

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

Rowland J. Harrison, Q.C., Faculty Affiliate, Positive Energy

Positive Energy Virtual Conference, June 1<sup>st</sup>, 2021

POSITIVE ENERGY

CANADA'S ENERGY FUTURE IN AN  
AGE OF CLIMATE CHANGE



uOttawa

# 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!

