Who decides: what, when and how?
The Challenge in Getting It Right
(and some implications of getting it wrong)

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Positive Energy Virtual Conference, June 1st, 2021
A case study: NGTL 2021 expansion project

- Since 2012, role of NEB/CER to recommend approval or rejection (not to decide)
- CER recommended approval (with extensive conditions)
- Following comprehensive public hearing process
GIC (cabinet) decision

• Project approved

but

• Conditions recommended by CER amended
• New condition added
• New condition had been expressly rejected by CER
Cabinet decision based on Crown consultation report

- CCR prepared by Natural Resources Canada (NRCan)
- No public process
- Further consultations by NRCan
In the result:

- Recommendation of independent expert regulator rejected ("overruled")
- Non-transparent process (with further private consultations)
- Little accountability
Responsibility for Crown consultation

• Integrating the duty to consult with principles of regulatory effectiveness and procedural fairness
• Breach of procedural fairness by cabinet
Looking ahead

- Emerging role of CER in fulfilling Crown duty to consult
- CER as agent of the Crown
- Cabinet may be less likely to intervene based on internal advice
- NGTL North Corridor expansion project
Role of the regulator

• What exactly is the role of the regulator when its recommendations can be rejected on the basis of other non-transparent advice?
• What of “effectiveness” of the overall regulatory framework?
• Are there measures that would retain cabinet as the final decision-maker while maintaining transparency, accountability and the integrity of the overall process?
THANK YOU!