannot discharge three contradictory and competing mandates at one and the same time. To be sure, there is controversy, opposition, much political dialogue, and considerable bantering even today as a result of the ongoing MMS restructure. Yet the underlying need for appropriate restructuring is not questioned.

The National Energy Board in Canada, functions in a dynamic similar to that of the former MMS. It too consistently claims it can discharge contradictory and competing mandates at one and the same time. Through its permissions and permit processes, the NEB sees itself as being mandated to facilitate the expansion of economic activity related to oil and gas development. At the same time, the NEB insists that it can effectively discharge its second mandate, which is to police the industry, thereby ensuring environmental integrity and protection.

¹ There is a brief explanation of this described situation in Peter Lewington's book, *No Right of Way*.

Instinctively recognizing the potential conflict between these competing mandates, the NEB has responded by creating “goal oriented environmental targets.” In essence, it doesn’t make regulations so much as it sets targets. And when it comes to the environment, the target is perfection. How the NEB implements this policy is to tell the development interests it regulates to use their own corporate standards to meet the goal.

The way this process plays out in practical terms is that it frees the NEB from having to prescribe environmental regulations. It merely has to talk about its goal—which is no contamination whatsoever. It also means that instead of enacting and prescribing standards and procedures that will ensure water and lands are protected, the NEB believes its mandate in this regard is to tell the companies it regulates that they must do whatever they think they have to, in order to reach the goal—the goal of no contamination. It also means that NEB environmental standards are self-prescribed by the companies it regulates. The companies that for so many years the NEB quite literally and openly referred to as its “partners.”

The only way to enforce accountability in any regulatory jurisdiction is to maintain minimum standards, and require compliance. There can certainly be goals beyond the minimum standards, but that is a very different dynamic than what the NEB now practices. By way of background and to make clear the NEB’s approach to its competing mandates, consider the group of British Columbia landowners who have a 50-year old pipeline on their property; so old, the pipeline is virtually worn out and in need of replacement.

The replacement pipeline is 42.3 km in length. Knowing the NEB does not require an environmental assessment when pipeline companies engage in maintenance, and also knowing that the NEB exempts companies from environmental assessments when the permit being requested is for a pipeline that is fewer than 40 kilometers in length, the company that owns the old pipeline split its application, and applied for new pipeline approval in a way that deliberately used this NEB designed loophole, to avoid environmental considerations despite the fact that the new pipeline would cross a river.

When affected landowners and interested citizens challenged the pipeline company and the NEB with their legitimate environmental concerns, the NEB responded by saying it cannot tell a pipeline company how to ask the NEB for project approval (even if the apparent goal is to avoid an environmental assessment).

If any reasonable person thinks about this statement for very long, the absurdity of the NEB’s position becomes apparent. The notion that the regulator is powerless with respect to the manner in which those it regulates seek its approval, and that it is therefore powerless to consider environmental factors, is bizarre to say the least.

The Third Element—Legitimate Landowner Interests

There is yet a third element in the NEB’s operational mandate. In addition to being responsible to facilitate expanded energy-related economic activity, and ensure protection of the environment, the NEB also has a theoretical obligation to ensure that the legitimate interests of

landowners and others affected by NEB regulated projects, are given due process and due regard.

In this third area of the NEB's mandate, it receives a failing grade. In some instances this is true due to neglect, indifference, or incompetence. In other instances because it is not humanly possible for one regulator to effectively discharge three contradictory and competing mandates.

The NEB is so indifferent of its obligation toward landowners that it freely implements policies that impose large scale liability and financial risk upon landowners, without so much as informing them of what it has done, or telling them of the implications. Similarly, the NEB implemented policy that transferred quasi-control over one million acres of private and public land to the pipeline companies it regulates, without consulting the property owners, or even informing them of what it had done, or the implications.

The NEB's Growing Influence

A reader may ask, "Why now?" Why are interested Canadians and landowners all of sudden expressing such obvious and intense animosity toward the NEB? After all, the NEB has been in place for decades.

The answer to this question has two parts. The first is that the number of landowners affected by NEB policy, in years gone by, has been relatively small. Due to the rapid development and expansion of the energy sector, change is occurring. The number of kilometers of federally-regulated pipeline has grown from a few thousand, into many tens of thousands. That means the number of Canadians affected by NEB policy has also reached into the many tens of thousands.

The second part of the answer is that the NEB's performance and disposition toward landowners has been so consistently objectionable, that the problem has become almost impossible to ignore.

In western Canada, there are landowners who ten years ago had National Energy Board pipeline projects imposed upon their holdings, who to this date, have not received a dime in compensation. Some have experienced loss of livestock due to pipeline construction practices, devaluation of property values, and loss of all-weather water sources.

Despite numerous and plentiful stories of this nature, the watershed that now shapes the NEB-landowner relationship has undoubtedly been the NEB's decision to assume regulatory control of the extensive NOVA Gas Pipeline System in Alberta. To do so, it held a hearing at its own offices in Calgary, and decided at that hearing, that its own staff, rather than the province of Alberta, which had regulated the NOVA system for more than 50 years, should be in charge.

The NEB Knowingly and Deliberately Tramples Landowner Interests

At the NOVA hearing, knowing that thousands of landowners would be dramatically affected if a change of regulatory jurisdiction were to occur, landowners assembled a legal team to present their case. Their objective was not to say which regulator should or should not regulate the system. Their objective was to demonstrate to the NEB how far reaching the injury to landowners would be if the regulatory change occurred, apart from conditions being imposed upon the pipeline company, by the NEB.

There is a distinct difference between provincial regulations that apply to pipeline landowners and NEB rules that apply to pipeline landowners. At that hearing, quite deliberately, the NEB chose not to assign regard to the extensive body of information put before it by landowners. It then openly commented in its written decision on the matter, not so much about the legal ramifications upon landowners, but instead, about the number of landowners it believed might be represented by the association that presented the information.

Interestingly, the NEB regulations applying to these landowners were assembled by the NEB in consultation with energy company lobbyists, outside of any transparent arrangement that permitted public input.

Individual landowners and professional landowner associations such as CAEPLA (Canadian Association of Energy and Pipeline Landowner Associations) have made repeated attempts to find out exactly who was in the room when the NEB crafted these regulations. The NEB refuses to say. In response to an enquiry made under the terms of the Access to Information Act, the NEB literally sent back 300 empty sheets of paper. The pages were absolutely blank.

The NEB hearing on the NOVA regulatory jurisdiction ended with the NEB ruling that it should regulate the fifty year old pipeline network rather than the province of Alberta. As a result, regulatory control shifted. Shortly thereafter, Gaétan Caron, the head of the NEB, publicly referred to the decision as “priceless.”

It is worth noting that this decision by the NEB immediately increased by 50% the number of km of pipeline it regulates. It was growth by acquisition. In plainer terms, the NEB was not only the judge in the NOVA decision. The NEB was also the direct beneficiary of its own decision. It will result in more staff and an expanded budget.

The effect upon landowners was immediate, even though most didn't know it. They didn't know it because the NEB didn't inform them, nor did it require that the pipeline company inform individual landowners about the full affect.

With one fell swoop, thousands of Alberta landowners lost their longstanding right to recover legal fees and other related costs in the event of a dispute with the pipeline company. This loss is especially important if and when new pipelines are put into the existing easement, and especially when existing steel pipes are to be decommissioned or abandoned.

The NEB's rules also imposed immediate risk and liability on landowners where none had been before. NEB rules impose liability every time a farmer drives "large" equipment across the buried pipeline, without first asking permission from the NEB, or the pipeline company. Under the previous Alberta-based rules, no such liability existed, nor was it necessary for a farmer to ask permission before driving a farm truck across a pipeline easement.

Pipeline abandonment policies were changed to favour the pipeline company over the interests of landowners; restrictions on digging post holes and other farming practices were imposed on a strip of land 200 feet wider than the actual pipeline easement. That's almost the length of a football field. This new policy means the pipeline company now maintains control or quasi-control over roughly ten percent of the acres on a quarter section of land, and it has not paid a nickel for this additional jurisdiction over private property.

The penalty against landowners for breaking certain rules has gone from a fine of \$5,000 under Alberta guidelines, to a maximum fine of \$1 million and up to five years in prison as a result of the NEB's rules. And because of the change, landowners along the existing NOVA easements are now ineligible to receive annual payments on any new pipelines placed into the existing easement.

The Need for Realignment at the NEB

As Canada's energy sector keeps growing, fueling the national economy, the country will need regulators who act in the public interest, and in an unbiased fashion. Their eye must be not just on the acceleration and development of the energy sector, as is the case with the NEB, but also on safety and the environment. And on the legitimate interests of those whose property is being damaged or taken as a result of NEB regulated actions.

The thousands of landowners who have pipelines on their property in Canada do not own these pipelines. They have no financial interest in them. Yet their property has been devalued. They are often pulled into legal battles or regulatory wranglings over pipeline crossing restrictions, duty of care, control zones, liability, etc. Yet under existing NEB regulations, they cannot recover their out of pocket and actual costs.

Even to participate in an NEB hearing requires hundreds of thousands of dollars. This is true because of the demand for technical and legal experts. For example, if a pipeline company applies to the NEB to abandon a fifty year old pipeline and leave it buried on your property, and you as the landowner want it removed and the property restored to its original condition, the landowner is obligated to respond to technical presentations made to the NEB by pipeline company engineers and other experts who claim abandonment in place is desirable.

The landowner is thus pulled into a regulatory and legal confrontation from which he or she stands to gain nothing. Yet the expense the landowner will incur not to become the sole owner of a buried abandoned pipeline, will be enormous.

Ex Parte

In law, when an official at a legal hearing, or judge, meets privately with one party to a matter, prior to the actual hearing, the act is referred to as *ex parte*. The legal dictionary states:

“*Ex parte* refers to proceedings where one of the parties has not received notice and, therefore, is neither present nor represented.”

The NEB has always been mandated to act in an unbiased fashion. Understandably so because in law, it has the power and authority of a *bona fide* court. Even so, early in the NEB’s existence, its chairman, Jack Stabback, confessed that the NEB engaged in *ex parte* activity. For example, Stabback indicated that the head of the NOVA Corporation met privately with NEB panel members.

The seriousness of this situation was underscored by a perspective presented in Canadian Business:

“The NEB’s enabling statute, the National Energy Board Act, gives it the attributes and powers of a superior court...”

Today, it is understood that as a matter of practice the NEB regularly meets *ex parte*, allowing itself to be lobbied prior to formal adjudicated decisions and policy decisions. Professional policy institutes and landowner organizations in Canada, such as CAEPLA, the Canadian Association of Energy and Pipeline Landowner Associations, have made numerous requests under the provisions of the Access to Information Act, seeking to know the extent that *ex parte* meetings play not just in the NEB’s adjudicated hearings, but in the drafting of new rules and legislative amendments that are then proposed to parliamentarians, and that parliamentarians assume have been authored by the NEB’s regulatory staff, as opposed to industry insiders.

To date, the NEB has been tight-lipped, refusing to provide details. In response to one such Access to Information inquiry, the NEB’s official response was to bundle up 300 empty sheets of paper, and provide them as a legitimate response to that enquiry.

The NEB and the Practice of *Ex Parte*

What Purposes are Served by Limiting *Ex Parte* Communication of a Federal Regulator?

Rules that restrict *ex parte* communications have their roots in longstanding legal principles of due process and fundamental fairness. With public agencies and regulators, rules limiting *ex parte* communication serve an important function because they ensure transparency.

Allowing *ex parte* communications on a matter, and then remaining secretive about them, as is the case with the National Energy Board, feeds public cynicism and demonstrates that NEB decisions can be based more on special access and influence than on the appropriate consideration of evidence.

Ex parte communications are fundamentally offensive in regulatory and adjudicative proceedings because they involve an opportunity by one party to influence the decision maker, outside the presence of the other involved parties. It violates due process. Such communications are never subject to review, rebuttal, or comment by other affected parties.

Does Restricting *Ex Parte* Communication Prevent Decision Makers from Understanding Issues?

Rules that govern *ex parte* communication do not prevent the flow of information to decision makers. Instead, *ex parte* rules shape how regulators receive that information, and are intended to ensure that decision makers receive relevant information in a fair and transparent manner.

Ex parte rules create an open and transparent environment which allows everyone to know what’s going on, and if desired, provides an opportunity for each stakeholder to rebut any information being presented. Regulators that operate in secrecy do not serve the public interest, and cannot serve the public interest, because their method of operating does not facilitate what anyone could call an “above-board” adjudication process.