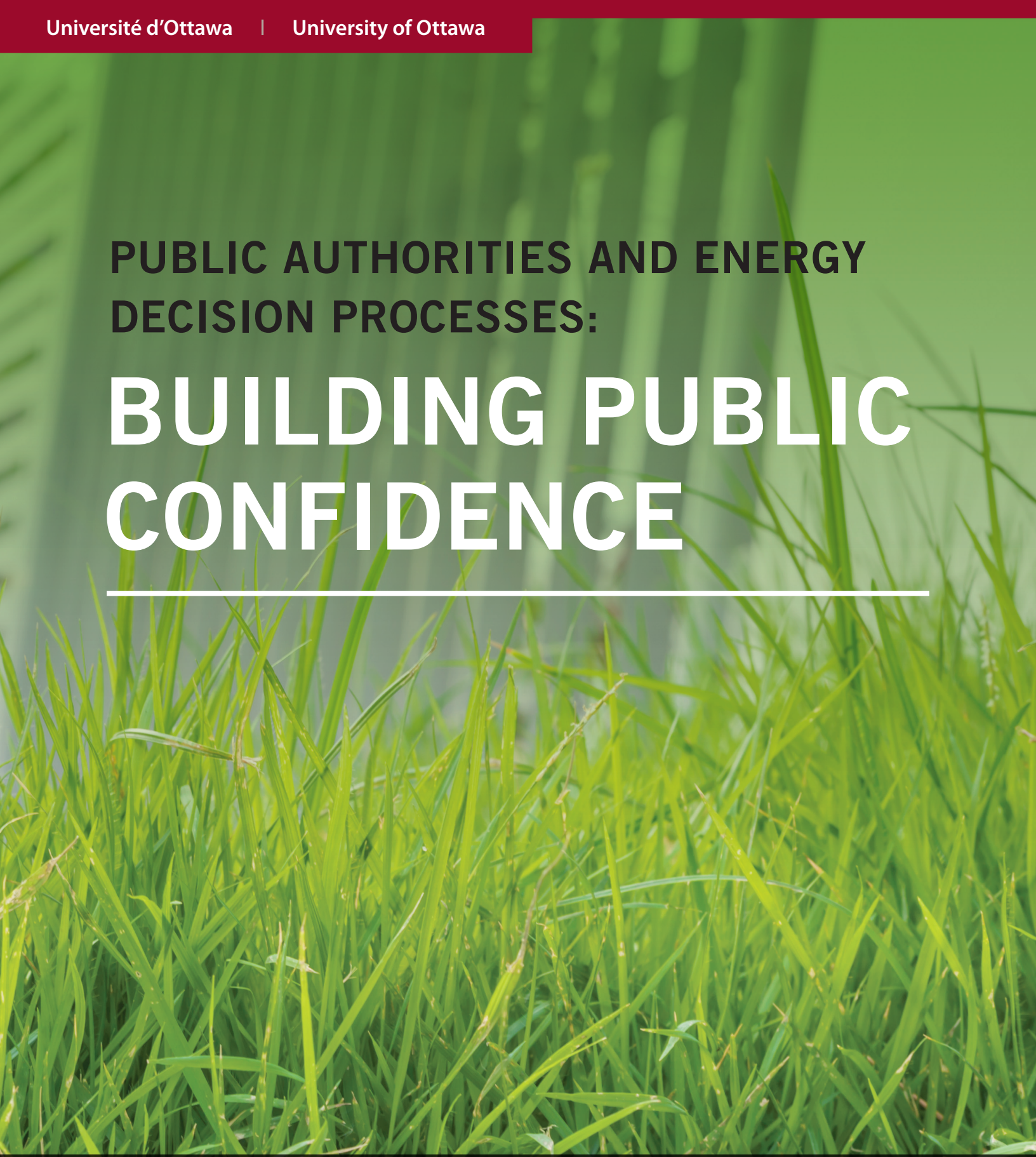

# PUBLIC AUTHORITIES AND ENERGY DECISION PROCESSES:

# BUILDING PUBLIC CONFIDENCE

MAY 2016

uOttawa

We would like to thank the members of the Public Authorities' Project Advisory Group who reviewed and commented on earlier drafts: Professor Loleen Berdahl (University of Saskatchewan), Shawn Denstedt (Osler, Hoskin & Harcourt), Professor David Mullan (Queen's University) and Professor Adonis Yatchew (University of Toronto). The following individuals also provided input on the text: Dave Collyer, Monica Gattinger and Brenda Kenny. The comments from all reviewers strengthened the text substantially but responsibility for the final product rests solely with the author.

Positive Energy's financial supporters include:

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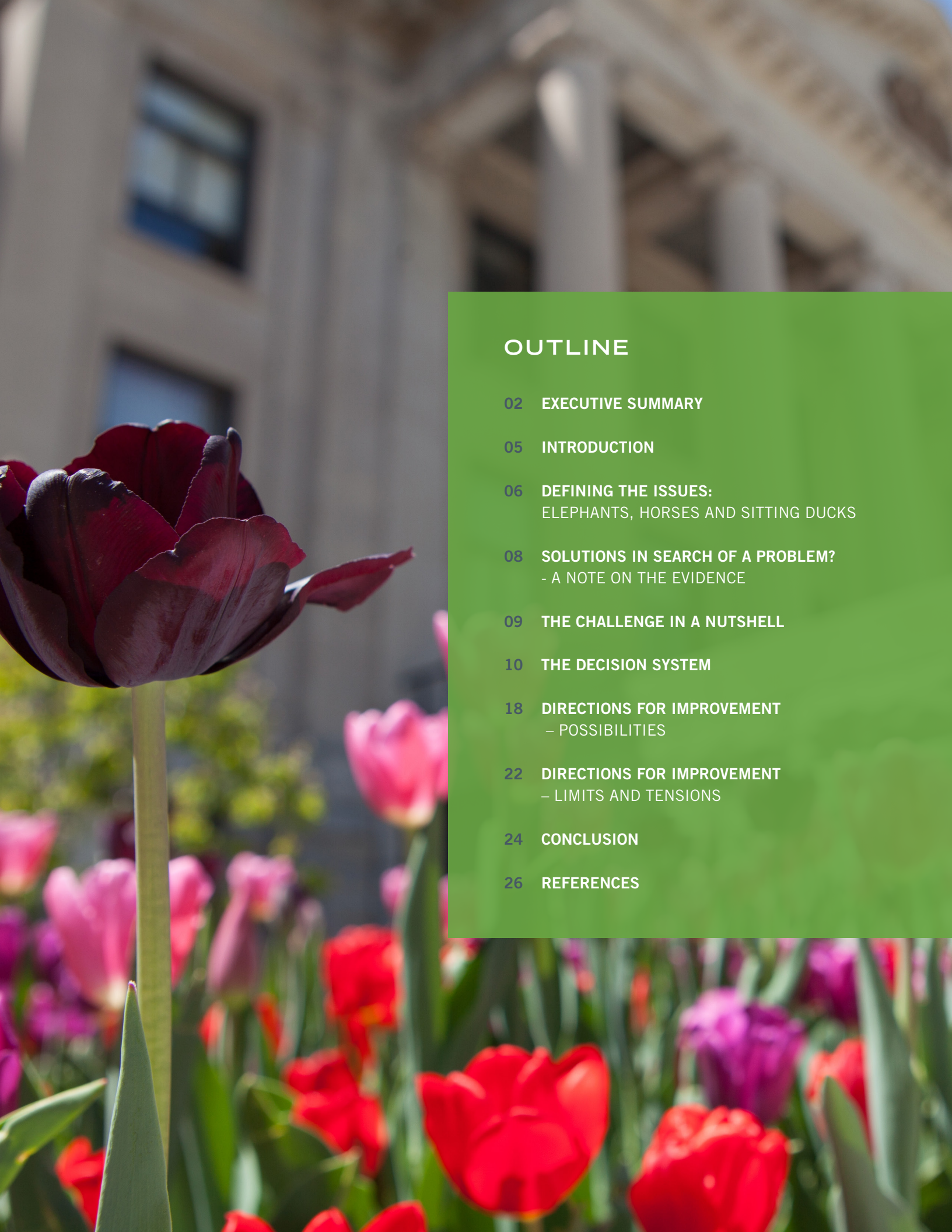
The Canadian Council for Aboriginal Business has graciously provided financial support for this workshop.

Nanos Research is our official pollster and our national media partner is The Globe and Mail.



# OUTLINE

# EXECUTIVE SUMMARY

## Introduction

This paper outlines possible avenues for increasing public trust and confidence in the actions of public authorities responsible for deciding and advising on energy. Jurisdictionally competent public authorities must be the ultimate decision makers in any society governed by the rule of law. But recent debates have implied a role for other actors as, somehow, the actual granters of permission, the results of which are potentially (and very often in experience) incoherent, fundamentally undemocratic, outside any rule of law construct and, finally, inimical to the public interest.

## Defining the Issues

Much of the disruption of traditional decision processes is reflective of very large societal forces including the decline of deference and the rise of distrust; fragmentation and a shift away from broadly communitarian values; and the rise of the zero-risk-tolerance society. All of this, in turn, is bound up in the effects of 21st century communications. These are fundamental forces in society and we have to find ways to work with them.

Within the context of broad societal forces there are several fundamental policy issues that governments have been slow to tackle including climate change, the role of Indigenous communities and effective regional planning. No effort at reforming regulatory processes has any chance of success as long as these large policy issues are left inadequately addressed.

Many of the debates on energy increasingly take the form of a kind of Babel where language is used loosely and ambiguously, where fact is subordinated to opinion and where wishful thinking and urban myth substitutes for analysis even in the highest reaches of policy making. The question is how can better decision processes contribute to a more coherent debate?

Regulatory processes have often been tasked – far beyond their mandates or their competencies – to accommodate these new realities. But regulatory processes themselves have been slow to adapt and there is much that can be done.

## Solutions in search of a problem? - a note on the evidence

It is always a good idea before tackling a problem to assure oneself that it actually exists.

Although based largely on anecdotal evidence, we believe it can be said with confidence that there is enough of a problem – at the very least a problem of perception - to warrant much more sustained and serious attention than it has received to date.

## The Challenge in a Nutshell

The issues rest most fundamentally on the question of what is in the public interest broadly construed and how that interest can be reconciled with or, if not reconciled, then fairly balanced against narrower interests whether regional, local or specific to particular concerns.

Society and local communities need to feel trust and confidence in decision processes. Trust and confidence, in turn can be thought to flow from a sense that decision processes deliver results that are fair in both substance and process.

But the public interest and the needs of local communities or specific interests are not always convergent. This tension plays out along three dimensions: time, geography and complexity. The public interest - tends to the long term, wide geography and complexity, in contrast to local or issue specific concerns which are often at the other end of all three spectrums.

The question, then, is how can a decision system be structured and how can such a system operate such that it can address itself to the public interest while adequately accommodating local interests or issue specific interests that may be much narrower – but still legitimate and politically salient?

## The Decision system

The decision system is ill understood even by many of the most vocal participants in the debate. The paper lays out a brief description and explanation of this architecture. The most important point is that this system entails both policy upstream of regulatory processes and regulatory processes themselves from project approvals all the way through to decommissioning and abandonment. The issues arise across the full system from upstream to down.

## Directions for Improvement – Possibilities

The paper lays out possible areas for improvement under several categories

- → A refreshed understanding of the Constitution
- → Big policy
- → Planning
- → Framing the regulatory system
- → Information
- → Outreach and engagement
- → Communications
- → Procedure
- → New architecture

## Directions for Improvement – Limits and Tensions

And it offers up some cautions as to the limits.

- → The unresolvables
- → The hard to resolve
- → Tensions and tradeoffs
- → Inherent limits
- → Resources and capacity

## Conclusion

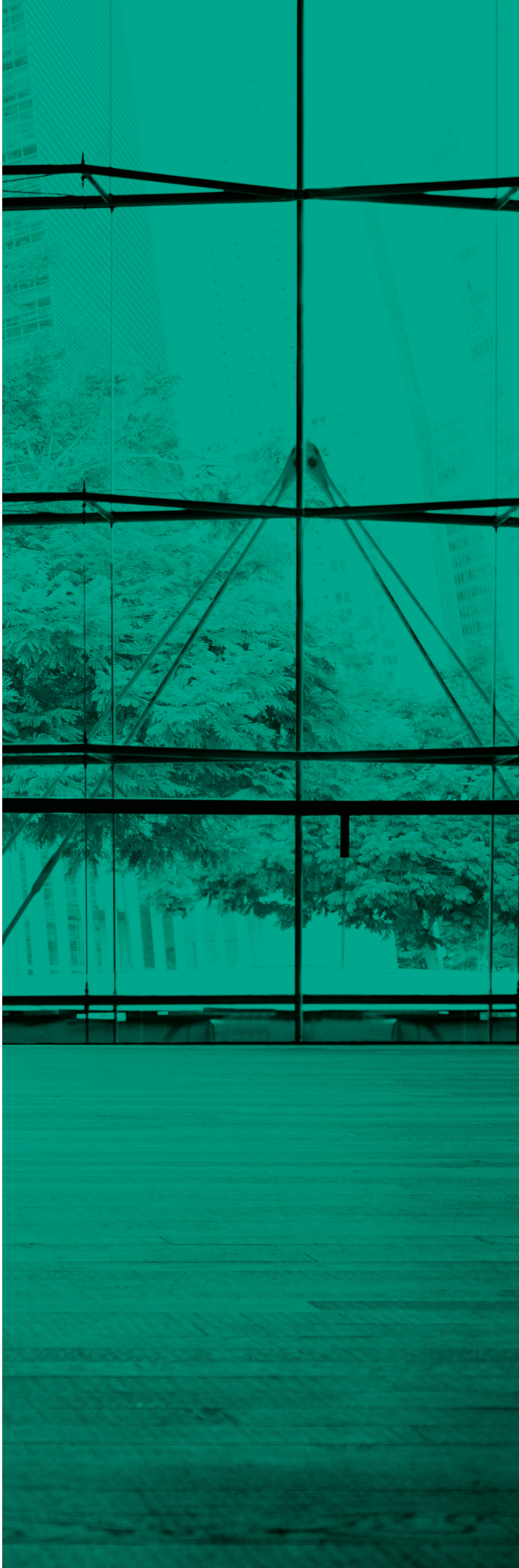
The paper brings it back to the core question as outlined earlier:  how can a decision system be structured and how can such a system operate such that it can address itself to the public interest while adequately accommodating local interests or issue specific  interests that may be much narrower – but still legitimate and politically salient?

We have suggested that a well working system needs a capacity:

- to take a long view, sometimes over multiple decades;
- to encompass wide geography – extending to the whole province, territory or country and sometimes beyond;
- to comprehend the complexity of multiple objectives – economic, environmental, social and security.

In this context, decision processes must get better at grappling with local needs and in particular:

- Understanding and respecting local context
- Understanding and respecting local interests and values
- Providing adequate information
- Offering means of engagement and meaningful dialogue



# INTRODUCTION

The energy decision space can be understood in terms of four interacting cells: project proponents, public authorities, local communities and civil society (Cleland et al, 2016).[1] This discussion paper focuses on public authorities[2] and ways to improve how they function relative to the other actors. In a functioning democracy, public authorities have a crucial role as administrators, arbitrators and – ultimately - decision makers but their legitimate authority as decision makers seems to have come into question of late. The question, then, is how to return formal, legally mandated decision processes to their appropriate roles as the granters of approval.

The actors occupying the other three cells have critical roles to play. Project proponents have recently taken a lead role in creating new approaches to meeting the concerns of local communities, engaging them as partners in the process of developing energy resources and infrastructure. Civil society has played a large role in spotlighting issues of public concern, energizing and (sometimes) informing public debates. Local communities have shifted from roles as largely passive recipients of development to becoming shapers, co-managers and more complete beneficiaries. How each of these sets of actors might improve their own contributions to future decisions would form a research agenda of its own.

We focus on public authorities because they must be the ultimate decision makers in any society governed by the rule of law. Much of the "social licence" debate has centered on proponent action and that has proved constructive. Much has centered on the ostensible role of either civil society or, more often, local communities as contributors to the processes of granting permission and that is constructive. But much has also implied a role for these other actors as, somehow, the actual granters of permission[3] and that is far from constructive because it is potentially (and very often in experience) incoherent, fundamentally undemocratic, outside any rule of law construct and, finally, inimical to the public interest.

But where is improvement needed? What is broken? What needs replacing and what needs mending? There is good evidence for the areas of reform which are most promising and there is good evidence that decision making bodies – regulators and policy makers – have embarked on serious efforts to better align themselves with public needs and expectations (Communities paper). But there has been no systematic effort at research and analysis aimed at the system as a whole and there have been only sporadic efforts at engagement designed to allow debate among the various actors: policy makers, regulators, industry, civil society and local communities including Indigenous communities. The aim of this paper is to begin to frame such an agenda of research, analysis and engagement.

[1] Much of this paper draws from a recent University of Ottawa/Canada West Foundation report entitled "Fair Enough: Assessing Community Confidence in Public Authorities". The term "Communities paper" is used throughout to refer to that document.

[2] By "public authorities" we mean authorities with jurisdictional authority and competence. Depending on the question at hand that could mean various levels of government including aboriginal governments but for the purposes of approving the building and operation of energy infrastructure this most often means federal or provincial governments and their agencies.

[3] The term social licence often seems to carry this sort of implication which is the reason why we generally avoid it in preference to the term "public confidence".

# DEFINING THE ISSUES:

## *elephants, horses and sitting ducks*

In a paper related to this one (Gattinger, forthcoming) we have framed the broad issues in an extended zoological metaphor that seem to us entirely apt. In brief:

The elephants (in the rooms). Much of the disruption of traditional decision processes is reflective of very large societal forces. These form a complex mix whose overall effect has been to make decision processes often more effective at protecting values such as health and safety, heritage and environmental health but also more complex, more intractable, more risky, less stable and (maybe) more democratic but often much less so. The various socio-political forces include the decline of deference and the rise of distrust; fragmentation and a shift away from broadly communitarian values; and the rise of the zero-risk-tolerance society. All of this, in turn, is bound up in the effects of 21st century communications, the fierce competition for the "mental desktop" and the changing nature of discourse.

The role this particular part of the menagerie plays in the debate is largely backdrop. These are fundamental forces in society and we have to find ways to work with them.

But there are still more elephants. Within the context of broad societal forces there are several fundamental policy issues that governments have been slow to tackle. The most fundamental is that we seem to have lost what used to be a firm national consensus concerning the basic value and legitimacy of developing our energy resources such that in many cases no decision except "no" can be seen as legitimate in the eyes of an influential part of the stakeholder community.

The most obvious policy issue and the one that most heavily bears on energy decisions is climate change. The new engagement and empowerment of Indigenous Canadians reflects yet another issue or set of issues where policy makers have been either tardy or reactive, arguably leading both to growing frustration and growing and perhaps unrealizable expectations. Finally, while we have systems and processes in place to deal with transactions one by one, we have fallen short with respect to regional planning and the overall effects of development on the landscape and on local cultures and communities, effects that extend over decades, over multiple activities and over geography at a regional scale.

This part of the menagerie is much more than backdrop and we will return to it as we explore the roles of different public authorities. Suffice to say at this point, no effort at reforming regulatory processes has any chance of success as long as these large policy issues are left inadequately addressed.

The horses (that have left the barns). Many of the debates on energy increasingly take the form of a kind of Babel where language is used loosely and ambiguously, where

fact is subordinated to opinion and where wishful thinking and urban myth substitutes for analysis even in the highest reaches of policy making. Views surrounding the health effects of power plants, the risks of pipeline failures, the solutions to greenhouse gas emissions and the potential for resource rents to sustain a new and much larger system of economic redistribution have all reached a point where there seems little prospect of respectful exchange. Have these horses left the barn? Yes, for now. The question is whether and how reformed decision processes can contribute to the roundup.

The (sitting) ducks. Amidst so many elephants and horses, the others in the barnyard, most notably regulatory processes, are sitting ducks. Regulatory processes are inherently conservative, cautious and prudent. All good we might have argued - until they met up with the forces of a mistrustful, risk intolerant society turbocharged by social media and grappling with seemingly intractable policy challenges. The regulatory ducks stick to their knitting (the mind boggles) - as society and the law say they should, but then society demands that someone take responsibility for failure to deal with greenhouse gas emissions or the rights of Indigenous Canadians. And if the policy makers have flubbed it, then the regulators at least afford forums where people can speak and – it is thought by many - they have ostensible authority to act even where they have no such thing.

In parallel with movement on the policy issues, much can be done with regulatory systems per se. Even within the dangerous context of ponderous pachyderms and unruly ungulates the ducks have ways to act, becoming more nimble and creative and establishing new relationships with others in the barnyard.

In summary, the central issues that must be reckoned with are:

- Public confidence in regulatory decisions is set against a backdrop of often intractable societal and policy challenges
- Agreement that any given decision is “right” or “fair” is elusive and debate has become highly polarized.
- The mandates of regulatory bodies are intentionally limited in scope and that often leaves affected stakeholders frustrated that the “real” issues are not being addressed

# SOLUTIONS IN SEARCH OF A PROBLEM?

*- a note on the evidence*

It is always a good idea before tackling a problem to assure oneself that it actually exists.

There seems little doubt in most people's minds that energy decision processes are, if not broken, then certainly in need of improvement. But despite the fact that we can cite numerous examples (Cleland and Nourallah, 2015, Cleland et al, 2016, Nourallah, 2016) the evidence is still largely anecdotal. The stories of failure loom large in media reportage and in chatter among the commentariat but the stories of success get almost no attention. As it turns out, many energy decision processes evidently do work, at least if the evidence is approval of projects that get built and are operating safely. They also work, or may be said to, if the evidence is projects that get turned down because they lacked societal support and where there were better alternatives. They may be said to work if they deliver results and if the overall profile of cost, time and risk arising from decision processes is within the bounds of tolerance for the majority of investors.

That said, the anecdotal evidence of failures still adds up. The views of senior decision makers across the spectrum as reflected in the Communities paper are compelling, suggesting that the problems are commonplace and growing. Inadequate decision processes can produce real costs to society whether in the form of protracted litigation, compensation for developers of rejected projects, failure to put in place infrastructure needed to deliver domestic energy supplies or failure to respond in a timely and cost-effective manner to export market opportunities. Alternatively, in the view of others, the system falls short of protecting the public interest by failing to prevent significant environmental costs or serious risks to human health and safety.

We believe it can be said with confidence that there is enough of a problem – at the very least a problem of perception - to warrant much more sustained and serious attention than it has received to date. Based on that we suggest that there are potential solutions that could be cost-effective if built on good evidence for the nature of the problem and realism about what can and cannot be fixed within bounds that reasonable people would deem reasonable.

# The Challenge in a Nutshell

We begin with a policy model around which to organize discussion.

The issues rest most fundamentally on the question of what is in the public interest broadly construed and how that interest can be reconciled with or, if not reconciled, then fairly balanced against narrower interests whether regional, local or specific to particular concerns.

Start with the narrower interests because that is the apparent source of the tensions with which decision makers are grappling. In the Communities paper, based on the literature as well as discussions with senior leaders we framed a tentative model. Society at large and local communities need to feel trust and confidence in decision processes. Trust and confidence, in turn can be thought to flow from a sense that decision processes deliver results that are fair in both substance and process based on:

- A sophisticated understanding of context – both the project and the affected community;
- A fair distribution of benefits, costs and risks based on understanding of diverse interests and values;
- An appropriate base of widely available, trusted information;
- A widespread process of engagement and ability for citizens to contribute meaningfully to the decision process.

In turn, the broader public interest needs to be addressed under much the same rubric. Specifically with respect to context, we can say that the tension plays out along three dimensions:

**Time:**

Energy from the public interest perspective is a long game whether it concerns infrastructure with multi-decade lives or shifting to a low carbon energy system. But we make decisions with current information and current attitudes that may or may not still prevail in the long term. And for a local community faced with disruption, fears of health impacts or hopes of jobs it is also a very short game indeed.

**Geography:**

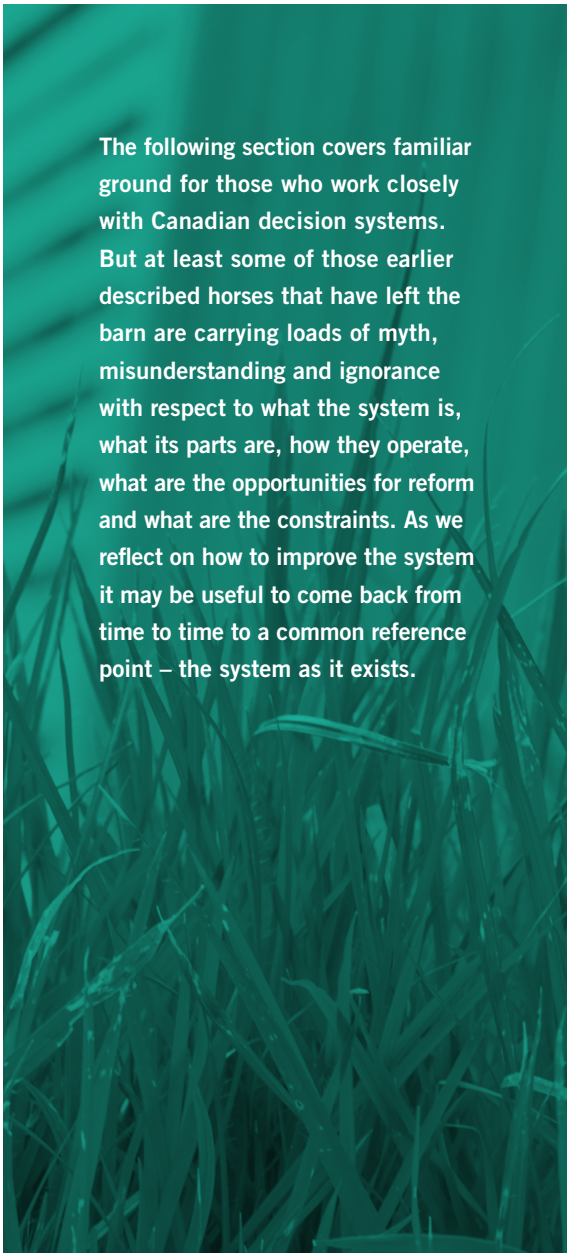
Energy decisions play out over very extensive geography. Whether renewable or not, most energy sources are connected to centers of energy demand over hundreds of kilometers often touching multiple communities and jurisdictions and the effects of energy development often ramify over hundreds of square kilometers - or the entire planet in the case of GHG emissions. But for a local community my back yard is just that.

**Complexity:**

At the level of the public interest energy choices are informed by a constantly shifting, complex mix of assumptions and concerns for economic development; export opportunities; low cost energy supplies; security, reliability and resilience; health and safety; and environmental impacts. For the local community, the individual citizen or the community activist the capacity to process such complexity will be limited and, in any event, often only one or two of those dimensions will be salient and the rest all distractions.

**The question, then, is how can a decision system be structured and how can such a system operate such that it can address itself to the broad public interest while adequately accommodating local interests or issue specific interests that may be much narrower – but still legitimate and politically salient?**

# THE DECISION SYSTEM[4]



**The following section covers familiar ground for those who work closely with Canadian decision systems. But at least some of those earlier described horses that have left the barn are carrying loads of myth, misunderstanding and ignorance with respect to what the system is, what its parts are, how they operate, what are the opportunities for reform and what are the constraints. As we reflect on how to improve the system it may be useful to come back from time to time to a common reference point – the system as it exists.**

One of the challenges in all of this lies in the fact that different people of good faith may have fundamentally different measures of success or failure when it comes to energy projects. The problem, in other words, is not simply a matter of getting things done quickly and economically. It is getting the right things done but not the wrong ones. It is getting the right things done right, meaning with due consideration of costs, benefits and risks and the balance of effects on different groups and individuals. And it is getting to a conclusion in a way that is procedurally fair. After that, it involves ensuring that construction and operation is carried out as safely as possible and with minimal environmental effects. This set of requirements engages a complex set of decision processes and requirements. Some of these are reflections of policy and, therefore, necessarily political; others may be wholly technical and many more entail some mix of the two.

We, therefore, use the term "decision system" advisedly because far too much of the debate concentrates on the "regulatory system" as if it were the only system that matters or as if it were the primary source of the problem. In fact the decision system – call it the policy-regulatory complex – has multiple dimensions.

[4] Note that parts of the following section are extracted verbatim from the Communities paper.

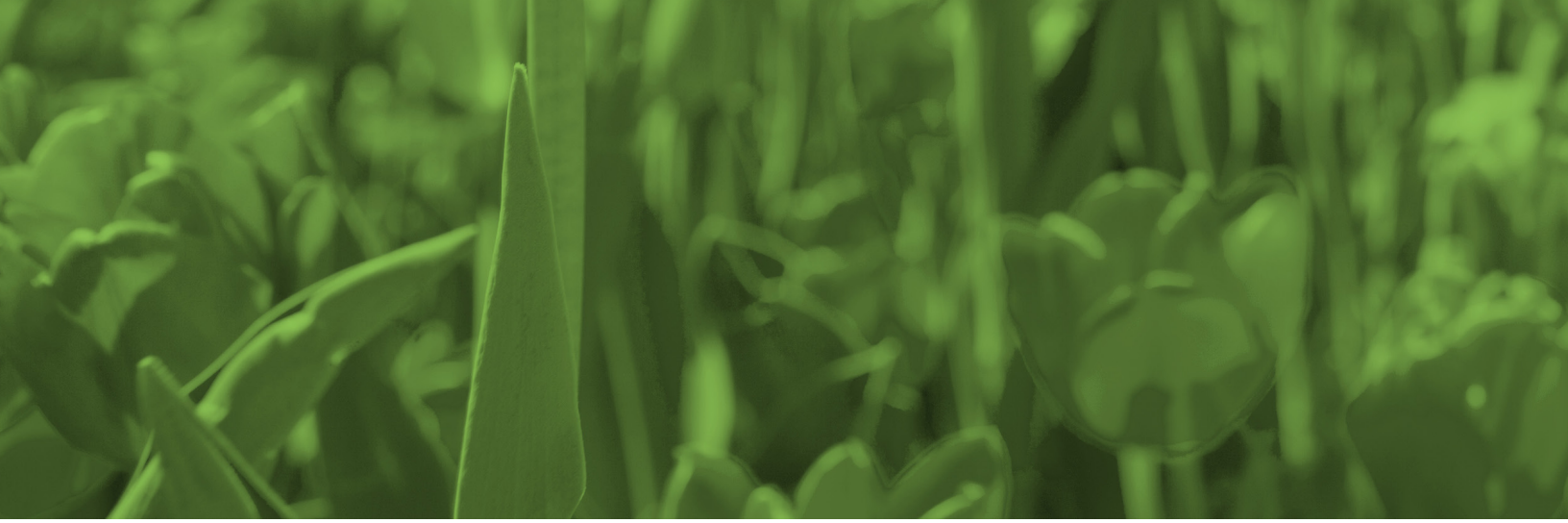
- Start upstream in the realm of high policy and its various operational expressions through program expenditure, taxation and tax expenditure, international treaties and any number of regulations implemented directly under departmental mandates.
- It extends into more granular processes – but which are still essentially forms of policy – through things like regional planning and cumulative effects management, land management arrangements with First Nations and varying forms of "directives" intended to shape decisions in the formal regulatory system.
- It then encompasses a complex mix of more formal and to varying degrees "independent" regulatory processes.
- These processes then extend throughout the full life cycle of the project and all the way to abandonment and decommissioning.

The most basic principle governing all of this is that regulation is not intended to be "prohibition" but rather oversight and management of the public interest aspects of development. A regulatory decision and its associated procedures unavoidably reflect all relevant policy and regulation upstream of the regulatory decision process itself including the fundamental proposition that development – on its face - is in society's interests. Regulators are unavoidably informed by and constrained by these elements.

As reflected in the Communities paper, we undertook a series of interviews with knowledgeable senior people who brought a wide range of perspectives. There was strong consensus on three points which are worth emphasizing.

- We have a problem (with public confidence in the decision system)
- There is need for reform but the system is far from "broken"
- The problem starts with policy, the substance of policy not only process.

Our focus in this paper is necessarily limited to a sub-set of the policy regulatory complex, specifically the formal regulatory systems but it cannot be emphasized enough how important it is to look beyond those systems to the other parts of the complex that bear on them. In order to underscore the point it is worth touching again on the big issues – some of the elephants in the room.



## Policy for an Effective Decision System

As obvious as it seems, Canada needs to revisit the fact that it is a natural resource producing country. Canada will be a resource producing country for many decades and those resources will most likely include hydrocarbons for many decades. Developing those resources will have numerous impacts, good and bad but on balance can be of very great benefit both to local communities and to the nation. Step one is an honest conversation on this matter.

The reasons why climate change policy is seen as a failure would fill many volumes. The reasons why it may well continue to be seen to fail would fill many more – or possibly only a single sentence: we have yet to face the issue honestly and that can be said about both those who argue that we should act hardly at all and those who insist that Canada must achieve dramatic emission reductions in little more than the time it takes to conduct a major infrastructure approval process. Step two in all of this is a new conversation on climate.

Much the same can be said for the fraught relationship between Canada and its Indigenous citizens. The public conversation encompasses myriad conundrums most notably how the rights of hundreds of individual "nations" can be reconciled with a national public interest in developing resources and, most importantly, with building needed linear infrastructure. Step three, particularly in light of the recent government decision to fully recognize the UN Declaration on the Rights of Indigenous People is a new conversation on both the rights and the responsibilities of Canadian communities including Indigenous communities in shaping our national energy economy.

## Aboriginal Engagement Challenges for Public Authorities

While all local communities are concerned with costs, benefits and risks from energy development and with the decision processes associated with them, Aboriginal (or Indigenous) communities have a unique legal position and their expectations reflect that position. Aboriginal groups, First Nations, Mètis and Inuit have constitutionally protected rights which may be traditional rights or treaty rights. Any government action that might impact those rights requires that the government consult with the potentially impacted group. Traditional rights and treaty rights are not absolute, however, and may be infringed by a government, if justified.

Aboriginal (or traditional) rights are those rights that Aboriginal peoples hold as a result of their ancestors' longstanding use and occupancy of the land. Treaty rights are those rights that an Aboriginal group enjoys as a result of having entered into a treaty with the federal government. Some Aboriginal groups, including many in British Columba, have yet to enter into treaties with the Federal government.

All parties including public authorities face a number of important questions in engaging with Aboriginal groups in the course of a regulatory process. The question of who owes the duty to consult with Aboriginal groups is a preliminary question that must be wrestled with. Another challenge is how proponents, government and regulators identify which Aboriginal groups need to be engaged and how that engagement will take place. Affected Aboriginal groups may require funding in order to participate in a regulatory process; the questions of what level of funding is adequate and who pays are important and may impact whether the group can participate meaningfully in this process. The regulator must also determine how to consider and incorporate traditional knowledge from affected Aboriginal groups into the review process and how that fits with western based science. At the same time, some Aboriginal groups may be reluctant, or refuse to share their traditional knowledge in a public process.

Increasingly, some Aboriginal groups have expressed a desire to run independent environmental assessment processes for a project under regulatory review. For example, federal responsible authorities may be required to cooperate and coordinate their environmental assessments with Aboriginal groups that claim to be a separate "jurisdiction" (CEAA, 2012). If an Aboriginal group wants to conduct its own environmental assessment, a question arises about whether the parallel environmental assessments can be coordinated, and what happens if there are conflicting results?

While some groups argue that "free and prior informed consent" implies that states cannot act without the consent of Aboriginal groups, this interpretation is inconsistent with Canadian jurisprudence. Given this, public authorities must consider how this concept can be applied in a way that addresses Aboriginal concerns and remains compatible with statutory authority and Canadian law.

All of these issues and questions are superimposed on the underlying substantive and procedural issues that public authorities must address with all Canadian communities.

The last big policy package centers on questions of regional planning. Done right, regional planning becomes a potential avenue for success in addressing the role of Indigenous Canadians in decision processes and more broadly, addressing the need for decision processes to be based on a thorough understanding of the community context in which projects are established as well as the interest and values of people in those communities. But if regional planning were easy we would see more examples of its application. Step four is a considered debate about where more and better regional planning processes can provide the necessary forums for engaging citizens as well as the necessary frameworks for guiding individual regulatory decisions. All this mindful of the fact that planning processes are constrained by the realities of politics, the rights of land holders and the realities – timeframes, decision processes, questions of investor confidence - of a market economy.

All of these issues and others get addressed in the tangle of jurisdiction in a federal system where a clear division of responsibility on matters relating to the economy, the environment and social issues will forever remain elusive. Federal and provincial, and (increasingly) Indigenous governments all have constitutionally established authorities which affect energy developments. Some of this authority is in turn delegated – to territorial governments or to municipal bodies. Bringing any measure of coherence and efficiency to such a complex weave requires trade-offs and compromises. Sometimes it is better for one or more governments to stay their hand and leave others to do the necessary work, perhaps mindful of our 1867 Constitution and its ostensible guarantee of a Canadian common market. Sometimes a certain measure of duplication is unavoidable if only for reasons of political accountability. More often than not, some form of active intergovernmental collaboration is unavoidable – conceivably making things even more incomprehensible to a lay person.

The important point in all of this is that clichés about overlap and duplication or "one-window" decision making or calumnies about governments failing in their duties when they choose to delegate authority (or not) are unhelpful in this sort of debate. Canada is a complex place and every decision involves a trade off of some sort.

## The Role of Formal Regulatory Systems

Earlier we suggested that there was need for a decision-making system that avoids the perils of "presentism", "localism" or "simple-ism". Where decisions are necessarily political these sorts of perils are inescapable; they are part of a democratic system. But where the questions are not political, the choice of decision system should emphasize, insofar as possible, objective evidence, expertise, and transparent due process. All of these can be found in democratic decision systems but they are found much more often in formal regulatory systems.

Regulators' duties take many forms. Broadly speaking, four essential types of regulation bear most heavily on energy projects.

- Resource regulators oversee the orderly exploitation and management of (usually publically owned) natural resources such as hydrocarbons or water.
- Economic regulators ensure that natural monopolies such as pipes and wires function in the public interest.
- Environmental regulators ensure environmental protection through processes ranging from large scale environmental assessments to precisely targeted emission or spill management regulations.
- Power system regulators oversee establishment and operation of power infrastructure and operations, power being a unique case due to the nature of a system requiring precise real time balancing.

Regulatory bodies take many forms. Some are more independent than others. Departmental regulators are accountable through senior officials and ministers and have limited independence from their political masters.

But they are bound to act and decide as specified in their governing statutes and regulations. The choices they make are largely technical in nature and they are ultimately accountable to the broader polity for adhering to the law. Different jurisdictions may place the same functions in either a departmental form or in an arm's length independent body. In many cases regulator independence provides a useful degree of insulation or political cover. There is no right answer except that the regulatory requirements and the degree of independence need to be clear, understood and adhered to.

Canada makes extensive use of the explicitly independent regulator model especially for natural monopoly regulation, somewhat less so for resource regulation, environmental regulation, and power system reliability management. In general, all independent regulators have certain characteristics in common:

- appointed bodies with defined tenure for individual members;
- expert in their defined fields;
- make decisions under legally established procedures;
- can be given policy direction through various mechanisms such as policy directives or post-hearing processes but in general not directly accountable to elected officials for individual decisions;
- accountable to courts for procedure and adherence to jurisdiction, but not merits.

The above attributes are in a sense archetypal. In practice there is a wide range of different approaches in different circumstances and, more importantly, many inevitable flaws - both real and perceived - when practice meets ideal. Appointment processes may be flawed, lacking objectivity and transparency, and those appointed, however professional they may be, are human beings who bring their own biases with them. As with any institution, regulatory bodies are subject to a certain amount of inbreeding and to being "captured" by those they regulate. The tribunals themselves and their staff are expert (in contrast to courts or to decision making bodies made up of elected members) but their expertise, experience and breadth of perspectives may be limited despite efforts in recent years to expand the range. And, of course, the principle of independence from elected officials for individual decisions appears to have eroded of late in several jurisdictions.

None of this is new; the shortcomings of regulatory systems are the subject of a broad literature (cited in the Communities paper) and over the years, policy makers have often sought to correct them. Regardless, perceptions of this sort inevitably colour the attitudes of outside observers and contribute to the problem of confidence. No suggestion is made here that these institutions are in some sense models of perfection, only that they do have deep roots in public administration theory and administrative law and they have functioned for better more often than for worse over many decades. In past, regulatory agencies have often attracted deference and respect much like courts; the restoration of public trust and confidence would ideally bring some of that back.

Something that should be obvious but does not seem to be well understood is that decision-making necessarily occurs in sequence over time as information accumulates and as a project moves from concept to construction to operation. The public – or some part of it – often expects at any one point in the cycle that all issues are to be resolved at that point and, by logical extension, that all the information needed for all decisions will be known and available.

It is worth recapping the cycle, mindful that these sorts of things are never entirely linear but involve numerous feedback loops. In an ideal world, the pre-regulatory cycle entails articulation of policy and a process of planning - high level, over a broad (regional scale) geography and multiple land uses, over a multi-year or multi-decade time horizon - all working with information much less granular and detailed than is entailed in project decisions. These processes belong principally to the political actors although regulators can play important supportive roles. At the level of specific projects, pre-regulatory processes also encompass the activities of proponents who may engage with communities prior to deciding if, and how, to present regulators with project proposals.

The regulatory process itself has several stages through which decisions and supporting processes and information become increasingly granular. Regulators address themselves to individual projects determining whether or not they are in the public interest (as defined depending on policy and the specific type of regulation), approving or not approving, and applying terms and conditions that must be met before construction. The construction process itself is subject to multiple regulatory requirements and extensive monitoring and enforcement. The decision to begin operations is then subject to regulatory approval and the regulator typically monitors operations and maintenance activities over the life of the project, intervening as needed to correct deficiencies. Further in time, regulatory processes impinge on questions around refurbishment, repurposing, abandonment, decommissioning and replacement.

# DIRECTIONS FOR IMPROVEMENT

*- Possibilities*

As noted, our focus is the formal energy regulatory system; the whole decision system is the topic of a lifetime of work. But as also noted, many of the issues flow from parts of the system – policy and planning – upstream of formal regulation and simply ignoring them is not an option.

A practical way to get at this problem is to think about where the role of the regulatory system may be either advisory or deciding with respect to issues and how the formal regulatory system interacts with the policy system. Herewith a framework of possible topics:

## A Refreshed understanding of the Constitution

Some recent energy debates have proceeded much as if Canada's 1867 Constitution did not exist – in at least two respects. One, and most obvious is the division of powers in Section 91 and 92. Federal jurisdiction over works and undertakings extending beyond provincial boundaries (Section 92(10) (a) and (c)) seems to have gotten lost in the welter of demands for decision authority coming from provincial and even municipal leaders. Perhaps as important is the long ignored Section 121, potentially the guarantee of a Canadian common market. A recent New Brunswick decision on liquor sales may have breathed new life into this provision but in fact courts and scholars have for some time taken the view that its provisions should be broadly construed to encompass all barriers to movement of goods and not limited only to tariffs (Dunsmuir, 1990). What this might say about interprovincial energy flows and the infrastructure necessary for such flows could be of interest in the future.

## Big policy

Big policy is clearly the realm of policy makers – governments and their immediate advisors and, as noted several times, shortcomings in big policy will inevitably persist and redound to the detriment of the functioning of the formal regulatory system. That does not mean that regulators have no roles. In the interviews conducted for the Communities paper one of our interlocutors put it as follows: "Regulators are independent in their decisions but they are not independent of the broader system." In other words, while regulators cannot advocate for policy, they play significant roles in the creation of policy.

Regulatory decisions as they accumulate, particularly in the absence of clearly articulated policy, can create policy de facto. In some cases regulatory processes can address not only individual applications but broader systemic issues in much the same way as public inquiries. Finally, regulators are important sources of information and advice and channels for public information and outreach of which policy-makers should be taking advantage. We expand below on these sorts of roles.

## Planning

Much the same and more can be said with respect to planning as with respect to policy.

## Framing the regulatory system

It is the business of policy makers to decide how to structure regulatory systems. This begins with the choice of legal form. It extends to what functions might be put in the hands of regulators (advisory, analytical, hearing, deciding, oversight, standards-development). And it encompasses what mechanisms are established for policy makers to inform or direct regulators and what mechanisms regulators use to inform policy. Over recent years many governments have acted in ways that have blurred the lines of authority and accountability, compromising the real and perceived independence of regulators and – arguably – contributing in some measure to the erosion of trust and confidence in the system. There is need to reconstruct our understanding of why we have the systems we do and how they can be made to be most effective. After that there is a need for policy makers to stand behind and defend the decision processes they have created.

## Information

Earlier we referred to the problems that arise from a debate increasingly dominated by emotion, opinion and urban myth. In the interviews for the Communities paper this problem was nicely crystallized by one of our interlocutors: "In the past, proponents and opponents based their interventions on fact. Today, opposition is not as grounded in fact. A lot more people involved won't allow for others to be heard." Better, more accessible and trusted information might mitigate this problem although there are real limits to how far this might go. In any event, the provision of information in forms that are accessible, understandable and trusted is at the heart of any possible idea of procedural fairness and one of the essential conditions of trust and confidence.

Information is first and foremost the business of policy makers – and famously, despite the massive importance of energy to our economy and society, Canada is rather bad at it. If there is one entirely obvious area for improvement in Canadian energy decision making – one that goes to the heart of trust and confidence – it is publically supported investment in better information infrastructure including both data and the capacity to process data into useful information.

Here regulators have multiple roles. Regulators collect data, they analyze data and generate information, including highly granular information flowing from project monitoring and they place both information and data in the public domain. Regulators probably have a better understanding of the data and information systems – both their strengths and their deficiencies - than do most institutions because they are called on all the time to decide based on evidence. They are, therefore, well placed not only to be delivery agents in an information system but also to advise in any discussion of how Canada might better organize its energy and related environmental information.

## Outreach and engagement

The second essential element of procedural fairness concerns the ability to be heard. In the Communities paper interviews, most of those with whom we spoke commented one way or another on the potential for regulators to take roles - earlier and more active – in engaging with the broader society. Two quotes are worth noting. One from an industry voice: "Regulators come in at the end of the process and this is not helping.....(they) have not been active in thinking how to reach out to communities and to help communities understand." And one from a regulator: "Back in the day – not that long ago – all you had to do was stay at home, be a good regulator and everything would be fine." It would be facile in the extreme to suggest that more engagement would be simple or straightforward, whether legally, administratively or financially. Regardless, this seems a priority topic for attention both directly by regulators and in dialogue with policy makers and the broader community.

In the realm of formal regulatory processes new forms of engagement present themselves. Again, from the Communities interviews: memoranda of understanding with municipal governments to share information and to keep all interests informed; direct involvement of stakeholders in creating regulations; outcomes based regulations; and more open and accessible information not only leading to project approvals but throughout the life cycle.

## Communications

Again it is worth quoting from the interviews in the Communities project. This from a regulator: "Regulators.... need to be more effective at communicating...decisions are written in legal terminology." Regulators have moved a long way on this front despite some natural caution about the legal implications of potentially loose language. What more they might do – and whether and how they should be more engaged in social media – are important points of debate which, again, need to involve policy makers and the broader community.

## Procedure

Possibly the most controversial set of issues in recent years concerns procedure: standing, time lines, who can submit questions, who can formally intervene and cross examine witnesses. What is fair? What is perceived as fair? Against that, what is practical, cost-effective and expeditious? Absent an effective system of policy, planning, information and outreach, regulators become the default mechanism for any number of concerns and frustrations. Informal forums such as those afforded by social media both address and frustrate such concerns. But on a more formal basis, as one interlocutor put it: regulators "are the only forum with a public process." They are on the front lines and they hear the public directly and often. Regulatory bodies can operate

in different modes for different purposes provided that clear distinctions can be drawn between project applications and more systemic inquiries. Improvements to the system upstream would no doubt reduce the pressure on regulators to be all things to all people but it seems likely that continued procedural experimentation will be a part of the system for years to come.

## New architecture

Standing back from the whole thing, the decision system as it exists and as described in the previous section is presumably not the only system that could exist. In Canada we have evolved certain models that are familiar and which generally work but the question needs to be asked, as one of our interlocutors put it: "Is there a role for another sort of body – neither regulator nor policy-maker but "an objective third party" – or perhaps several to allow competitive information provision - that can provide information and a forum for debate? Commissions of enquiry perform this sort of role on an ad hoc basis as can well constituted regional planning processes. Other countries' experiences could be of interest. Who knows what other models might present themselves?

A related question is how the rest of society organizes itself to participate in a much more open and democratic system. Again, from the interviews: lack of basic understanding or literacy came in for comment in several instances, where local communities – or at least some individuals in them – are ill-informed on energy realities or on the nature of the regulatory process or the regulatory institutions but such ignorance does not inhibit them from being vocal. Communities need to be engaged early, often and respectfully. Yet communities themselves have work to do to become informed and to act objectively, fairly and democratically.

# DIRECTIONS FOR IMPROVEMENT

*- Limits and Tensions*

Without wanting to throw too much cold water on things, it is important to conclude on a note of caution. Much should and can be done to reform the energy decision system but if it were cheap and easy or devoid of complications much more would have been done already and decision processes would be less fraught. There are several things to keep in mind:

### The unresolvables.

The big societal forces such as decline of deference, growing mistrust of authorities and risk aversion have been decades in the making and they apply to every public decision process at every scale. Reforms to energy decision processes will inevitably fall far short of perfection because they have to contend with the inconvenient matter of human nature.

### The hard to resolve.

The big policy issues, notably climate change and the roles and responsibilities of Canada's Indigenous communities will be with us for years to come. They will, with some luck, move steadily toward resolution. But the utter misalignment between many aspirations and many underlying physical, economic and political realities will dog us and often make even the most creative and well intentioned reforms seem like small beer.

### Tensions and tradeoffs.

The notion that many issues really do not involve tradeoffs but simply require political will makes for convenient political sloganeering but is rarely true. Trivializing real tensions and tradeoffs makes solutions less likely, not more. Some examples:

- Regulator independence/democratic accountability
- Efficiency and expeditiousness/inclusivity and openness
- Costs and returns to society at large/attractiveness to investors and competitiveness in markets
- Investor certainty/democratic choice
- Market investment choices/public planning
- Private ownership/public ownership of energy delivery (and where such ownership does or does not substitute for regulation)

All of these are resolvable but they are all complex. A realistic appreciation of what needs to be done, the need for compromise and the inevitability of imperfect solutions would go far to making progress possible.

## Inherent Limits

We characterize both more information and fuller engagement as essential conditions for success but a note of caution is in order. Information has to contend with – and is often trumped by - human realities such as confirmation bias, the use of heuristics, time limitations and processing capacity. Information, in other words is a necessary but far from sufficient condition for trust and confidence. In a different but related vein, there are obvious limits to engagement given such factors as capacity, willingness (or not) to find accommodation and the simple need – eventually – to bring debate to a close. Exactly who should be engaged, when and how questions to which answers will always remain elusive

## Resources and capacity.

Nothing comes for free. For example, as obvious as it has been for many years, the need for a better Canadian energy information system has never been addressed, in large measure because it costs money – small amounts of money in the large scheme of things but with no very obvious political payoff. The demands for resources to support a more open and accessible system would be much larger. Process costs money. Community capacity to participate in process costs money. Absorptive capacity is limited by many factors including time, skills, knowledge, local organization and, inevitably, money and potentially a lot of it.

# CONCLUSION

We bring it back to the core question as outlined earlier: how can a decision system be structured and how can such a system operate such that it can address itself to society's needs while adequately accommodating local interests or issue specific interests that may be much narrower – but still legitimate and politically salient?

We have suggested that a well working system needs a capacity:

- to take a long view, sometimes over multiple decades;
- to encompass wide geography – extending to the whole province, territory or country and sometimes beyond;
- to comprehend the complexity of multiple objectives – economic, environmental, social and security.[5]

In this context, decision processes must get better at grappling with local needs and in particular:

- Understanding and respecting local context
- Understanding and respecting local interests and values
- Providing adequate information
- Offering means of engagement and meaningful dialogue

With that in mind we can turn our minds to an agenda of research, analysis and engagement that moves us in a productive direction in the coming years.

[5] Various debates typically resort to the standard – and useful - sustainable development rubric of economic, environmental and social when framing objectives but it needs emphasizing that for energy, security and its subsets, reliability and resilience often trumps all of the others.

# REFERENCES


Canadian Environmental Assessment Act (CEAA). (2012). S.C. 2012, c. 19, s. 52, s 18.

Cleland., M., Nourallah, L., & Fast, S. (2016). Fair Enough: Assessing Community Confidence in Energy Authorities. Collaboratory on Energy Research and Policy, University of Ottawa. Positive Energy Project. https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/nrp_fairenough_report_11apr2016-1_0.pdf

Cleland, M. & Nourallah, N. (2015). The Social Licence to Regulate: Energy and the Decline of Confidence in Public Authorities. Energy Regulation Quarterly, 3(3). http://www.energyregulationquarterly.ca/articles/the-social-licence-to-regulate-energy-and-the-decline-of-confidence-in-public-authorities#sthash.5IUaGtfo.dpbs

Dunsmuir, M. (1990). Mobility rights, the economic union and the constitution. Library of Parliament, Research Branch.

Gattinger, M. (2016). Public Confidence in Energy and Mining Development: Context, Opportunities/Challenges and Issues for Discussion. Paper Prepared for 6-8 June 2016 Stakeholder Workshop on Public Confidence for EMMC.

Gattinger, M. (forthcoming). Public Confidence in Energy Development: Elephants, Horses and Sitting Ducks. Ottawa: University of Ottawa Positive Energy Project.

Nourallah, L. (2016). Communities in Perspective: The Dimensions of Social Acceptance for Energy Development and the Role of Trust. Collaboratory on Energy Research and Policy, University of Ottawa. Positive Energy Project. https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/positive_energy-community_social_acceptance_literature_review_0.pdf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