

# **POLICYMAKERS, REGULATORS AND COURTS – WHO DECIDES WHAT, WHEN AND HOW?**

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## **THE EVOLUTION OF REGULATORY INDEPENDENCE**

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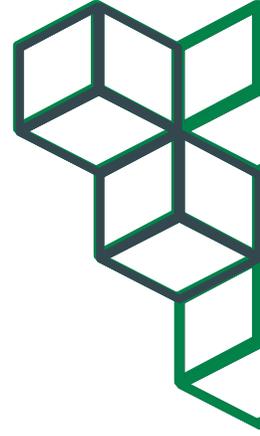
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# INTRODUCTION

## BACKGROUND

This paper outlines preliminary findings and ideas from a project aimed at exploring the relationship between regulators and other actors in energy decision-making processes. It is part of Positive Energy's examination of the roles and responsibilities of decision-making authorities in Canada's energy decision-making system (Box 1). Like all of the research and engagement in Positive Energy's second three-year phase, this study is guided by the core concepts of *Informed Reform* and *Durable Balance*:

"Reforms need to strike a durable balance between competing priorities and tensions: demands of communities for engagement, involvement, transparency and representation; requirements of investors for adequate stability, timeliness and predictability in decision processes and outcomes; demands of consumers for safe, affordable, reliable energy. [...] 'Informed reform,' for its part, emerges from the fact that energy decision-making is a complex organic and ever-changing system of multiple component parts. It is in need of repair, but it requires informed reform that carefully considers both short- and long-term intended and unintended consequences from a systems perspective."<sup>1</sup>

It is important to note that this work follows directly from the research and engagement concerning public authorities carried out by Positive Energy in 2017/2018.<sup>2</sup> That work created a broad overview of energy decision-making systems which provides a foundation for many of the observations and proposed directions found in this paper. The present work builds on that foundation by taking a much more granular look at the concept of regulatory independence, specifically through historical case studies of several regulators and the policy systems within which they work.

Our unit of analysis for this project is what is often termed 'independent regulators' but is more accurately termed 'statutory regulatory agencies' since most, to one degree or another, are limited in their independence whether from Parliament or provincial legislatures or the political executive (cabinet). In any event, independence needs to be understood as a means, not an end; the end is regulatory effectiveness in the larger energy decision process.

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1. Cleland, M., and Gattinger, M. (2018). *Durable Balance: Informed Reform of Energy Decision-Making in Canada*. Positive Energy, University of Ottawa. Retrieved from <https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/180418-db-report-final.pdf>, p. 4.

2. Cleland, M., and Gattinger, M. (2017). *System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform*. Positive Energy, University of Ottawa. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/2\\_positive\\_energy-system\\_under\\_stress-cleland\\_and\\_gattinger.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/2_positive_energy-system_under_stress-cleland_and_gattinger.pdf); Fast, S. (2017). *Who Decides? Balancing and Bridging Local, Indigenous and Broader Societal Interests In Canadian Energy Decision-Making*. Positive Energy, University of Ottawa. Retrieved from: [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/positive\\_energy-who\\_decides\\_dec\\_2017.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/positive_energy-who_decides_dec_2017.pdf); Bird, S. (2018). *The Policy-Regulatory Nexus in Canada's Energy Decision-Making. From Best Practices to Next Practices*. Positive Energy, University of Ottawa. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/pe\\_the\\_policy\\_regulatory\\_nexus\\_in\\_canada\\_final.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/pe_the_policy_regulatory_nexus_in_canada_final.pdf); Simard, L. (2018). *How to Decide? Engagement: Information and Capacity*. University of Ottawa. Retrieved from: [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/pe\\_louis\\_simard\\_final.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/pe_louis_simard_final.pdf).



## BOX 1: POSITIVE ENERGY'S RESEARCH ON ROLES AND RESPONSIBILITIES

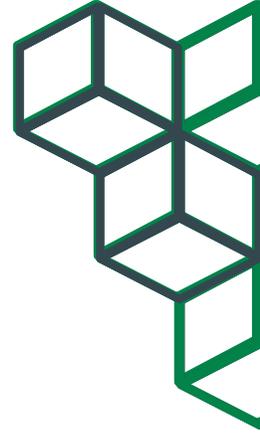
The second three-year phase of Positive Energy (2019-2021) aims to address the following question: How can Canada, an energy-intensive federal democracy with a large resource base, build and maintain public confidence in public authorities (federal, provincial, and territorial policymakers and regulators, Indigenous governments, municipal governments and the courts) making decisions about the country's energy future in an age of climate change?

Three fundamental questions form the research and engagement agenda. How can Canada effectively overcome polarization over its energy future? What are the respective roles and responsibilities between policymakers, regulators, the courts, municipalities and Indigenous governments when it comes to decision-making about its energy future? What are the models of and limits to consensus-building on energy decisions? Clearly articulating and strengthening roles and responsibilities between and among public authorities is one of the most pivotal but understudied factors shaping Canada's energy future in an age of climate change. Confidence of the public, investors and communities in government decision-makers – be they policymakers, regulators, courts, Indigenous governments or municipalities – is a critical success factor in Canada's ability to successfully chart its energy and emissions future.

Positive Energy's research and engagement over the last five years reveals that answering two questions will be fundamental to confidence in public institutions: *Who decides? How to decide?* Positive Energy's research and engagement also underscores that two core principles should inform answers to these questions: *Informed Reform and Durable Balance*.

The roles and responsibilities research programme includes projects in the following areas:

- Federal-provincial relations
  - o A research report examining evolving models and practices for intergovernmental relations over energy and climate
  - o A comparative study of factors driving final investment decisions for liquefied natural gas facilities in British Columbia and Western Australia
- Policy-regulatory-judicial relations
  - o A literature review on regulatory independence in Canada's energy systems: origins, rationales and key features
  - o Historical case studies of federal and provincial regulators exploring the evolution of regulatory independence over time
  - o Policy-regulatory relations: analyzing innovations in policy-regulatory relations to identify 'What Works?' (research collaboration with CAMPUT)
- New imperatives in energy decision-making
  - o Emerging technologies: interviews with provincial and municipal policymakers and regulators to identify the impact of emerging technologies on decision-making
  - o Public engagement: analyzing innovations in regulators' engagement practices to identify 'What works?' (research collaboration with CAMPUT)



More specifically, the detailed focus of the work is historical case studies of five regulators whose mandates encompass to varying degrees approvals of resource development and infrastructure. Aside from that specific focus, we chose regulators in five different jurisdictions from coast to coast in Canada and whose structures, mandates and evolution vary widely. The regulators in question are the Canada Energy Regulator, successor to the National Energy Board (NEB/CER); the British Columbia Oil and Gas Commission (BCOGC); the Alberta Energy Regulator (AER); the Ontario Energy Board (OEB); and the Nova Scotia Utility and Review Board (NSURB).

The emphasis, as noted, lies on their relations with other actors in the decision process: policymakers, courts, Indigenous and municipal governments, other regulatory authorities, and affected and interested parties. Interested parties include non-government actors, be they local communities, individual citizens, corporations, or civil society organizations. All of it, to underscore the point, is examined through the lens of regulatory effectiveness.

Our approach is historical. The case studies examine how each of these decision-making systems and the relevant institutional relationships have evolved over time and what were and are the economic, environmental, social, political and technological circumstances (expanded upon in Section 2) that may have shaped change. Ultimately, the question turns on how those various circumstances might evolve in the next ten to thirty years to mid-century, how that in turn might shape the decision systems and how reform of such systems can facilitate adaptation to emerging realities (Box 2).



## **BOX 2: CANADA'S ENERGY FUTURE IN AN AGE OF CLIMATE CHANGE**

Positive Energy's present focus is "Canada's Energy Future in an Age of Climate Change". That future will be turbulent and it will entail countless individual decisions respecting development of energy resources and the building of energy infrastructure. It will continue for many years to involve hydrocarbon development and related transport infrastructure. Increasingly, it will entail questions around electric power.

Today, about 20 percent of Canadian end use energy is in the form of electricity. Many scenarios see that proportion growing immensely and doing so very quickly, conceivably more than doubling the capacity of our existing power systems within thirty years. Even with the potential for downstream and end use systems to adapt through improved efficiency and the greater deployment of distributed resources, it seems a certainty that a very large number of large-scale developments are in prospect.

Such developments could entail renewable projects of many sorts, including wind, solar, biomass and hydro; energy storage; hydrocarbon projects deploying carbon capture technology; hydrogen production and related infrastructure; and a possible revival of nuclear power, notably through small modular reactors. Because load centres and energy sources may be heavily concentrated and widely separated, it will involve extensive new transmission infrastructure, often crossing jurisdictional boundaries and requiring historically unprecedented intergovernmental cooperation.

Overall, the scale of demands on public energy decision systems is set to grow, perhaps exponentially. As such, successfully charting Canada's energy future in an age of climate change will depend in considerable measure on whether public energy decision systems are up to the job.



## METHODOLOGY

Data collection for this paper involved several steps. Step one involved a review of relevant literature respecting both the general concepts of regulatory independence and the specific regulators under examination. The general literature review has been published as a separate document.<sup>3</sup>

Step two involved a series of semi-structured interviews with 23 (to date) individuals, knowledgeable about each of the five regulators, but with different perspectives – as policymakers, regulators, people with judicial experience, applicants and their industries, Indigenous representatives, other authorities such as municipal governments and other regulators and various stakeholders. These interviews are ongoing.

Step three involved a virtual workshop held in late October convening a diverse group of senior experts to discuss the project and to test and strengthen our emerging thinking. Their insights and feedback have been incorporated into our observations and suggestions for future directions.<sup>4</sup>

Step four looks to various sources of primary documentary evidence – from legislation to policy statements to reports of advisory bodies. This work is also ongoing.

This discussion paper, as noted, offers a preliminary assessment of findings to date. A later, final report, to be released in 2021, will afford detail on the case studies, will build and refine the conclusions and will offer proposals for how relationships might be structured in future, in other words, what we hope will prove to be informed reform.

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3. Thomson, I.T.D. (2020). *A Literature Review on Regulatory Independence in Canada's Energy Systems: Origins, Rationale and Key Features*. Positive Energy, University of Ottawa. Retrieved from: [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/a\\_literature\\_review\\_on\\_regulatory\\_independence\\_in\\_canadas\\_energy\\_systems\\_final.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf)

4. For more information on the workshop and the information presented, please visit the following link: <https://www.uottawa.ca/positive-energy/content/policymakers-regulators-and-courts-who-decides-what-when-and-how-evolution-regulatory>



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## CONTEXT: EVOLVING ADMINISTRATIVE FORMS IN AN EVOLVING SOCIETY

The idea of ‘independent’ decision-making agencies in Canada goes back to the 19th century with the regulatory functions surrounding railway rates delegated to the Railway Committee of the Privy Council, a decidedly non-independent tribunal.<sup>5</sup> After years of concerns about the politicization and lack of expertise within the sub-committee, the McLean Royal Commission, established in 1899, provided the recommendations and design that would lead to Canada’s first federal regulatory body: the Board of Railway Commissioners. The body would possess many of the traits characteristic of independent regulators including security of tenure for the commissioners and finality of factual decisions within its jurisdiction.<sup>6</sup>

For energy decision-making in Canada the seminal event was the creation of the National Energy Board in 1959 following the ‘Great Pipeline Debate.’<sup>7</sup> The establishment of the Board was recommended by the 1958 Royal Commission on Energy (informally the Borden Commission), which called for greater independence for the regulator from cabinet.<sup>8</sup> Under the *National Energy Board Act*, the regulator was granted such independence; for instance, there was no provision allowing the government to provide general policy direction to the Board, nor could cabinet approve a certificate if the application had been rejected by the NEB or vary a certificate approved by the NEB.

There are numerous models for such agencies, from ones with very broad mandates and high degrees of independent decision-making authority to others that are largely advisory, are essentially extensions of the core public service and are directly accountable to the political executive. Most, but not all, function as tribunals, as triers of fact through formal procedures. All are supervised directly or indirectly by courts respecting matters of law and jurisdiction.

The rationale for the choice of agencies separated from the core of government has varied over time. One can identify several objectives: to afford a longer-term view of the matters in question beyond electoral cycles; to ground decisions in distinctive expertise and due process; and to ensure decision stability. Put another way, the overall objective is more effective decision-making consistent with investment cycles, subject to expert consideration of a broad range of interests and undertaken through processes that are seen as fair and open and not influenced by short-term political interests.

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5. For more information on the history of regulatory independence in Canada, please see Thomson, I.T.D. (2020). *A Literature Review on Regulatory Independence in Canada’s Energy Systems: Origins, Rationale and Key Features*. Positive Energy, University of Ottawa. Retrieved from: [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a\\_literature\\_review\\_on\\_regulatory\\_independence\\_in\\_canadas\\_energy\\_systems\\_final.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf)

6. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, 83-120.

7. The Great Pipeline Debate surrounded the establishment of a Crown corporation to build the Ontario section of a cross-Canada natural gas-pipeline from Alberta to Québec, and the government’s invoking of closure (closing debate) in Parliament on the legislation in question. The government’s use of closure has been described as “one of the most famous confrontations in parliamentary history.” See: Lucas, A. R. (2018). The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision. *Review of Constitutional Studies*, 23(1), p.29.

8. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), 757-782.



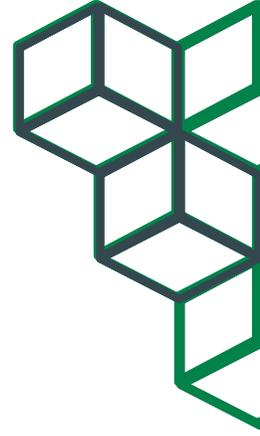
Regulators often act like courts but they are not courts. Superior courts, although created by statute, have “inherent authority”, that is grounded in the rule of law and derived from what is essentially an unwritten foundational principle of the Canadian system of government. The existence, functions and powers of regulators are determined by statute but regulators are accountable to legislatures or Parliament through the political executive and the relationships are in a constant state of evolution. Regulators are normally subject to judicial review as noted above. Additionally, each regulator possesses a unique mandate and function related to social, economic or environmental matters. These diverse functional differences mean that different regulators require greater or less independence based on the need to effectively exercise their respective mandates rather than the desire for independence in itself. In short, “independence” is not absolute and it is a means, not an end.

In the period under examination – which is mainly the past three to four decades – several important factors and trends have emerged that have shaped attitudes towards regulatory independence and affected the relationships over time.<sup>9</sup>

- **Changing role of government in energy markets:** The emergence of an understanding that energy markets could be subject to less or less heavy handed regulation and the more or less simultaneous shift in some jurisdictions from energy providers as agencies of government to being privately owned entities (which has reduced direct policymaker control of those entities and may have helped spur the tendency to look for other forms of direct control through regulatory processes).
- **Emergence of multiple diverse objectives:** The emergence of broader societal goals beyond the traditional ones of resource management and the correction of market failures such as the existence of natural monopolies or the phenomenon known as market power. This evolution has occurred with particular speed in the past two decades with the emergence of environmental and social issues, climate change, and an ever-increasing slate of social goals such as we see contemporarily with the idea of ESG (environmental, social, governance) investing. What this has led to is that authorities face growing calls for decision-making to take a more holistic and systemic approach, demanding input from multiple sources.

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9. Cleland, M., and Gattinger, M. (2019). *Canada's Energy Future in an Age of Climate Change: How Partisanship, Polarization and Parochialism Are Eroding Public Confidence*. Positive Energy, University of Ottawa. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/canadas\\_energy\\_future\\_design\\_rd\\_web\\_reduced.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/canadas_energy_future_design_rd_web_reduced.pdf); Cleland, M., and Gattinger, M. (2017). *System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform*. Positive Energy, University of Ottawa. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/2\\_positive\\_energy-system\\_under\\_stress-cleland\\_and\\_gattinger.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/2_positive_energy-system_under_stress-cleland_and_gattinger.pdf)



- **Citizen inclusion:** These processes have been accompanied by steadily growing expectations for citizen involvement in decision-making and the consequent necessity for much broader and more open consultation, engagement and accommodation with a broad range of affected communities.
- **Duty to consult and accommodate:** In parallel with the emergence of broader societal goals, the legal obligation of the Crown to consult with and, where appropriate, accommodate Indigenous peoples, has continued to evolve, with direct impacts on the regulatory process for reviewing major energy infrastructure projects. While the obligation is clearly that of the Crown, regulatory agencies play a significant role in fulfilling that duty, with consequences for the scope and conduct of their processes (Box 3).
- **Polarization:** All of these emerging realities are set in a context where political fragmentation and polarization appear to be growing and there has been a steady erosion of trust in all authorities and a decline in deference to expertise.
- **Changing media environment:** Finally, all of it in turn is situated in a world of rapidly evolving media and the effects of those media on public understanding and debate.

Through all of this, the administrative forms on which we are focused (i.e., statutory regulatory agencies) have in some cases remained stable or in others have been subject to considerable turbulence, often due to actions by policymakers that have resulted in the attenuation of regulatory independence and the removal of decision

authority to the hands of the political executive. What is of interest is whether the result of such turbulence has been to make decision systems more or less effective at balancing all the complex variables of modern society in a way that creates stable outcomes, in other words, decisions that embody what we call ‘durable balance’.

There have unquestionably been legitimate reasons for reform of energy decision-making systems. It is important to note that the idea of taking politics out of decision processes is misleading since public policy and politics are distinct but inseparable in practice. The question is how, under what circumstances and when politics – more accurately, the judgement of the political executive – intervenes. The political executive – under the ultimate authority of legislative bodies – has numerous tools at its disposal to ensure that all the complex variables are taken into account. These tools can be applied everywhere from high-level policy to direct intervention in decisions concerning individual applications. How, why and in what way these tools have been applied in the service of reform is the subject of our enquiry. As we see reforms of Canada’s energy decision-making system evolving, have they been well-informed?

Part of that question turns on how regulators are structured and treated as agencies with some measure of independence. However, as noted earlier, independence is not an absolute, but a matter of degree – a complex matter with multiple dimensions. The next section sets out to explore those dimensions.



### BOX 3: INDIGENOUS CONSULTATION

- The legal obligation of the Crown to consult with and, where appropriate, accommodate Indigenous people is guaranteed by subsection 35(1) of the *Constitution Act, 1982*, which provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
- Legal responsibility for fulfilling the duty to consult rests squarely with the Crown. However, it is now established that Parliament may delegate certain procedural aspects of the duty to consult to a regulatory tribunal and that the regulatory process can play a part in meeting the requirements of the duty to consult. As a result, “Crown consultation” has become a significant issue in the review process for any proposed energy infrastructure project that has the potential to infringe upon aboriginal or treaty rights.
- The duty is triggered when there is a decision to be made by government, such as an approval of an infrastructure project, that might adversely affect the exercise of aboriginal or treaty rights. The scope of consultation is proportionate to the nature or extent of the aboriginal or treaty rights involved and the potential impact on those rights. The duty to consult does not give rise to a power of veto.
- Non-Indigenous communities that are potentially affected by proposed energy infrastructure projects may have legitimate expectations that they will be consulted (and, where appropriate, their concerns accommodated). Indeed, the extent to which these expectations are satisfied would often be a relevant factor in determining whether regulatory approval of any particular application should be granted. However, unlike the duty to consult Indigenous communities, such expectations do not give rise to any **legal duty**, on the part of either proponents or regulators.
- Jurisprudence on the duty to consult Indigenous peoples will likely continue to evolve, potentially with further implications for the regulatory process.
- Policy initiatives by the federal government, such as proposals to prescribe elements of the duty to consult by statute, are also possible, again potentially with implications for the regulatory process.

Canada is a signatory to the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP), which includes the principle of “free, prior and informed consent”. Federal or provincial legislative initiatives reflecting the principles of UNDRIP could have significant implications for regulators responsible for reviewing energy infrastructure projects. To date, the only legislative initiative formally recognizing UNDRIP in Canada is British Columbia’s Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, 2019, which, as its title indicates, is an aspirational declaration that is not itself intended to create new rights.



# EFFECTIVE REGULATORY DECISION-MAKING

## ESSENTIAL DIMENSIONS

The literature offers up a variety of ways to unpack the underlying attributes of an independent and effective decision-making system. For instance, the Organisation for Economic Co-operation and Development, in a 2017 report, outlined five dimensions that determine a regulator's *de facto* independence: "role clarity, transparency and accountability, financial independence, independence of leadership, and staff behaviour and culture of independence."<sup>10</sup>

Based on the literature and discussions and interviews to date we have settled on three broad categories under which various sub-elements can be grouped. What, in other words, allows any regulatory agency to do its job?

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10. OECD. (2017). *Creating a Culture of Independence: Practical Guidance Against Undue Influence*. The Governance of Regulators, OECD Publishing, p.2. Retrieved from <https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf>



## MANDATE

The sorts of regulators we are concerned with operate under mandates established by statute or sometimes by several statutes. They can be very broad such as in the case of the Nova Scotia Utility and Review Board or, in the case of the other four regulators, focused on a sub-set of the energy system such as resource development or infrastructure approvals and ongoing oversight. While the breadth of mandate may affect any given regulator's capacity to be expert, there is no reason per se why that should affect its capacity to be effective or to act with independence.

But **expertise and knowledge** of the substance of the issues do matter with respect to both effectiveness and independence. One critical attribute of the regulators we have examined is that they have some measure of expert capacity. This capacity may be either in house or it may be something that the regulator can access but, critically, it is separate from that of the bureaucracy that directly serves the political executive and of the interveners that appear before the regulator. Regulators should be able to draw on that expertise as circumstances demand and they should have **financial resources** to support that. To the extent that those financial resources are constrained, such as reliance on conventional government budgetary processes or through internal processes that limit the ability of the agency to secure expertise, the regulator is less independent and likely to be less effective. To the extent that financial resources are derived from applicants there is a risk that the regulator will be perceived to be in some way beholden to or 'captured' by applicants.

A core question underlying independence concerns whether the agency has **advisory or deciding roles** respecting specific applications before it. As often as not – as illustrated by the five cases – the agency will have deciding roles of one sort or another but those roles will be in some way limited. How, at what stages and with what limitations can the political executive intervene in decisions on individual applications are all critical questions.

Again, to underscore a point made earlier, politics is an inevitable factor but, more importantly in any democratic system, political accountability is not only inevitable but vital. Regulators contribute to policy change, but they typically don't make policy except perhaps in the operational realm. **How regulators are directed by policy** is the critical question. Research has shown that there is a wide range of possibilities here. In many instances, policy is expressed through legislation and regulation. Policy guidance can take the form of directives, which can be high-level and general in application, or it may take the form of direct intervention with respect to individual applications. It has been observed, for example, that the Ontario government's significant use of ministerial directives in guiding provincial energy policy and arm's length agencies like the OEB in the late-2000s has been a source of controversy and has undermined the Board's independence.<sup>11</sup>

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11. Harrison, R. J. (2014). Tribunal Independence: In Quest of a New Model. *Energy Regulation Quarterly*, 2(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.xfbKAWTy.dpbs>; Vegh, G. (2017). *Report on Energy Governance in Ontario: To the Ontario Energy Association and the Association of Power Producers of Ontario*. Ontario Energy Association. Retrieved from [https://energyontario.ca/wp-content/uploads/2018/04/Governance\\_Report\\_to\\_OEA\\_and\\_APPrO.pdf](https://energyontario.ca/wp-content/uploads/2018/04/Governance_Report_to_OEA_and_APPrO.pdf)



Just as important is the question of **how such guidance or the assertion of final decision authority is framed**, an attribute that lies on a spectrum from publicly accessible statements to guidance delivered in camera or, occasionally and usually inappropriately, through informal ‘nudges’ coming from a minister or senior official. Where any given regulatory system falls on this spectrum not only affects regulatory independence but is potentially critical to both investor confidence and broader public confidence in the reasonableness of decisions. Regulators, for example, typically issue their decisions with ‘reasons for decision’ that are stated publicly; decisions by cabinet are more typically backed by press releases and rarely by detailed rationales based on the evidence.

A sometimes controversial aspect of any regulator’s mandate concerns its role in providing **broad knowledge** or possibly advice, albeit not respecting specific applications. This is a two-edged sword. As an expert body, the regulator has access to knowledge and analytical capacity on matters such as the state of energy markets or outlooks for supply and demand. If such knowledge is tendered confidentially to the political executive or if it takes the form of policy advice, that can undercut public confidence in the perceived objectivity of the regulator. But if it is simply evidence-based knowledge and is tendered publicly and, therefore, available to all parties interested in and affected by the regulatory process, it potentially brings depth of expertise and close-to-the-ground experience into the public forum that might not otherwise exist. As important, in the case of individual applications, applicants and interested parties will have knowledge a priori of how the regulator will initially view any matter in front of it and this knowledge will be widely shared. Such a state of affairs is arguably of benefit and not on its face incompatible with a capacity to undertake objectively based adjudicative roles.





## STRUCTURE AND CULTURE

Whether given a mandate to function like a court, like a commission of enquiry or like an advisory body, it is possible that the most important attribute of any agency is an organizational culture that stresses **adherence to statute and regulation and avoidance of bias** irrespective of any external pressures to act otherwise. This is an attribute that may be formally mandated but perhaps of greater practical importance are leadership and the depth and longevity of the organizational culture. The downside here may arise when stakeholders or the government are frustrated that the regulator is perceived to be stuck in its ways and failing to adapt to changing circumstances. However, as already noted, governments have many tools available to correct that – some more consistent with regulatory independence and decision stability, others more ad hoc and unpredictable.

The **formal internal structure** of an agency is of interest and it can take several forms. It may be unitary in the sense that the governance, management and regulatory/ adjudicative functions are gathered under a single agency head – normally designated as the chair. It may be bipartite with the regulatory/adjudicative function separate from governance and management but with all three functions still meeting standards of independence. Or, as in the case of the AER, CER and most recently the OEB<sup>12</sup>, it may be tripartite with management accountable to the political executive and/or the Board of Directors, governance as a separate function providing oversight and the regulatory/ adjudicative function separate from both.<sup>13</sup>

Exactly what is the ideal structure may be a matter of some dispute but the core questions concern whether, indeed, governance is effective and independent, whether the formal regulatory/adjudicative function can be carried out free from real or perceived bias and whether the regulatory/ adjudicative function in particular has independent access to resources necessary for it to have needed expertise and the capacity to exercise its procedural functions.

A further structural question is how the necessary **lines of reporting and accountability to the political executive and legislature** are structured. The critical element here and one stressed by several of our interviewees, concerns **appointments and removals**. How are appointments made, by whom, on whose advice, through what procedure, and how transparent is that process? Just as important is security of tenure. Do members of the agency (whether those responsible for governance, management or regulation/adjudication) have secure tenure over a fixed term and how can they be removed – by whom, through what process and whether removable at pleasure or only for cause?

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12. Ministry of Energy, Northern Development and Mines. (2020). *Ontario Energy Modernization Update*. Retrieved from <https://energyontario.ca/wp-content/uploads/2020/10/Correspondence-from-the-Minister-of-Energy-Northern-Development-and-Mines.pdf>

13. Harrison, R. J., McCrank, N., and Wallace, R. (2020). The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals? *Energy Regulation Quarterly*, 8(1). Retrieved from <https://www.energyregulationquarterly.ca/articles/the-structure-of-the-canadian-energy-regulator-a-questionable-new-model-for-governance-of-energy-regulation-tribunals#sthash.Se30VYXh.dpbs>



## PROCEDURE

An independent agency is typically **master of its own procedure**. The broad outlines – such as whether it functions as a formal tribunal – will be specified in statute but beyond that the question remains whether the political executive can intervene in procedural matters and on what basis. For example, in Alberta, recent legislative amendments now give the provincial government the ability to set time limits for project applications and the exercising of AER functions and duties to which the regulator must adhere.<sup>14</sup>

Regulatory agencies may function under formal, court-like rules or they may be less formal. In a world of multiple stakeholders and multiple complex issues, more formal processes may be seen to be exclusionary. Less formal processes may be open to a broader range of interested parties and able to account for less standard forms of evidence such as traditional knowledge or stakeholder (vs. expert) opinion. How that can be reconciled with the requirements to meet essentially judicial standards of evidence may be an ongoing challenge.

Another vital attribute of an effective regulatory process is **openness, transparency and traceability** of the whole process including the extent to which it lies in the hands of the political executive. In other words, in order to mitigate real or perceived bias, openness, transparency and traceability from initial policy through to final decisions are of central importance for both public and investor confidence in the integrity of the system.

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14. *Responsible Energy Development Act*, SA 2012, c. R-17.3. Retrieved from <https://www.qp.alberta.ca/documents/Acts/r17p3.pdf>



## PROCESSES AND INSTITUTIONS THAT CAN EVOLVE AND ADAPT

One thing that seems clear is that formal regulatory processes in the hands of court-like agencies are unavoidably somewhat rigid since they are bound by statute and regulation. Meanwhile, there appears to be a growing need to better account for changing expectations of the decision process such as outlined in the preceding section. One way or another – whether through independent processes or not – the systems will need to evolve and adapt in order to meet ever more complex and demanding expectations of effectiveness.

It is worth considering what might be key indicators of effectiveness. These emerge both from the current research and other Positive Energy work cited earlier. We make no claim that this list of indicators is the last word, only that they appear, based on several years of research and engagement, to cover all the essential ground.

- Decisions must be substantively sound and aimed at serving the broad public interest; they must be fair – or, as some may prefer, equitable – and based on evidence and they must be seen to be fair by all affected parties.
- Decisions must take into account a complex and evolving mix of substantive objectives and they must be able to take a long-term view consistent with the nature of the energy system.
- Decisions must be arrived at through open and inclusive processes, a need that is inevitably in tension with requirements for predictable timelines and some measure of efficiency so that questions of balance inevitably arise.

- Rules and procedures must be transparent and widely understood.
- There must be some measure of certainty and predictability surrounding the decision processes and their outcomes; in other words, decisions must be durable so that both investors and all other publics can be assured that the results cannot be overturned, at least without due process.
- In some way there must be democratic accountability but not necessarily at the level of individual proceedings if policy is clear and direction can be given to regulators in a transparent and traceable manner.
- Ultimately, the process must enhance the confidence of both investors and applicants and the various affected publics.

In short, the question is whether decision processes meet these standards of effectiveness. There are arguments that the need to account for judgment on complex social matters in a context of low public confidence in most institutions requires more direct political accountability and, therefore, administrative forms need to be designed to allow that political accountability. Alternatively, it can be argued that the other standards of effectiveness cannot readily be met through conventional government and political processes and that greater regulatory independence is an essential guardian against ‘undue’ political interference or bias introduced through informal political processes. Whether and how all the standards of effectiveness can be balanced in reformed administrative forms is the critical question.



## CODA – THE ROLE OF THE COURTS

Apart from political accountability, regulators are subject to supervision by the court system. Typically, regulatory decisions are appealable to a provincial court of appeal or to the Federal Court of Appeal on matters of law or jurisdiction but not on matters of substance. As decision processes have become ever more fraught and controversial, the role of the courts appears to have increased. At the same time, questions have arisen over whether courts are overstepping their bounds and making decisions that bear on substance as well as law or jurisdiction.

The recent decision of the Federal Court of Appeal (FCA) concerning the Trans Mountain Pipeline (TMX) is illustrative of these concerns – and instructive. In that decision the FCA focused on two questions: whether there had been adequate consultation with Indigenous communities; and whether the approval was based on adequate attention to concern for “physical activity that is incidental” (Canadian Environmental Assessment Act) to the project itself.<sup>15</sup>

With respect to the first question the FCA overturned the approval, ruling that the process failed to satisfy the duty to consult. But in this case it was not the National Energy Board that was held to account for this failure but rather the Governor in Council. In other words, the failing, was not on the part of the regulators or their processes but on that of the political executive.

With respect to the second question, the FCA held that the NEB had misapplied the definition of a “physical activity that is incidental” to the project, in this case marine shipping associated with the project. In other words, the NEB should have taken the effects of that “incidental activity” into account. But it did not interpret the jurisdiction of the NEB to include marine shipping.

Overall, in the TMX case it is hard to argue that the FCA overstepped but that it simply applied the law as it interpreted it. What may be most striking is that, in the case of the duty to consult, the failing was one of the political executive not of the regulators. That, in turn, raises questions about whether lifting decisions out of the hands of regulators serves the purpose of better accounting for new complex effects. Absent adequate policy framed to be consistent with the law as it stands, it is by no means clear that that objective will be served and it still leaves open the question of what reforms might best serve that objective.

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15. *Tsleil-Waututh Nation v. Canada (Attorney General)*, F.C.A. 153 (2018). Retrieved from <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/343511/index.do# Remedy>



## OBSERVATIONS AND FUTURE DIRECTIONS

Our approach to examining the relationships between regulators and other actors in public energy decision systems is historical: how have those relationships evolved and what were and are the contextual factors that have shaped and continue to shape those relationships? We have centred this examination on the question of regulatory independence.

Our purpose is to open up avenues for the future, building on the lessons learned from the past (including, as noted earlier, the research and engagement that have preceded this study). The deeper questions underlying regulatory independence concern how whole decision systems operate, how formal regulatory processes will fit in those systems in the future and how public, policymaker and investor confidence in those systems can be restored.

The history of the past several decades has witnessed an increasing number of complex and often conflicting societal expectations about what energy decisions should take into account. That has led in many jurisdictions to numerous reforms to the way decision systems operate, as will be elaborated in the case studies. But there is little evidence in Positive Energy's research, including public opinion studies, that those reforms have achieved an improvement in public confidence in those systems, whether on the part of investors or directly affected parties or the general public.<sup>16</sup>

If true, that fact will continue to stand in the way of mobilizing the immense amounts of effort and capital needed to transform energy systems over the coming decades to respond to climate change, all the while doing so with the support of local communities, investors and the public at large.

What we do know about that future, as noted earlier in this discussion paper, is that it will be turbulent, characterized by widespread fragmentation in public opinion and – if Canada is serious about a low-emissions transformation – extremely demanding of public energy decision systems. Those systems, as they stand today, are probably not up to the job. We outline below several avenues of approach for thinking about reform. These are all matters which will require further debate and discussion.

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16. Nanos Research for Positive Energy (2019). *Canadians still twice as likely to say Canada is doing a poor rather than a good job on energy issues – consensus opinions emerging on national interest being more important, oil and gas being on the decline and a need for more partnerships*. Positive Energy Omni, Summary. Conducted by Nanos for Positive Energy, September 2019. Submission 2019-1485. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/2019-1485\\_positive\\_energy\\_omni\\_-\\_populated\\_report\\_w\\_tabs\\_survey.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/2019-1485_positive_energy_omni_-_populated_report_w_tabs_survey.pdf); Nanos Research for Positive Energy (2018). *A majority of Canadians think it is possible or somewhat possible for Canada to develop its energy resources while protecting the environment but think Canada is doing a poor or very poor job at balancing concerns of communities and building public confidence in energy projects*. Positive Energy Omni, Summary. Conducted by Nanos Research for Positive Energy, April 2018. Submission 2018-1169. Retrieved from [https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/2018-1169\\_positive\\_energy\\_march\\_omni\\_-\\_populated\\_report\\_with\\_tabs.pdf](https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/2018-1169_positive_energy_march_omni_-_populated_report_with_tabs.pdf)



### **Improve understanding of public energy decision systems.**

There are many actors and processes in public energy decision systems and how they interact needs to be better and more widely understood. It starts with policy and policymakers who may engage multiple parties in their deliberations. It may entail informal processes respecting individual projects, mainly involving proponents and directly affected communities. At some point it finds its way into formal regulatory processes often involving a multitude of parties. Policymakers may then intervene in various ways and may or may not engage other parties when doing so. And finally, it may end in judicial proceedings involving a variety of interveners.

These systems need to meet a complex set of standards of what constitutes regulatory effectiveness as outlined earlier in this discussion paper. Throughout the sequence of steps in the process, the overarching question is who should decide what, when and how. Each of the more specific questions following needs to be considered with the overall framework in mind.

### **Consider the role of policy.**

How are multiple societal complexities captured in policy decisions and where, when and how do such policy decisions shape the approval or rejection of individual projects? This question has stood out above all others in our research to date. Given the immensity of the challenges facing decision systems over the next few decades it seems evident that general policy needs to be far better articulated upstream of individual decisions, developed through wide consultation and inserted into decision processes in ways that enhance rather than detract from public confidence. Conversely, policy expressed through late stage and detailed interventions in individual decisions will place immense burdens of time and effort on decision processes. And policy decisions arrived at – either as general policy or in the form of specific interventions – without adequate attention to the requirements for procedural fairness will rarely enhance public confidence.



### **Consider the role of informal and more collaborative processes.**

Much that needs to be done to arrive at stable outcomes can take place before formal regulatory processes are initiated, as project proponents engage with local communities and other stakeholders. To the extent that such processes can develop durable consensus and to the extent that the outcomes are introduced into formal regulatory processes openly and with due process, the formal processes are likely to be less contentious and less costly for all parties. The trend toward greater use of such processes needs to be better examined and understood and in all likelihood needs to be encouraged and facilitated by policymakers.

### **Consider the stability of regulatory institutions.**

Effective regulatory institutions inevitably stand on a foundation of organizational cultures that emphasize the law, fairness and openness. Those cultures in turn require that the accountability of regulators to policymakers be transparent and that procedures such as policy directives, resource allocation in proceedings or appointment and removal processes be judiciously structured so as to ensure that regulators have the necessary depth of experience and expertise and the ability to operate free from pressures that can introduce bias or perceived bias into decisions. And all of this needs to be transparent to all relevant publics.

### **Consider matters of procedure.**

Questions of procedure need to be viewed through the lens of regulatory independence. That is, are regulators masters of their own procedure? To the extent that policymakers wish to shape procedure, it is at least arguable that they should do so ahead of individual proceedings and be clear in their intent so that regulators can act accordingly.

More fundamentally, that leaves the question of how procedure should be structured in a twenty-first century context. Questions about procedure will dog regulatory processes and their accompanying policy processes for a long time to come because there will inevitably be a need to balance competing demands. The whole process must be open, transparent and traceable and it must be better understood by relevant publics. It must meet robust evidentiary standards. It must allow and facilitate input from a variety of sources, traditional and otherwise. At the same time, it must meet reasonable standards of expeditiousness and, ultimately, stability. Finding and sustaining an optimum balance will require ongoing debate.



### **Consider the potential for dialogue and mutual learning.**

Every decision system has its own unique qualities depending on the specific matters under consideration, the specific social, economic and physical circumstances surrounding individual decisions, and the political culture of each jurisdiction. But there are many common elements. We have outlined our understanding of what constitutes effectiveness and the attributes of decision processes that underpin effectiveness. Many or most of these are relevant across jurisdictions and different sets of circumstances. There is potential in dialogue involving numerous parties that can facilitate useful exchanges and can lead to better informed and ongoing reform. This can be done and is being done in various ways; such exchanges should be encouraged and supported and they should be ongoing as systems adapt to rapidly changing circumstances.

### **And a last word**

Next steps in this research project include finalization of the five case studies based on further interviews and document review followed by a synthesis and a series of recommendations. The final report will be published in spring 2021.

There may be other important directions that should be pursued and other ways of framing those we have identified. As our research continues, we hope to better articulate the relevant directions and to crystallize more specific ideas that might allow public decision processes – including formal regulatory processes – to better contribute to public confidence in decisions about Canada’s energy future in an age of climate change.



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