THE ELUSIVE GOAL OF REGULATORY INDEPENDENCE AND THE NATIONAL ENERGY BOARD: IS REGULATORY INDEPENDENCE ACHIEVABLE? WHAT DOES REGULATORY "INDEPENDENCE" MEAN? SHOULD WE PURSUE IT?

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This article explores recent amendments to the National Energy Board Act *that have fundamentally changed the National Energy Board's role as a regulatory agency. Specifically, it examines the Board's independence before and after the amendments, focusing on the controversy that gave rise to the Board's independence and the controversy that in turn removed it. Though the independence of the Board must now be understood differently in light of the amendments, this article concludes that the Board still plays an important role in societal choices regarding pipeline projects.*

Cet article explore les récents amendements à la Loi sur l'Office national de l'énergie *qui changent fondamentalement le rôle de l'Office national de l'énergie en tant qu'organisme de réglementation. Il porte tout spécialement sur l'indépendance de l'Office avant et après les amendements et insiste sur la controverse qui a accordé l'indépendance à l'Office et celle qui l'a retirée par la suite. Bien que l'indépendance de l'Office doive être vue différemment à la lumière des amendements, cet article arrive à la conclusion que l'Office joue toujours un rôle important dans les choix de société au sujet des projets de pipeline.*

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I. INTRODUCTION

With the enactment of the *National Energy Board Act*[1] in 1959, the National Energy Board (NEB or Board) was established with a broad public interest mandate over specified energy development and trade matters and was bestowed with court-like independence. As a result, over the course of its first 53 years, the Board earned a well-known reputation as a respected energy regulator[2] whose decisions were essentially final.[3] Board decisions on applications for pipeline projects required only the *approval* of the Governor in Council (GIC) — that is, the Cabinet. Legally, a Board decision to issue a certificate of public convenience and necessity for a proposed pipeline project could be rejected, but it could not be *modified* at the political level of government. A decision by the Board to *reject* an application for a certificate did not require GIC approval and, therefore, could not be *reversed* by Cabinet. Indeed, it is arguable that the *NEB Act* as originally enacted went as far as it is legally possible to go, subject to the supremacy of Parliament, to entrench the independence of a statutory, subordinate authority, in terms of both its formal, procedural independence and the finality of its decisions.

Recent amendments to the *NEB Act*, however, have fundamentally changed the Board's role. The Board has been stripped of its core decision-making authority over new pipeline projects and has been reconstituted as what might be described as a "special status adviser" to Cabinet. The amendments have also introduced significant procedural constraints on the Board and have conferred extensive powers on the Chairperson to take measures to meet specified time limits. Panels of Board members designated to hear individual applications will no longer be complete masters of their own procedure.

Given that these changes have been made in the politically charged environment of the proposed Northern Gateway pipeline project, some might be tempted to characterize them as blunt political interference with an independent regulatory process. However, a more sophisticated analysis is required. Indeed, the changes were likely inevitable; the Northern Gateway application before the NEB may have merely been the trigger for their timing.

The Northern Gateway project is a proposed oil pipeline from a point near Edmonton, Alberta to Kitimat, British Columbia, which is a distance of 1,177 kilometers. The pipeline would traverse undisturbed areas and would pass through the traditional areas of many Aboriginal groups. The petroleum to be transported would be sourced from projects in the Canadian oil sands in Alberta. It would be exported by marine tanker to markets in Asia.[4]

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1 SC 1959, c 46. The current consolidation of the *Act* is cited as RSC 1985, c N-7 [*NEB Act* or *Act*].

2 The Board has from time to time been criticized for its lack of *de facto* independence. See Alastair R Lucas & Trevor Bell, *The National Energy Board: Policy, Procedure and Practice* (Ottawa: Law Reform Commission of Canada, 1977). Some of the conclusions of this study are discussed further below. See also François Bregha, *Bob Blair's Pipeline: The Business and Politics of Northern Energy Development Projects* (Toronto: James Lorimer, 1979); Ian McDougall, "The National Energy Board: Economic 'Jurisprudence' in the National Interest or Symbolic Reassurance?" (1973) 11:2 Alta L Rev 327.

3 *NEB Act*, *supra* note 1, s 22(1), provides for an appeal, with leave, to the Federal Court of Appeal from a decision or order of the Board.

4 There are two parallel pipelines proposed in the same right-of-way, a 36-inch pipeline to carry an average of 525,000 barrels per day of petroleum west for export by ship and a 20-inch pipeline to carry an average of 193,000 barrels per day of condensate east. Condensate is used to thin petroleum products for transport by pipeline. See Enbridge Northern Gateway Project Application to the National Energy Board (May 2010), online: National Energy Board <http://www.neb-one.gc.ca/11-eng/livelink.exe?func

Northern Gateway presents public policy issues across a range, and on a scale, that are perhaps unprecedented. These include potentially gaining access to significant new markets for Canadian oil exports, the pace of development of the Canadian oil sands, impacts on Aboriginal rights, and risks to the environment, particularly the marine environment off the coast of British Columbia. Not surprisingly, considering the diversity of these issues, the proposal has attracted the interventions of numerous organizations and individuals, which have posed unique challenges for the regulatory process being conducted jointly by the NEB and the Canadian Environmental Assessment Agency through a joint three-person panel.[5] The application for approval of the project was filed in May 2010. The regulatory review process is expected to be completed by the end of 2013. If approved, the project is planned to begin operation by the end of 2017.

Northern Gateway is not unique in illustrating the range of issues, interests, and challenges posed for the regulatory process that are presented by major new pipeline projects in today's environment, with widespread concern about sustainability, cumulative impacts, global warming, and the pace and scale of developments. The proposal for the Mackenzie Gas Project that was reviewed by the regulatory process between 2004 and 2010 similarly presented fundamental questions across a wide range of issues.[6] The proposed Keystone XL project has also provoked widespread political controversy.[7]

What the controversy surrounding these three pipeline proposals illustrates is that such projects raise issues that go beyond their immediate impacts and require that society make fundamental choices, firstly about whether a particular project should proceed at all (the "go or no go" decision) and, if so, on what terms and conditions. The fundamental question in establishing an appropriate regulatory framework is whether such choices should be made on behalf of society by a subordinate agency that is not directly accountable to society at large.

These project proposals also present challenges for improving regulatory efficiency, particularly the time taken for reviews and defining the range of interests that may participate directly in the regulatory process. The challenge here is to find the right balance between, on the one hand, the commercial needs of project developers to have a timely review of their proposals and, on the other hand, the needs of those affected, and, indeed, the responsibility and needs of the regulatory agency itself to develop a complete record on which to base its conclusions. In striving to find this balance, it must be kept in mind that the legitimate interests that are potentially affected by such projects range from other commercial interests

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=11&objId=61988&objAction=browse&redirect=3>.

5 Canadian Environmental Assessment Agency, *Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project* (4 December 2010).

6 See Joint Review Panel for the Mackenzie Gas Project, *Foundation for a Sustainable Northern Future: Executive Summary*, vol 1 (Ottawa: Canadian Environmental Association, 2010); National Energy Board, *Mackenzie Gas Project: Reasons for Decision* (December 2010), online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/ppletnsbfrthnb/mcknzgsprjct/rfd/rfd-eng.html>.

7 The completed Keystone XL project comprises several phases, some of which are already in operation, that would eventually transport crude oil from the Alberta oil sands to the US Gulf coast in Texas. In addition to environmental issues, particularly relating to the Sandhills and Ogallala Aquifer in Nebraska, the project has been linked by some critics to the issue of pace and scale of development in the oil sands and the associated greenhouse gas emissions. Keystone XL Pipeline Project (2013), online: TransCanada <http://www.keystone-xl.com/?gclid=CLyn5sfqnbgCFaU5QgodPA8AfA>.

to government departments with specific mandates that are engaged, to aboriginal groups, to various interest groups, to individual landowners.

The recent amendments to the *NEB Act* reflect Parliament's view on who should make the necessary choices on behalf of society and on the role of the NEB in the process leading to such choices. Given the nature of the choices that must be made, it is not surprising that final decisions on major pipeline projects will henceforth be made at the political level of government by the GIC, that is, the federal Cabinet. The changes also attempt to address the challenge of improving regulatory efficiency by imposing time limits on the Board's review of specific applications.

What exactly is the change in the Board's role as a result of the recent amendments to the *NEB Act* and what do they tell us about our understanding of "regulatory independence"? Why overturn more than 50 years of experience with a formula that had succeeded in maintaining the independence of the NEB and, generally speaking, had kept its decisions out of the political arena? What might the answers tell us about the nature of regulatory independence and whether and how we should pursue it?

Independence is widely regarded as a fundamental — indeed, defining — characteristic of many regulatory agencies. Such agencies frequently, and often quite prominently, describe themselves as being "independent," even though the adjective does not appear in the relevant legislation. For example, the NEB has for many years stated that it is an "independent federal agency,"[8] though neither of the words "independent" nor "independence" is found in the *NEB Act*. Among those who challenge the independence of a particular agency, the premise is always that the agency is not in fact independent, but should be, thereby further validating the idea of independence as a necessary precept for the agency's legitimacy. In the regulatory arena, "independence" is a bedrock principle.

However, while the idea of independence might be generally, although not universally,[9] accepted as a desirable condition in the context of regulatory law, putting practical meaning around the concept is not straightforward. Do we mean by "regulatory independence" that the regulatory process should be independent, or do we mean as well that the outcome of that process should be independent in the sense that it is final and not subject to further review at the political level of government? The latter understanding of "regulatory independence," taken literally, would be inconsistent with the principle of the supremacy of Parliament and responsible government.[10] It is necessary, therefore, that the concept be understood within the limits of the broader political and legal framework of our system of government. In the

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8 See e.g. National Energy Board, "Who we are & our governance," online: National Energy Board <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/whwrndrgvrnnc-eng.htmo>.

9 See Robert W Macauley & James LH Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) vol 1 at 2-12.28: "[A]dministrative agencies are not independent. They never were independent and never will be independent. If they ever became independent, they would not then be administrative agencies. The association of the word 'independent' with 'administrative agencies' in Canada is … a misnomer."

10 It is always possible for Parliament to repeal the legislation establishing any statutory authority and, therefore, such an authority continues to exist at, and depend on, the pleasure of Parliament and the government of the day. For an example of Parliament outright abolishing an agency, by repealing the applicable legislation, in the face of a paralyzing dispute within the agency see Les Filotas, *Improbable Cause* (Toronto: McClelland-Bantam, 1991), which chronicles the abolition of the Canadian Aviation Safety Board in 1990.

context of energy regulation in particular, it is also important that we develop a more sophisticated understanding of the nature of the choices that must be made on society's behalf. We must ask whether subordinate regulatory agencies should make fundamental choices on behalf of society at large and, if not, who should make these choices and what is the proper role of subordinate agencies in the process?

This article analyzes the legal nature of the independence of the NEB as originally established in the *NEB Act* in 1959, and that remained in place for 53 years. The paper then identifies the changes implemented by the recent amendments to the *Act* and assesses the significance of those changes, both for the role of the NEB in particular and, more broadly, for our understanding of the concept and role of "regulatory independence." The writer concludes that widely held notions of independence are, at least in the context of regulating major energy development projects, sometimes simplistic. A more sophisticated understanding of the principle should result in more realistic expectations of the regulatory process and in the structuring of that process in ways that are more likely to meet those expectations.

In addition to fundamentally changing the role of the NEB, the recent amendments have imposed a number of procedural constraints intended to improve the efficiency of the Board's processes, specifically by imposing time limits for decisions on pipeline applications. Elements of these measures reject certain principles of procedural fairness and directly undermine the extent to which the Board was previously the master of its own procedure. Legal challenges could follow in the context of specific decisions.

II. TRIBUNAL INDEPENDENCE: GENERAL PRINCIPLES

Before turning to consider the independence of the NEB, either as originally established in 1959 or under the recent amendments to the *NEB Act*, it is important to recall the fundamental principle endorsed by the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia*[11] that, absent constitutional challenge, a statutory regime prevails over common law principles of natural justice, including principles of independence. In a unanimous decision, the Court was unequivocal in its view that the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication:

> Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. *Courts* engaged in judicial review of administrative decisions *must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question*.
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> …
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> [G]iven 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. While tribunals may sometimes attract *Charter* requirements of independence, as a general

[11] 2001 SCC 52, [2001] 2 SCR 781 [*Ocean Port*].

> rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.[12]

As will be further discussed, Parliament has clearly expressed, first in 1959 and now with the 2012 amendments to the *NEB Act*, two very different intentions with respect to the nature of the NEB's independence.

However, while it is thus clear that the independence of the NEB must be evaluated by reference to Parliament's intention as expressed in the *NEB Act*, at the same time it is helpful to start with the meaning of what might be termed "full independence" as understood by the courts. This was considered by the Supreme Court in *Valente v. The Queen*,[13] where the Court was concerned with the concept of judicial independence:

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government…. The relationship between [the individual and institutional] aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[14]

While the independence of the NEB does not raise the question of judicial independence in the strict sense,[15] the Court's view in *Valente* provides a valuable benchmark for assessing the extent of the Board's independence, under either the original 1959 *NEB Act* or the 2012 amendments.

III. *NEB ACT 1959*

Immediately prior to its amendment by the *Jobs, Growth and Long-Term Prosperity Act*,[16] which was proclaimed on 29 June 2012, section 52 of the *NEB Act* provided:

> The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:
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> (a) the availability of oil, gas or any other commodity to the pipeline;

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12 *Ibid* at 794-95 [emphasis added].
13 [1985] 2 SCR 673 [*Valente*].
14 *Ibid* at 687.
15 In *Ocean Port*, *supra* note 11 at 797, the Court stated that the discussion of judicial independence by Chief Justice Lamer (as he then was), for the majority in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, did not extend to tribunals other than courts of law.
16 SC 2012, c 19.

> (b) the existence of markets, actual or potential;
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> (c) the economic feasibility of the pipeline;
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> (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 of participating in the financing, engineering and construction of the pipeline; and
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> (e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.[17]

A similar formulation was applied in conferring the Board's authority to issue a certificate of public convenience and necessity for a designated international power line.[18]

Two elements of this formula for empowering the Board are of fundamental significance for present purposes. First, in determining whether a pipeline "is and will be required by the present and future public convenience and necessity" (that is, whether the pipeline is in the public interest), the Board was required to have regard to all interests that appeared to it to be relevant. Further, the Board could have regard to any public interest that in the Board's opinion may be affected. Together, these words conferred on the Board a wide discretion to make its decisions based on its subjective determination of the public interest. The courts have consistently ruled that the Board has broad authority to determine the public interest and the relevance of the matters that it may consider in reaching its public interest determinations.[19]

Second, the core element of section 52 was that it empowered the Board itself — not the GIC — to issue a certificate. While the issuance of a certificate by the Board required the approval of the GIC, it was the Board that was the the final decision-maker. Under this formulation, the GIC's authority was restricted to approving, or denying approval of, a final decision that had already been made by the Board. The Board's decisions were not mere recommendations to the GIC.

The significance of the operation of section 52, as it was before the enactment of the recent amendments, was fundamental in both its direct and indirect consequences. It was only the issuance of a certificate by the Board that required GIC approval. As a result, if the Board denied the issuance of a certificate, that was the end of the matter — the GIC had no authority to overrule the Board and proceed to issue a certificate itself.[20] This effect of the

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17 *NEB Act*, *supra* note 1, in force between 12 July 2010 and 5 July 2012. This section is essentially the same as it was when it was originally enacted as section 44 in the 1959 *Act*.

18 *Ibid*, s 58.16 in the amended *Act*. The Board's authority to issue a certificate under this section, subject to the approval of the GIC, as opposed to merely making a recommendation that a certificate be issued, was not changed by the recent amendments. However, time limits were imposed.

19 See *Sumas Energy 2, Inc v Canada (National Energy Board)*, 2005 FCA 377, [2006] 1 FCR 456.

20 For an example of a controversial project where the Board denied a certificate of public convenience and necessity and the matter therefore did not proceed to Cabinet consideration, see National Energy Board, *Reasons for Decision: Sumas Energy 2, Inc EH-1-2000* (March 2004), online: National Energy Board <http://www.neb.one.gc.ca/11-eng/livelink.exe.fetch/2000/90464/90548/90556/90558/313822/313807/AOJ8V7_-_Reasons_for_Decision_-_EH-1-2000.pdf?nodeid=313604&vernum=0>. This was an application for a certificate for an international power line, but the Board's authority to issue such a certificate was enacted (and still is, see *supra* note 18) in the same terms as the Board's previous authority with respect to issuing pipeline certificates.

old section 52 was no doubt the immediate reason for the recent amendments to the *Act*, the stated purpose of which is to reverse this result.[21]

Further, the GIC's authority under the old section 52 was restricted to approving a decision of the Board. The GIC role was to approve or reject, but not to change, a Board decision. While it may have been theoretically possible for the GIC to issue its approval subject to conditions, it would still have been up to the Board to make a further decision regarding whether to issue a certificate with the GIC conditions attached (in other words, to modify the Board's previous decision) or, alternatively, to deny the certificate (a decision that would not require a further GIC approval). The GIC had no authority to issue any direction to the Board with respect to the issuance or denial of a certificate of public convenience and necessity.

While conducting research for this article, only one instance was identified in the 53-year history of the old section 52 where the GIC withheld its approval of a Board decision to issue a certificate. In that case a revised certificate was subsequently issued by the Board, with the approval of the GIC, after the applicant filed a revised application.[22] In both theory and reality, the Board was the final decision-maker with respect to issuing certificates.[23]

Parliament's original intentions with respect to the independence of the Board in exercising this mandate are reflected in several provisions of the original *Act*,[24] which remain in force. For example, the Board reports to Parliament, not to the government or any Minister of the day; although the Board's annual report is forwarded to the responsible Minister, the *Act* requires that it be tabled in Parliament.[25] The *Act* also establishes the Board as a court of record with the powers of a superior court[26] and requires that its hearings generally be public.[27]

The Board's independence is further supported by the provisions respecting the appointment and tenure of members. Although appointed for an initial fixed term of seven years, members "hold office during good behavior," and can only be removed by the GIC "on address of the Senate and House of Commons."[28] Members are required to devote the whole of their time to performing their duties under the *Act* and are prohibited from accepting or holding any office or employment inconsistent with their duties under the *Act*.[29] They are expressly prohibited from engaging in any dealing in hydrocarbons or electricity or holding any financial security in any corporation engaged in any such business.[30] In some respects, these restrictions go beyond those imposed generally on federal public office holders by the

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21 See note 110 for further discussion.

22 NEB Proceeding RH-003-2011, 6 February 2012, NEB Document A39091 (Information Request response of TransCanada Pipelines Limited, B10-20).

23 In the past, some critics have concluded that "go" or "no go" decisions on "pioneer" pipeline projects were in fact made by the Cabinet in advance of the Board's consideration of the relevant application. This criticism is discussed further below under the heading NEB Advisory Functions.

24 The 1959 debates are discussed below under the heading Debate in Parliament.

25 *NEB Act*, *supra* note 1, s 133.

26 *Ibid*, s 11.

27 *Ibid*, s 24. "Public" hearings are not necessarily "oral" hearings; they may be conducted in writing.

28 *Ibid*, s 3(2). This is the same formula as is enacted for the removal of justices of the Supreme Court of Canada by section 9(1) of the *Supreme Court Act*, RSC 1985, c S-26.

29 *NEB Act*, *ibid*, s 3(5).

30 *Ibid*, s 3(4).

Conflict of Interest Act,[31] to which Board members are also subject, and, indeed, beyond those imposed on judges.

In summary, the Board was originally constituted by Parliament with a broad public interest mandate. Core decisions within its mandate were essentially final. In addition, the *NEB Act* included a range of measures to ensure the Board's independence. The combined effect of these two features has been that, in both practical and legal terms, final decisions on pipeline projects have been made by the Board itself, independently of, and at arm's length from, government, with the GIC role being to approve, but not reverse or amend, a Board decision. Furthermore, the Board was independent in both the individual and institutional aspects of independence as discussed in the *Valente* case.[32] The result was a Board that was as independent of the political level of government as is possible within the principle of Parliamentary supremacy.

IV. ORIGINS OF THE NEB MANDATE

A. THE GREAT PIPELINE DEBATE

The history of the events leading up to the tabling of the *NEB Act* in March 1959, including what is known colloquially as the "Great Pipeline Debate," has been well documented and need be summarized only briefly for present purposes.[33]

In early 1956, prior to the establishment of the NEB, Parliament was presented with legislation to establish a Crown corporation, the *Northern Ontario Pipe Line Crown Corporation Act*,[34] to build the Ontario section of what would become the natural gas pipeline system owned and operated by TransCanada PipeLines Limited (TCPL). This move was the culmination of a controversial debate that began with the emergence of two competing proposals to build a gas pipeline from Alberta to the east, one by way of a southern route through the United States and the other by a northern, wholly-Canadian route. The northern route was acknowledged to be considerably more expensive. The Liberal government, however, elected to support the northern route and agreed that it would initially build that section through a Crown corporation. TCPL would lease and operate, and later purchase, the northern Ontario section.

The government was concerned that the financing of the project would be jeopardized if the legislation to establish the Northern Ontario Pipe Line Corporation was not passed quickly and on 14 May 1956 it invoked closure.[35] The legislation was passed on 6 June 1956.

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31 SC 2006, c 9, s 2.

32 See *supra* note 13. It is interesting to note that the leading Supreme Court of Canada decision on reasonable apprehension of bias was initiated as a reference by the Board to the Federal Court of Appeal: *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, known as the *Crowe* case. It was accepted by all respondents in that case that the principle of reasonable apprehension of bias or reasonable likelihood of bias applied to the Board in respect of hearings on applications for certificates of public convenience and necessity. See Chief Justice Laskin for the majority at 385.

33 See e.g. Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Toronto: Douglas & McIntyre, 2000) at 9.

34 SC 1956, c 10.

35 *House of Commons Debates*, 22nd Parl, 3rd Sess, Vol IV (14 May 1956) at 3864-65.

The northern Ontario section was built (and later purchased by TCPL) and, by the end of 1958, Alberta gas was being delivered to Montreal.

However, the controversy over the use of closure, which has been described as "one of the most famous confrontations in parliamentary history,"[36] lingered. A year later, on 10 June 1957, the Liberal government was defeated and was succeeded by the Conservative government of John Diefenbaker. Although the Liberal government's defeat did not follow immediately in the wake of the government's use of closure, it was widely accepted at the time that closure was the single most significant contributor to its demise.[37]

B. THE GORDON COMMISSION

In February 1957, Diefenbaker, still in Opposition but subsequent to the Great Pipeline Debate of 1956, argued for the establishment of a "Canadian energy board."[38] Then, in November 1957, the Report of the Royal Commission on Canada's Economic Prospects (the Gordon Commission), was tabled.[39] It recommended that a "national energy authority" be established with the dual mandate of advising the federal government on energy matters and "approving, or recommending 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."[40] The Gordon Commission had been appointed by the preceding Liberal government in June 1955 "to inquire into and report upon the long-term prospects of the Canadian economy"[41] and its report was largely ignored by the new Diefenbaker government.

C. THE BORDEN COMMISSION

In October 1957, prior to the release of the final report of the Gordon Commission, the Royal Commission on Energy (the Borden Commission) had been appointed by the new government to inquire into a broad range of energy-related matters, including:

> [T]he extent of authority that might best be conferred on a National Energy Board to administer, subject to the control and authority of parliament, such aspects of energy policy coming within the jurisdiction of Parliament as it may be desirable to entrust to such a Board, together with the character of administration and procedure that might best be established for such a Board.[42]

In its first report in October 1958, the Borden Commission made extensive recommendations that formed the underpinnings of the *NEB Act*, which was tabled less than six months later, in March 1959. Specifically, the Commission recommended that a National Energy Board be established as a permanent board and be authorized, *inter alia*, "to require

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36 Robert Bothwell, "Pipeline Debate" (2012), online: The Canadian Encyclopedia <http://www.thecanadianencyclopedia.com/articles/pipeline-debate>. At the time, the Opposition called closure "the guillotine": *ibid* at 3865 (Hon Evans Knowles).

37 See Gray, *supra* note 33 at 7.

38 *House of Commons Debates*, 22nd Parl, 5th Sess, Vol I (11 February 1957) at 1159.

39 Royal Commission on Canada's Economic Prospects, *Final Report* (Ottawa: The Commission, 1957).

40 *Ibid* at 146.

41 *Ibid* at 471.

42 Royal Commission on Energy, *First Report* (Ottawa: Royal Commission, 1958) at 43.

that 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 Board."[43] The origins of the Board's broad public interest mandate were found in the recommendation that it should, in issuing certificates, take into account "all matters which in its opinion are required to be considered by it in the public interest."[44]

The Commission's recommendations respecting the independence of the Board were specific: "[T]he National Energy Board shall not be … subject to the direction of any specific Minister otherwise than as specified in the recommendations concerning the extent of the authority of the Board."[45]

The Commission commented:

> It is considered of importance by the Commission that the Board conduct all hearings in public and that the constitution of the Board be such as to ensure the independence of its members. The Commission does not consider that the Board should be subordinated to any particular ministry of the Government except to the extent set out in its recommendations.[46]

Furthermore, the Board should report to Parliament, through the Minister of Trade and Commerce.[47] In addition, provisions should be included to ensure the independence of the Board members.[48] Hearings should be public.[49]

The Borden Commission report also made recommendations with respect to an advisory role for the Board. These are discussed further below.

D. DEBATE IN PARLIAMENT

During the ensuing debate in Parliament on the Bill for the *NEB Act*, there were some contradictions and inconsistencies among members, and indeed on the part of government members themselves, as to the degree of independence that the Board would have under the *Act* and its role with respect to determining the public interest.

Although the Opposition was generally supportive of the Bill, some members suggested that it gave "unnecessarily wide powers" to the GIC[50] and that the Board would be "a political stooge of the government in power,"[51] subject to "political expediency control."[52] The Prime Minister, however, categorically rejected these suggestions:

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43 *Ibid* at Recommendation 15.
44 *Ibid* at Recommendation 21.
45 *Ibid* at Recommendation 27.
46 *Ibid* at 53.
47 *Ibid* at Recommendation 26.
48 *Ibid* at Recommendation 23.
49 *Ibid* at Recommendation 25.
50 *House of Commons Debates*, 29th Parl, 2nd Sess, Vol IV (22 May 1959) at 3935 [22 May 1959 Debate].
51 *Ibid* at 3950.
52 *Ibid*.

> That is the reason for this type of legislation — to assure that decision [*sic*] 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 the stooge about a board whose members will be placed in the same position as the civil service commissioners, who can not be removed except by a vote of parliament. In other words, to make sure that this board will operate for the benefit of all Canadians *it will operate beyond any suggestion of control in any way*.[53]

The Prime Minister was also clear about the link that he saw between the Board's broad mandate with respect to the public interest and the independence of the Board:

> [The powers conferred on the Board] are spelled out and are sufficiently flexible to assure, through public hearings and through maintaining the inviolability of the board by its appointment for a period of seven years unremovable except by vote of parliament, that the public interest can be and will be maintained.[54]

The Minister responsible for the Bill, however, was less clear: "Like any other body set up by parliament *it will report to the cabinet* and it will report through the Minister of Trade and Commerce to parliament, and *every action taken will be reviewed*."[55]

At the same time, he was clear about the purpose of the requirement for GIC approval of certificates:

> 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.[56]

Notwithstanding the mixed messages in the Parliamentary debates, the legal effect of the *Act* in conferring independence on the Board is clear. It is also clear that the Board was intended to have a broad public interest mandate. The Board was constituted as an independent decision-maker and not merely as a body that would make recommendations to Cabinet, subject only to the requirement for GIC approval (but not reversal or amendment) of a Board decision to issue a certificate of public convenience and necessity.

V. NEB ADVISORY FUNCTIONS

The Borden Commission had also recommended that, in addition to its regulatory responsibilities, the Board should have certain advisory functions to study and to recommend policies designed to assure to the people of Canada the best use of the energy and sources of energy in Canada.[57] The concept of assigning advisory functions to an agency that was intended to be primarily regulatory and judicial was recognized as "unusual and

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53 *House of Commons Debates*, 24th Parl, 2nd Sess, Vol IV (26 May 1959) at 4020 [emphasis added] [26 May 1959 Debate].
54 *Ibid* at 4021.
55 *House of Commons Debates*, 24th Parl, 2nd Sess, Vol IV (28 May 1959) at 4115 (Hon Gordon Churchill) [emphasis added].
56 22 May 1959 Debate, *supra* note 50 at 3931.
57 Royal Commission on Energy, *supra* note 42 at Recommendation 20.

experimental."[58] However, there was at the time no Department of Energy in the federal government and the Board was seen as a potential resource in filling this gap. The result would later contribute to criticism of the Board, which is discussed below.

Part II of the *Act* confers on the Board "advisory functions" in two categories. Firstly, the Board "shall study and keep under review" certain specified energy matters[59] and shall report thereon from time to time to the Minister, including making recommendations on related measures that "it considers necessary or advisable in the public interest."[60] Second, the Minister may request advice from the Board and call on it to prepare studies and reports.[61] The Board continues to act under these provisions and has from time to time been requested by the Minister to prepare reports.

Do the Board's advisory functions impinge upon its independence in its regulatory capacity? A 1977 study for the Law Reform Commission of Canada concluded that "[a]ll agree that wide-spread suspicions generated by the combination of functions, whether well-founded or not, are extremely damaging to the NEB's credibility as an adjudicator. This in turn can reduce public as well as industry confidence in the Board and impair its ability to exercise its statutory mandate effectively."[62]

In a more critical conclusion directly questioning the Board's independence, the study linked the Board's advisory responsibilities to its regulatory responsibilities with respect to specific applications: "Board members through the advisory function serve as Cabinet 'aides' in the same way as senior officials of public service departments. This occurs even when the policy issues involved correspond to the issues raised by applications before the agency."[63] The study also analyzed the role of the Cabinet in approving Board certificates and concluded that

> the power of approval retained by the Cabinet in certificate and licence applications is no mere formality, but part of a joint Cabinet-NEB policy-making process. This has been particularly evident in "pioneering" applications. Where the consequence of any particular application … is the opening up of major new energy markets, domestic or foreign, or major new sources of energy supply, the basic "go" or "no go" decision becomes a matter of government policy. In these situations, a policy decision is normally made by Cabinet following consideration of NEB advice prior to resolution of the initiating application by the Board.
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> …
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> This is not to suggest that Cabinet actually dictates the details of decisions on applications.… However, assuming financial and engineering details are in order, the fundamental question of whether the proposed project is in the public interest will have already been determined by Cabinet.[64]

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58 Douglas Fraser, "Speech to the Petroleum Accountants Society of Western Canada," Calgary, 9 April 1963, cited in Gray, *supra* note 33 at 17. Fraser was one of the original members of the Board.
59 *NEB Act*, *supra* note 1, s 26(1).
60 *Ibid*, s 26(1.1).
61 *Ibid*, s 26(2).
62 Lucas & Bell, *supra* note 2 at 35.
63 *Ibid* at 51.
64 *Ibid* at 37-38.

Whatever may have been the justification for this conclusion in 1977, this has clearly not been the case in recent years. Based on personal experience over 14 years, there was no "working relationship"[65] between Cabinet and the NEB during that time.

Indeed, if it were the case that the basic "go" or "no go" decision is made by Cabinet before a decision by the Board, the obvious question would be why the government thought it necessary to initiate the recent amendments to the *NEB Act*. Presumably those amendments were sought precisely because, under the old section 52, Cabinet did not have the authority to make the "go" or "no go" decision. This is at least implicit in the Minister's statement to Parliament regarding why the amendment was being sought.[66]

Whatever may have been the case in the past, recent practice supports the conclusion that the Board's advisory functions under Part II of the *Act* do not jeopardize its independence in its regulatory role. The Board's decision-making authority, based on a broad mandate to determine the public interest, combined with its structural independence, resulted in the Board's decisions being largely insulated from the political process. Parliament can, of course, always amend or repeal the legislation establishing a subordinate agency[67] and, therefore, there can never be an absolute guarantee of entrenched independence. It can be argued, however, that the *NEB Act*, prior to its recent amendment, provided as much of a guarantee as is possible within the framework of Parliamentary supremacy. Indeed, the very fact that it was necessary to resort to Parliament to change the NEB's role in the regulatory process should be seen as supporting that conclusion.

VI. 2012 AMENDMENTS

A. RECOMMENDATIONS VERSUS DECISIONS

Section 52 of the *NEB Act*, as amended recently by the 2012 Budget legislation,[68] now reads:

> (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
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> (*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 is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and
>
> (*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.

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65 *Ibid* at 38.

66 *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146 No 115 (2 May 2012) at 7471 [2 May 2012 Debate]. The Minister's statement is quoted at note 110.

67 See *supra* note 10.

68 *Jobs, Growth and Long-Term Prosperity Act*, *supra* note 16.

(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;

(*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.[69]

The Board's broad public interest mandate has been preserved. However, the Board's role is now explicitly to make a recommendation, rather than a decision.[70]

Under the recent amendments, it is still the Board that issues a certificate of public convenience and necessity, but only after an order by the GIC directing the Board to do so is made.[71] The GIC may also direct the Board to dismiss an application. As is discussed further below, in either case, such a direction may be contrary to the Board's recommendation. Thus, while the Board will continue to issue certificates of public convenience and necessity, it will do so only after, and in accordance with, a decision by the GIC to approve or reject an application for a certificate, taking into account the Board's recommendation on the matter. It is noted, however, that the GIC still cannot directly modify a Board recommendation, as will be discussed.

The steps in this process require elaboration. Firstly, under the new section 52(1), after satisfying itself that an application for a certificate for a pipeline is complete, the Board shall prepare and submit to the Minister, and make public, a report setting out its recommendation as to whether or not the certificate should be issued and the reasons for that recommendation. The Board is also required to include in its report the terms and conditions that it considers necessary or desirable to which a certificate should be subject if the GIC, contrary to the Board's recommendation, were to direct the Board to issue the certificate.[72]

A second step may then follow under section 53(1), which empowers the GIC, "by order,"[73] with reasons set out in the order,[74] to refer the Board's recommendation, or any of

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69 *Supra* note 1.

70 A similar change was *not* made with respect to the Board's authority to issue certificates of public convenience and necessity for designated international power lines. The Board's authority continues to be to issue certificates for such projects, "subject … to the approval of the Governor in Council": *NEB Act*, *supra* note 1, s 58.16(1).

71 *Ibid*, s 54(1).

72 *Ibid*, s 52(1)(*b*).

73 The phrase "by order" engages the formalities that are required under the federal *Statutory Instruments Act*, RSC 1985, c S-22.

74 *NEB Act*, *supra* note 1, s 54(2).

its proposed terms and conditions, back to the Board "for reconsideration."[75] The GIC order may direct the Board, in its reconsideration, to take into account any factor specified in the order. The Board shall then, after reconsideration, submit a further report to the Minister in which it shall either confirm its recommendation or make a different recommendation or, where a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one. Again, the Board shall also set out in its report the terms and conditions that it considers desirable in the event that the GIC, contrary to the Board's recommendation, directs that a certificate be issued.

Yet a further direction to the Board may follow to reconsider its reconsideration, following the same provisions that apply to a first round of reconsideration and applying *mutatis mutandis*.[76]

After the Board has submitted its report, either at first instance or following the reconsideration steps described above, the GIC may then, by order, direct the Board to issue a certificate or to dismiss the application. Where the GIC direction to the Board is to issue a certificate, the Board is also directed to make the certificate "subject to the terms and conditions set out *in the report*."[77] The only report referred to is that of the Board to the GIC, and the effect of this provision is, therefore, that the GIC cannot change the terms and conditions proposed by the Board. The GIC can, however, influence those terms and conditions through the reconsideration steps discussed above, which can explicitly authorize the GIC to refer back to the Board, not only the Board's overall recommendation, but also "any of the terms and conditions."[78] The GIC order to the Board to reconsider can also direct the Board "to conduct the reconsideration taking into account any factor specified in the order."[79] At the end of the day, however, a certificate issued by the Board under the new provisions will be subject to the terms and conditions that were ultimately determined by the Board. At the same time, it is clear that the Board may, contrary to the Board's recommendation, be directed to issue a certificate of public convenience and necessity or to dismiss an application for a certificate.

The GIC is not required, before directing the Board to issue a certificate or dismiss an application, to direct the Board to reconsider the recommendations in the Board's initial report. The GIC is, however, required to include in such an order directing the Board "the reasons for making the order."[80]

Questions that immediately arise are whether the Board would be required by the principles of procedural fairness to conduct another hearing before submitting a further report to the GIC and whether it would be required to provide an applicant with an opportunity to comment on any changes that might have been proposed by the GIC in the certificate. It is the standard practice of the Board, following judicial guidance,[81] to provide draft certificate conditions for comment. The same reasoning that supports this practice would appear to

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75 *Ibid*, s 53(9).
76 *Ibid*.
77 *Ibid*, s 54(1)(a) [emphasis added].
78 *Ibid*, s 53(1).
79 *Ibid*, s 53(2).
80 *Ibid*, s 54(2).
81 *Flamborough (Town of) v Canada (National Energy Board)*, [1987] FCJ no 460 (QL).

apply equally to proposed changes in draft conditions. In this context, section 53(2) of the *Act* empowers the GIC to specify a time limit "within which the Board shall complete its reconsideration."[82] The injudicious use of this power could seriously constrain the Board in the processes that it might otherwise adopt for processing an order by the GIC to reconsider the Board's report.

The recent amendments to the *NEB Act* directly reverse two of the direct consequences of the original formulation of the Board's authority to issue a certificate of public convenience and necessity. Previously, a denial of an application by the Board was the end of the matter, as discussed earlier; such a denial did not require any approval by the GIC. Now, a recommendation by the Board to deny an application for a certificate not only reaches the GIC, but may be rejected, and the Board may be directed to issue a certificate nevertheless. Secondly, the reconsideration process introduced by the amendments means that the GIC can also pursue the *modification* of Board terms and conditions, although the GIC cannot directly rewrite the terms and conditions as ultimately recommended by the Board.

B. MANDATED TIME LIMITS

The 2012 amendments to the *NEB Act* have also imposed on the Board significant procedural constraints revolving around the imposition of time limits. The Chairperson is given extraordinary authority to issue directives to the members assigned to deal with individual applications. The Chairperson also now has the responsibility of assigning members to panels, something that was previously done by the full Board.

Time limits for dealing with applications for certificates are initially set by the Chairperson. However, limits must be no longer than 15 months after the day on which the Board concludes that an applicant has provided a complete application.[83] Periods during which the applicant is required to provide further information or undertake studies may be excluded from the time limit "with the Chairperson's approval."[84] The Minister may extend a time limit "by a maximum of three months" and the GIC may "further extend the time limit by any additional period or periods of time."[85]

Section 6(2.1) of the revised *Act* empowers the Chairperson to issue directives to the members authorized to deal with an application "[t]o ensure that an application before the Board is dealt with in a timely manner."[86] This statement of the provision's goal is reasonably specific ("in a timely manner") and the marginal note reads: "Directives regarding timeliness."[87] However, the operative phrase states that the "Chairperson may issue directives to the members authorized to deal with the application *regarding the manner in which they are to do so*."[88] Grammatically, this reads as a reference back to the phrase "deal with the

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82 The provisions dealing with time limits are discussed further in Part IV.B.
83 *NEB Act*, *supra* note 1, s 52(4).
84 *Ibid*, s 52(5).
85 *Ibid*, s 52(7).
86 *Ibid*, s 6(2.1).
87 *Ibid*.
88 *Ibid* [emphasis added].

application"[89] and, as such, could be interpreted as empowering the Chairperson to direct a panel how to deal with a specific application beyond addressing time limits as such.

There is, however, little doubt about the extraordinary scope of the Chairperson's authority under section 6(2.2):

> If the Chairperson is of the opinion that a time limit imposed under any of sections 52, 58 and 58.16 is not likely to be met in respect of an application, the Chairperson may take *any measure that the Chairperson considers appropriate* to ensure that the time limit is met, *including*
>
> (*a*) removing any or all members of the panel authorized to deal with the application;
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> (*b*) authorizing one or more members to deal with the application;
>
> (*c*) increasing or decreasing the number of members dealing with the application; and
>
> (*d*) specifying the manner in which section 55.2 is to be applied in respect of the application.[90]

The section blatantly repudiates the fundamental principle that he or she who hears must decide. Indeed, the amendments implicitly acknowledge as much by attempting to forestall any challenge:

> (2.4) If the composition of the panel dealing with an application is changed as a result of any measure taken under subsection (2.2),
>
> (*a*) evidence and representations received by the Board in relation to the application before the taking of the measure are considered to have been received after the taking of the measure; and
>
> (*b*) the Board is bound by every decision made by the Board in relation to the application before the taking of the measure unless the Board elects to review, vary or rescind it.[91]

The Minister may issue directives to the Chairperson to specify a time limit or to take action under these provisions.[92]

These provisions are a direct denial of the independence of NEB panels as masters of their own procedure.[93] Indeed, the amended *Act* is explicit in its intention that fairness must yield to expediency:

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89 *Ibid*.
90 *Ibid*, s 6(2.2) [emphasis added].
91 *Ibid*, s 6(2.4).
92 *Ibid*, s 52(8).
93 In *Prassad v Minister of Employment and Immigration*, [1989] 1 SCR 560 at 568-69, Justice Sopinka for the majority said,"As a general rule, [administrative] tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

> 4) Subject to subsections 6(2.1) and (2.2), all applications and proceedings before the Board are to be dealt with *as expeditiously as* the circumstances and *considerations of fairness permit*, but, *in any case, within the time limit provided* for under this Act, if there is one.[94]

It may be asked, therefore, if there are grounds on which to challenge any of these provisions. However, no such grounds are obvious. The Supreme Court was unequivocal in its view in *Ocean Port* that "all principles of natural justice … may be ousted by express statutory language or necessary implication."[95] The intention of the time limit provisions of the amended *NEB Act* could hardly be clearer.

Furthermore, while the distinction between judicial and administrative functions has been less significant since the decision of the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,[96] the nature of the specific function in issue is relevant in determining the content, or level, of procedural fairness that is appropriate in a particular case.[97] It should be recalled, therefore, that the nature of the Board's function with respect to pipeline certificate applications has been fundamentally changed by the recent amendments. Whereas previously the Board was a decision-maker with respect to applications for certificates, now its role has been relegated to that of making a recommendation, through the Minister, to the GIC. Many of the hallmarks of the Board's formal status as a quasi-judicial, decision-making authority are still found in the *Act*.[98] There is, however, no doubt that its function — as distinct from its formal status — is no longer as a decision-maker. This, combined with the explicit intention that timeliness prevails over fairness, could present an insurmountable obstacle to arguing successfully that the *Act*'s curative provisions must yield to the underlying principles of procedural fairness.

The recent amendments expressly exclude Board reports under the amended section 52 from the *Act*'s provisions for appeals to the Federal Court of Appeal. Section 22 of the *Act* provides for an appeal, with leave, to the Federal Court of Appeal from "a decision or order of the Board."[99] Section 22(4) provides that no report submitted under section 52 or 53 and no part of any such report "is a decision or order of the Board" for the purposes of section 22(1).[100]

It also appears unlikely that either the *Canadian Charter of Rights and Freedoms*[101] or the *Canadian Bill of Rights*[102] could be invoked; it is not apparent how NEB certificate proceedings would infringe any of the protected rights and fundamental freedoms. The further statement by the Supreme Court in *Ocean Port* should be noted: "While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not."[103]

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94 *NEB Act*, *supra* note 1, s 11(4) [emphasis added].
95 *Ocean Port*, *supra* note 11 at 794.
96 [1979] 1 SCR 311.
97 See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
98 For example, under section 11 of the *NEB Act*, the Board is a court of record with the powers of a superior court of record and, under subsection 24(1), its certificate hearings must be public.
99 *Ibid*, s 22(1).
100 *Ibid*, s 22(4).
101 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].
102 SC 1960, c 44.
103 *Ocean Port*, *supra* note 11 at 795.

They may also fundamentally alter the nature of the relationship between the Chairperson and Board members. Previously, the Chairman,[104] while having additional responsibilities as the Board's chief executive officer,[105] was considered to have no special status with regard to the exercise of the Board's regulatory mandate. In addition to the direct intrusions into the mastery of panels over their own procedure, the new authority of the Chairperson to intervene in the work of individual panels undermines their independence.

The changes might also lead to more interaction between the Chairperson and the Minister's office with respect to the progress of individual applications through the regulatory process. As already noted, the Minister may issue directives to the Chairperson specifying time limits and directing the Chairperson to take measures to meet time limits.[106] During his second reading speech on the amendments, the Minister stated: "We have consulted with experts, including Gaétan Caron, the chairman of the National Energy Board, so we are comfortable that the delays, the timelines, are in fact adequate."[107] This may suggest a more direct ongoing role for the Minister's office in the Board's processes.

C. EFFECT ON NEB INDEPENDENCE

What general conclusions, then, can be drawn about the extent to which the Board's independence has been undermined by the recent amendments to the *NEB Act*? There are three levels at which the question should be addressed.

First, the finality of Board decisions is gone. There is no longer any independence from the political level of government with respect to the ultimate decision to approve or reject a proposed pipeline project. Indeed, it was the very purpose of the amendments to remove the Board's authority to make the ultimate "go" or "no go" decision on major energy pipeline projects and to vest that authority in the Cabinet. To the extent that "independence" means that regulatory decisions taken outside of — and independently of — the political level of government are final, there has been a complete negation of the Board's independence. The Board now makes recommendations, not decisions, with respect to the issuance of pipeline certificates.

Second, the reconstitution of the Board as a body that makes recommendations to the ultimate decision-maker — rather than making those decisions itself — could have a subtle, indirect effect on the perception of the Board's independence. Some may believe that, as a body that makes a recommendation to the final decision-maker, the Board could be more susceptible to being influenced by what it perceives to be the likely final outcome. Only time and experience will tell. Further, the process whereby the GIC can refer a recommendation back to the Board for reconsideration (not just once, but twice) could result in indirect influence, or even pressure, on the Board to modify its previous recommendation.

Third, the amendments seriously encroach on the Board's procedural independence, both directly and indirectly. The imposition of time limits and the extensive discretionary

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104 The title "Chairman" was changed by the recent amendments to "Chairperson."
105 *NEB Act*, *supra* note 1, s 6(2).
106 *Ibid*, s 52(8).
107 2 May 2012 Debate, *supra* note 66 at 7471.

authority of the Chairperson to take measures to ensure that such limits are met — including the removal of panel members — are direct denials of the independence of Board panels with respect to the mastery of their own procedure. Indeed, the amendments recognize as much, by including certain "curative" provisions.

The amendments dealing with Board procedures may also operate less directly to undermine the degree of independence with which Board panels operated previously. For example, the pressure to meet an externally imposed deadline could seriously hamper the panel in giving as complete reasons for its conclusions as it otherwise might. This may have a detrimental effect on the quality of panel contributions to the overall review process.[108]

Another indirect effect on the independence of panels could arise from the significant changes in the authority of the Chairperson with respect to individual panels, including the power to remove any or all members from a panel. A board member may still only be removable from the Board by a joint vote of the House of Commons and the Senate, but is now vulnerable to removal from a panel where the Chairperson is of the opinion that a time limit, specified by the Chairperson, is not being met or the Chairperson is directed by the Minister to take measures to meet time limits.

Overall, it must be concluded that recent amendments to the *NEB Act* have fundamentally changed the independence of the Board. The Board is no longer a decision-maker with respect to applications for certificates of public convenience and necessity for pipeline projects. It can no longer be said of the Board that it is independent in the sense of finality of a decision taken by a regulatory agency independently of the political level of government. Nor can it be said that the Board continues to be the master of its own procedure. What effect these changes will have on the stature of the Board and on the vulnerability to legal challenge of its regulatory activities with respect to pipeline projects will only become apparent with experience.

VII. "INDEPENDENCE" REVISITED

A. NATURE OF ENERGY DEVELOPMENT DECISIONS

Against the backdrop of the proposed Northern Gateway Project, it might be tempting to characterize this fundamental change in the NEB's role as a frontal assault on the concept of independence — a politically motivated wresting of final authority away from an arm's length decision-maker and a reassignment of that authority to the political forum of the Cabinet. Such a view might be fed by a perception in some quarters that the federal

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[108] Here it is worth noting a current example. It was reported in March 2013 that the Alberta government had rejected a request from Justice John Vertes, the head of the commission of inquiry into queue-jumping in the Alberta health system, for a six-month extension to his Commission's deadline of 30 April 2013. See e.g. Dawn Walter & Josh Wingrove, "Alberta Government accused of interfering in independence of health-care probe," *The Globe and Mail* (28 February 2013), online: Globe and Mail <http://www.theglobeandmail.news/politics/alberta-government-accused-of-interfering-in-independence-of-health-care-probe/article9196758>, where Justice Vertes was quoted in press reports as saying: "Not only is such a rejection unprecedented, it borders on an interference with the independence of the commission, since it requires me to rush through a report that would not be as complete or thorough as I would want." The government later relented and granted the extension requested.

government has already concluded that the Northern Gateway Project should be approved in the national interest.

It is clear that the 2012 amendments have transferred authority to the Cabinet, and relegated the role of the NEB to making a recommendation — that was their purpose. Furthermore, it seems obvious that the immediate driver for making that change was the government's view that it should have the final say in the face of a possible rejection of the Northern Gateway Project by the Board. However, perhaps this should not be seen as a rejection of the concept of regulatory independence so much as an inevitable consequence of the changing nature of the fundamental decisions that must be made with respect to major energy resource development projects.

Perhaps more than at any time in the past, such decisions truly engage the public, national interest in the widest sense, ultimately based on *choices* that must be made on behalf of society. The issues that are raised by projects such as Northern Gateway are of course many and complex. They include technical issues, such as pipeline integrity and safety. They also include issues in relatively discrete areas where information needs to be gathered and analyzed and conclusions drawn, such as immediate environmental impacts and economic benefits. As the circle widens, issues such as cumulative impacts and sustainability become more challenging, but nevertheless require the assembly of information, the assessment of opinions and, to a significant degree, the exercise of judgment.

Clearly, the regulatory process can and should play an essential role in addressing all of these issues. Evidence should be gathered and presented, and facts should be established in a forum that is conducive to a rigorous and disciplined consideration of the issues and that is as removed from political influence as possible. In many areas, expertise may be essential to coming to properly informed conclusions. Further, providing a forum in which interests can be heard has its own inherent value in a democratic system.

However, not all of the far-reaching issues that are raised by major resource development projects in today's society can be resolved on the basis of facts, evidence, and expert judgment. Conclusions of fact are themselves frequently value-driven and what constitutes evidence is often a matter of judgment. Even in the face of the best science and other information available, whether to approve major resource development projects increasingly requires that fundamental value-based choices be made by society. At the end of the day, they require a balancing of economic, environmental, and social considerations.

Even when the facts have been settled, the evidence assembled, and expert judgments reached, choices must still be made by society. These may revolve around convenient labels such as "sustainability," but ultimately they all require a conclusion by society as to whether, overall, the benefits outweigh the burdens and the risk is one that society is prepared to live with. This becomes all the more a matter of making choices when the benefits and burdens, including risk, may be disconnected across segments of society or geographically.

An independent consideration of the issues, undertaken in a forum that is independent of political influences, can, and should, inform the ultimate choice. Indeed, it is essential to ensuring that the ultimate decision is based on the best available information and the fullest

consideration of all of the issues. An independent review should also play an important role in limiting the risk that the ultimate decision might be made arbitrarily. A decision that is contrary to a recommendation resulting from an independent review process will demand explanation. In that respect, the regulatory process lays the foundation for accountability on the part of the ultimate decision-maker. It should be recalled here that the amended *NEB Act* requires the GIC, when directing the Board to either issue a certificate or to dismiss an application, to set out reasons in its order.[109]

B. WHO SHOULD DECIDE?

The question that then arises is: who should make such choices on behalf of society? The government's answer is found in the following, succinct statement by the Minister in debate on the amendments in the House of Commons:

> 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
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> …
>
> 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.[110]

It is difficult to disagree with this view as a statement of principle.

The Minister's statement also noted that the approach proposed for the NEB henceforth was "already the case for the vast majority of decisions across government, including under [the *Canadian Environmental Assessment Act*]," [111] thus confirming that the old section 52 conferred a somewhat unique status on the Board.

As seen in the discussion above, the NEB was established with a wide mandate to make a decision based on its view of the Canadian public interest. But the Board's view cannot be anything more than that: its view of the public interest. It is to be noted that the composition of the Board — as expert as it may be and even as independent as it may have been prior to the recent amendments — is hardly representative of Canadian society, yet it is Canadian society at large that must make, and live with the consequences of, the choices that major resource development projects require. The Board's view, based on its expertise and its review of a project through the hearing process, is an essential input into the process of making societal choices. However, it is not the appropriate forum to which society might delegate final decision-making authority on the fundamental choices that must be made.

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109 *NEB Act*, *supra* note 1, s 54(2).
110 2 May 2012 Debate, *supra* note 66 at 7471.
111 *Ibid*.

The question then returns to a discussion of the proper role of the Board in a system where it is not the ultimate decision-maker. Its role should be to contribute to the best understanding of the economic, environmental, and social implications of proposed resource development projects that come before it. It can do so by providing an independent forum for the gathering and analysis of information, on the basis of which it can contribute its own expertise, form judgments, offer opinions, and make recommendations. The value of its contribution to the ultimate decision on a particular project will be determined by the independence, integrity, and rigour of its processes.

An independent agency can come to its conclusion as to the proper balance between the fundamental considerations of economic development, protection of the environment, and impacts on society, but is it the proper forum in which a final decision should be made on society's behalf? In the context of reviewing major resource development projects, "independence" should not be defined by the finality of an agency's decision but by the integrity of the process that culminates in a "recommendation."

VIII. CONCLUSION

The pursuit of regulatory independence first requires a clear understanding of what is meant by "independence." Do we mean independent in the sense that regulatory decisions — taken outside of and independently of the political process — are final and are not subject to further review at the political level of government? Or do we mean independent in the sense that the agency's process for arriving at its conclusions is at arm's length from the political level and observes the other requirements of procedural fairness? The answer should depend in no small measure on the nature of the decision that is the ultimate outcome of the process. This will, in turn, help determine who should ultimately make the final decision. Once these questions are answered, attention can focus on the details of structuring the process, defining clearly the roles of each of the actors in the process and then designing safeguards to protect the degree of independence that is appropriate for each of those actors, having regard to its defined role. "Independence" should be defined with reference to the *process* that is appropriate for its specific mandate and whether that process is protected from political interference, and not by whether the ultimate *decision* is beyond the political process.

What, then, are the answers to the questions posed at the outset based on the experience with the *NEB Act*. Is independence achievable? Yes. The *NEB Act*, as enacted in 1959 and as it remained until the recent amendments to the *Act*, enacted a formula for the issuance of certificates of public convenience and necessity for pipeline projects that conferred on the Board the authority to make a final decision, subject only to the requirement for approval of an affirmative Board decision by the GIC. The *Act* also supported the procedural independence of the Board with a number of measures, including security of tenure for Board members. The combined effect of these two features (what was essentially the finality of Board decisions and the procedural safeguards) was a Board that was probably as independent as is possible within the limitations inherent in the principle of the sovereignty of Parliament. The very fact that the government had to resort to Parliament to enact the recent changes to the Board's role itself supports this conclusion.

What does regulatory independence mean? In the context of reviewing major resource development proposals, independence should be examined with regard to the process of the relevant agency and not by reference to whether the outcome of that process is itself final.

Should we pursue regulatory independence? Yes. Independent regulatory review processes, outside of, and independent of the political process, are essential to ensuring that a full record is developed, that the issues are fully explored from all perspectives in a rigorous and disciplined forum, and that recommendations are fully reasoned as the outcome of this process. It is submitted that it is not, however, appropriate that we pursue regulatory independence in the context of reviewing major resource development projects in the sense that a regulatory agency would make a final "go" or "no go" decision outside of and beyond recourse to the political level of government. The ultimate decision on such projects requires that society make choices —choices that are well-informed through the regulatory process, but that should not be delegated to an agency that is not directly accountable.

Critics of this view will argue that the value of an independent review is diminished if the outcome can simply be ignored by a final decision that is ultimately taken at the political level. However, the criticism is ill-founded. Cabinet would ignore the outcome of an independent process at its peril, which is not to say that it must consider itself bound by the outcome. Indeed, this reality is reflected in the scheme introduced into the *NEB Act* by the recent amendments. Under that scheme, Cabinet might ultimately reject a recommendation by the NEB, but would likely do so only after following the process in the amended *Act* allowing the GIC to order the Board to reconsider its recommendation or any of the proposed terms and conditions.[112] Furthermore, where the GIC ultimately directs the Board to issue a certificate or dismiss an application, the GIC order must set out the reasons for the order. Where the order is to issue a certificate, the certificate would be subject to the terms and conditions set out in the Board's ultimate report to the GIC[113] under section 54 (1). Together, these measures lay a foundation for Cabinet to be held accountable for its ultimate decision. They could, however, also operate to apply indirect pressure on the Board to come to a different conclusion as a result of its reconsideration at the direction of Cabinet. The Board should be alert to the possibility that Cabinet could seek to use the reconsideration process in an attempt to support its own direct accountability.

The independence of the NEB must now be understood differently. The Board has a fundamentally different role with respect to applications for pipeline projects within its jurisdiction. That role is as a body that makes recommendations to Cabinet, rather than as a decision-maker. Even within that redefined role, however, the Board's independence has been seriously undermined by the imposition of time limits and the discretionary authority of the Chairperson to intervene in the process of an individual panel to ensure that those time limits are adhered to. Only experience will demonstrate whether the perception of the Board as being independent will be maintained within its new role and whether other elements of the recent amendments will be sufficient to hold Cabinet accountable for the ultimate decision-making authority that it has now assumed.

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[112] As noted above, the GIC is not required to refer a recommendation back to the Board before directing the Board to either issue a certificate or dismiss an application, contrary to the Board's recommendation.

[113] *NEB Act*, *supra* note 1, s 54(1).

Given the fundamental nature of the decisions that must ultimately be made in approving major resource development projects in today's society — requiring that choices be made on behalf of society — it was probably inevitable that the locus of such decision-making would be shifted away from the Board and vested in the Cabinet, with the Board's role in the process being redefined. The question that only experience with the new model will answer is whether there are sufficient protections to respect the requirements of procedural fairness and to keep the Board at arm's length from the political process. On the face of the legislated changes, it appears they may have overreached in providing opportunities for undue government influence over the Board and in infringing upon the mastery of the Board over its own procedures.

A controversial pipeline project in the 1950s was a major factor in the Board being established by Prime Minister Diefenbaker's government to, in the Prime Minister's words, "operate beyond any suggestion of control in any way."[114] It is perhaps ironic that, more than 50 years later, another controversial pipeline project would be the immediate catalyst for rejecting that very underpinning of the Prime Minister's vision for a truly independent National Energy Board.

[114] See 26 May 1959 Debate, *supra* note 52 at 4020.