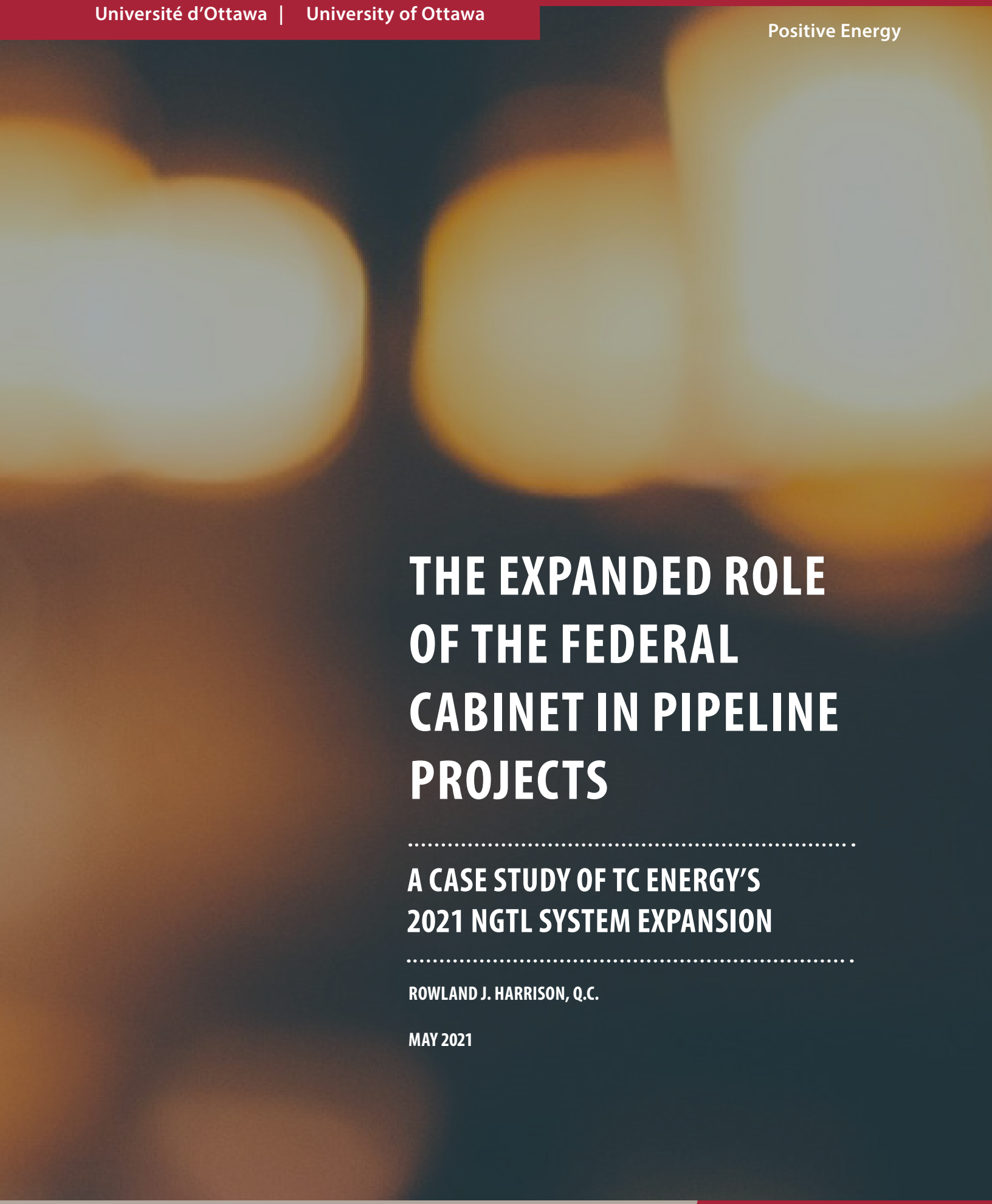

THE EXPANDED ROLE OF THE FEDERAL CABINET IN PIPELINE PROJECTS

A CASE STUDY OF TC ENERGY'S 2021 NGTL SYSTEM EXPANSION

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INTRODUCTION

Two developments in the past decade have fundamentally transformed the federal Canadian framework for reviewing proposals for interprovincial and international pipeline projects. In 2012, the role of the National Energy Board (NEB) was changed from that of making a **decision**[1] on proposed pipeline projects to making a **recommendation**.[2] Thenceforth, decisions whether to approve or reject such projects were to be made by the Governor in Council (cabinet), after considering the NEB's recommendation; in making its own decisions, cabinet could accept, reject or modify[3] the recommendation of the NEB.

In 2019, the NEB was abolished and the Canada Energy Regulator (CER)[4] was established. While the structure of the CER is significantly different from that of the NEB,[5] its role with respect to the review of proposed federal pipeline projects is similar to what had been the role of the NEB between 2012 and 2019. Specifically, the Commission of the CER (CER Commission) is to make recommendations to cabinet. Cabinet continues to have the direct authority that Parliament had assigned it in 2012 to make decisions to approve or reject such projects.[6]

That this was the intention is clear from the statement of the Minister on 2nd reading of the Bill to amend the NEB Act in 2012:

> *We are also ensuring that there is clear accountability in the system. The federal cabinet will make the go, no-go decisions on all major pipeline projects, informed by the recommendations of the National Energy Board. . .*
>
> *We believe that for major projects that could have a significant economic and environmental impact, the ultimate decision-making should rest with elected members who are accountable to the people rather than with unelected officials. Canadians will know who made the decision, why the decision was made and whom to hold accountable.*[7]

1. Subject to the approval of the Governor in Council (GIC). The writer is aware of only one instance in which a decision by the NEB to issue a certificate of public convenience and necessity was not approved by the GIC: see Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board", (2013) 50 Alta. L. Rev. 757, at 764.
2. *National Energy Board Act (NEB Act)*, R.S.C. 1985, c N-7, as amended.
3. As is discussed further below at notes 49-50, the source of cabinet's authority to modify recommendations (as opposed to rejecting a recommendation) is not explicit.
4. *Canadian Energy Regulator Act (CER Act)*, S.C. 2019, c. 28, s. 10. While the *CER Act* establishes the CER as the **Canadian** Energy Regulator, the agency conducts business as the **Canada** Energy Regulator.
5. See Harrison, McCrank and Wallace, "The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals", Energy Regulation Quarterly, Vol. 8, issue 1 (2020).
6. In the case of a negative recommendation (that is to say, a recommendation by the CER Commission to reject an application), the Governor in Council can accept the recommendation, and direct the CER to deny the application, or it can refer the matter back to the Commission for reconsideration; cabinet cannot directly "overrule" a negative recommendation. CER Act, para. 186(1)(b).
7. Hansard, May 2, 2012, p. 7471. In her 2nd reading speech on Bill C-69 (which established the CER), the Minister said: "[T]he final decision on major projects will rest with me or with the federal cabinet, because our government is ultimately accountable to Canadians for the decisions we make in the national interest." Hansard, February 14, 2018, p. 17203.

The transfer of decision-making authority to cabinet – and the relegation of the role of the NEB (post-2012) and the CER Commission (since 2019) to making a recommendation on proposed pipeline projects – immediately presented several questions:

- What process would (should) cabinet follow in moving from the regulator's recommendation to cabinet's decision?[8]
- Would cabinet consider additional information?
- Would cabinet undertake further consultations?
- If so, what are the implications for the transparency and integrity of the overall regulatory framework?
- What are the implications for respecting the principles of procedural fairness?

The challenge in addressing these questions is compounded by the second recent development, namely, further clarification in two seminal decisions of the Federal Court of Appeal on the Crown's duty to consult and, where appropriate, accommodate Indigenous people.[9] These decisions clearly establish that the Crown's duty in this regard continues throughout the cabinet process for considering the recommendation of either the NEB or the CER Commission. Indeed, one of the Federal Court decisions explicitly invites cabinet to give "serious consideration . . . to whether any of the [National Energy] Board's findings were unreasonable or wrong"[10] – to, in effect, second guess the regulator.

The significance of the questions that obviously arise is graphically illustrated by analyzing the process leading to the federal government's recent approval of a large expansion of TC Energy's NGTL System. The NGTL System connects most of the natural gas production in western Canada to domestic and export markets.[11]

The current study is one of a series of Positive Energy projects examining 'Roles and Responsibilities' in energy and climate decision-making (see Box 1).

8. And what are the implications for the timelines for project reviews? See the further discussion below at note 13.
9. See "Government of Canada and the duty to consult": https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810.
10. *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al,* 2018 FCA 153, at para. 757. See further discussion below at notes 43-50.
11. https://www.tcenergy.com/operations/natural-gas/ngtl-system/

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
    - A report examining models of intergovernmental relations for energy and climate
    - A comparative study of factors driving final investment decisions for liquefied natural gas facilities in British Columbia and Western Australia
- Policy-regulatory-judicial relations
    - A literature review on regulatory independence in Canada
    - Historical case studies of federal and provincial regulators exploring the evolution of regulatory independence over time
    - Policy-regulatory relations: analyzing innovations in policy-regulatory relations to identify 'What Works?' (research collaboration with CAMPUT)
    - A case study of the expanded role of the federal cabinet in pipeline projects (TC Energy's 2021 NGTL System Expansion)
- New imperatives in energy decision-making
    - Emerging technologies: interviews with provincial and municipal policymakers and regulators to identify the impact of emerging technologies on decision-making
    - Public engagement: analyzing innovations in regulators' engagement practices to identify 'What works?' (research collaboration with CAMPUT)

THE NGTL 2021 SYSTEM EXPANSION PROJECT

The 2021 NGTL System Expansion Project (Project) is a $2.3 billion project beginning in northwest Alberta along the west path of the NGTL System, from approximately Grande Prairie to north of Calgary, on land that is mostly adjacent to existing right-of-ways and facilities.[12] The Project will add approximately 344 kilometers of newly-built 48-inch pipe, with associated facilities, including three additional compressor stations.

NGTL has stated that the Project is needed to transport natural gas from areas of increasing production in northwestern Alberta and northeastern British Columbia to intra-Alberta and export markets. NGTL originally planned to begin operating the Project by April 2021. However, due to delays in securing the necessary approvals,[13] the anticipated in-service date for all facilities is now the second quarter of 2022.[14]

THE CER COMMISSION'S REVIEW OF NGTL'S APPLICATIONS

NGTL filed its applications for the Project with the NEB on June 28, 2018, prior to the coming into force of the *CER Act* and the establishment of the CER on August 28, 2019. Pursuant to the transitional provisions of the *CER Act*, the CER was required to process the applications as though the *NEB Act* (as amended in 2012) were still in force.[15]

As noted above, for present purposes, the role of the CER Commission under the CER Act is substantively similar to the role of the NEB in the period 2012 to 2019 and, therefore, while the following analysis proceeds within the framework of the post-2012 *NEB Act*, and references are to specific provisions of the *NEB Act*, the analysis would be expected to apply equally to the processing of similar applications that originated ab initio under the *CER Act*.

12. https://www.tcenergy.com/operations/natural-gas/2021-ngtl-system-expansion/
13. In particular, extensions by cabinet of the original statutory time limit for cabinet to consider the Project. See further, https://financialpost.com/commodities/energy/natural-gas-producers-frustrated-by-ottawas-delay-to-tc-energys-biggest-pipeline-expansion. See also https://financialpost.com/opinion/opinion-ottawas-delay-of-albertas-gas-pipeline-building-back-slower.
14. https://www.tcenergy.com/operations/natural-gas/2021-ngtl-system-expansion/
15. *CER Act,* Transitional Provisions section 36.

THE CER COMMISSION'S RECOMMENDATION REPORT

After an extensive review process, the CER Commission released its 330-page Report on February 19, 2020 recommending that the federal cabinet approve the Project (Recommendation Report).[16]

The Commission noted:

> *The benefits and burdens of any Project are never distributed evenly across the country. In light of these circumstances, reasonable people can and will disagree on what the best balance and outcome is for Canadians.*[17]

However, on balance:

> *[T]he Commission is of the view that the Project is in the public interest, is consistent with the requirements of the NEB Act and recommends that a Certificate be issued for the construction and operation of the Section 52 Pipeline and Related Facilities.*[18]

The Commission recommended 34 conditions and concluded:

> *[O]verall, with the implementation of NGTL's environmental protection procedures and mitigation measures and the Commission's recommended conditions, the Project is not likely to cause significant adverse environmental effects.*[19]

CABINET'S APPROVAL OF THE PROJECT

On October 19, 2020 the Governor in Council (cabinet) exercised its authority under subsection 54(1) of the *NEB Act* and directed the CER to issue a certificate of public convenience and necessity for the Project.[20]

Cabinet also found, pursuant subsection 31(1) of the *Canadian Environmental Assessment Act, 2012,*[21] that, taking into account the mitigation measures set out in the conditions, the Project "is not likely to cause significant adverse environmental effects..."[22]

16. Canada Energy Regulator Report, NOVA Gas Transmission Ltd. GH-003-2018: https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/3422050/3575553/3575989/3905746/C04761-1_Canada_Energy_Regulator_Report_-_NOVA_Gas_Transmission_Ltd._GH-003-2018_-_A7D5G0.pdf?nodeid=3905626&vernum=-2
17. *Ibid.*, at p.2.
18. *Ibid.*, at p.18.
19. *Ibid.*, at p.211.
20. Order in Council P.C. Number 2020-0811: https://orders-in-council.canada.ca/attachment.php?attach=39811&lang=en
21. S.C. 2012, c. 19.
22. *Supra* note 20.

CABINET'S AMENDED/ADDITIONAL CONDITIONS

Cabinet did not, however, accept the Commission's recommendation unconditionally. Rather, it amended certain conditions recommended in the CER Commission's Report and added a further condition.

The news release announcing the government's approval of the Project stated:

> *[T]he Government of Canada has made amendments to the Canada Energy Regulator's conditions for approval related to caribou and Indigenous engagement. In particular, we strengthened five conditions proposed by the regulator and added one new condition in order to better address impacts to section 35 [of the Constitution Act, 1982] Indigenous rights and help mitigate the disruption of the project's construction on caribou habitat.*[23]

The news release also stated:

> *This decision was based on facts, science, Indigenous knowledge, the public interest and careful consideration of the concerns of potentially impacted communities and about wildlife.*

Cabinet's changes were imposed unilaterally, without any "on the record" public or formal process.

In the absence of a public or formal process for cabinet's consideration of the Recommendation Report, it is reasonable to ask how the veracity of the above statement with respect to the basis for cabinet's decision is to be judged – what facts, what science, what Indigenous knowledge, what concerns about potentially impacted communities and about wildlife? What of procedural fairness?

23. News release: https://www.canada.ca/en/natural-resources-canada/news/2020/10/government-of-canada-approves-the-nova-gas-transmission-ltd-2021-system-expansion-project.html

CABINET'S REASONS

It is apparent from a reading as a whole of the Order in Council (OIC) approving the Project that the underlying reasons for cabinet's changes arose from the Crown's duty to consult and, where appropriate, accommodate Indigenous groups. For example, the OIC states:

> *Whereas, in response to Project-related concerns and potential impacts to established and asserted Aboriginal or treaty rights, raised by Indigenous groups and in response to proposals from Indigenous groups, and seeking to further accommodate outstanding Indigenous concerns raised during consultations, and consistent with the Government's commitment to reconciliation with Indigenous peoples, the Governor in Council is of the opinion that the addition to and amendment of the conditions set out in Appendix I of the Commission's Report...is appropriate...*[24]

The Preamble to the OIC also refers to "independent submissions by certain Indigenous groups..." The first paragraph of the OIC itself states:

> a. *in order to adequately discharge Canada's duty to consult and to accommodate any outstanding concerns of Indigenous groups, [the GIC] adds to and amends certain conditions set out in Appendix I [of the Recommendation Report] ...*[25]

Cabinet appears to have concluded that the CER Commission's proposed conditions fell short of what cabinet determined was necessary to satisfy the Crown's duty to consult and accommodate.

As an aside, it is to be noted that the Governor in Council must set out reasons for its decision **in** the relevant OIC itself.[26] In this case, these are found mostly in the Preamble (the "Whereas" clauses). While the Preamble includes 34 Whereas clauses, arguably as few as six of these clauses refer to matters relevant to the conditions that were amended or added by cabinet. Even these six clauses state conclusions more than **reasons** for cabinet's changes. They provide an inadequate basis for assessing the justification for, and soundness of, cabinet's changes.

24. *Supra* note 20.
25. *Ibid.*
26. *NEB Act, supra* note 1, subsection 54(2).

THE CROWN CONSULTATION AND ACCOMMODATION REPORT

While not referred to in the OIC, the basis for cabinet's conclusion is in fact to be found in a report prepared within the federal government, subsequently to the submission of the *Recommendation Report: Crown Consultation and Accommodation Report for the NOVA Gas Transmission Ltd. 2021 System Expansion Project (GH-00302018)* (CCAR), prepared by Natural Resources Canada (NRCan).[27]

The CCAR (that is to say NRCan) proposed the condition amendments and the additional condition that were in fact adopted by cabinet in the OIC. The CCAR states:

> *This CCAR was developed based on consideration of all information obtained from the CER; **supplemental consultations** between the Crown and potentially affected Indigenous groups; and, **independent submissions** made by Indigenous groups.*[28]

Development of the CCAR did not involve any public consultation. Nor, so far as is known, was NGTL provided an opportunity to comment on the amended and additional conditions to which it was bound by cabinet's approval of the Project.

27. https://mpmo.gc.ca/measures/nova-gas-transmission-ltd-2021-ngtl-2021/nova-gas-transmission-ltd-2021-report/321
28. *Ibid.* at section 1.1. Emphasis added.

THE CHANGES IMPOSED BY CABINET

It is beyond the scope of this case study to consider the merits of the changes made to the CER Commission's recommended conditions (or the additional condition) imposed by cabinet. It is to be observed, however, that the subject-matter of the particular conditions – the potential loss of caribou habitat that might arise from the Project – was addressed extensively during the CER Commission's review process and in its Recommendation Report. The Recommendation Report identified "the adverse effects that are likely to be caused by increased disturbance in the Little Smoky Caribou Range" as a burden associated with the Project[29] and included extensive discussion of the matter in its assessment of "Potential Project-related Cumulative Effects."[30]

Nevertheless, the CER Commission concluded that "the conditions recommended and imposed are sufficient for the Project to be in the public interest [and] that the effects of the Project on the Little Smoky caribou herd can be mitigated through the conditions recommended and imposed..."[31]

The CER Commission, however, was not unanimous on one particular issue, namely, whether it should recommend a condition requiring NGTL to establish an Indigenous Working Group (IWG) to provide for the direct involvement of Indigenous peoples in the finalization of the caribou measures for the Project. The majority of the CER Commission concluded that an IWG condition was not warranted.[32] Further, "the creation and implementation of an IWG of this scope poses demands in terms of processes and resources, including time, which may in turn pose a risk both to the Project and to other efforts being made to improve the state of the Little Smoky caribou Project and to other efforts being made to improve the state of the Little Smoky Caribou Range."[33]

In a dissenting view on the imposition of an IWG condition, another commissioner noted that he agreed with "the conclusion of the Majority that the applied-for Project is in the public interest, and...that the conditions related to restoration and offsets measures for caribou in the Little Smoky Caribou Range are acceptable..."[34] This commissioner, however, would have included an additional condition "related to collaboration with Indigenous peoples on those measures."[35]

The proposed terms of such an IWG condition were included in the Commissioner's dissenting view.[36] The terms of the additional condition subsequently imposed by cabinet are substantively the same as those proposed in the dissenting view, with the result that cabinet rejected the CER Commission majority on this issue and implemented the proposal recommended by NRCan, which essentially adopted the condition that the dissenting commissioner had proposed.

29. Recommendation Report, *supra* note 16, at p. 2.
30. *Ibid.*, Section 7.4.7.4.
31. *Ibid.*, at p. 206.
32. *Ibid.*
33. *Ibid.*
34. *Ibid*.
35. *Ibid.*
36. *Ibid.*, at pp. 208-210.

SUMMARY

In approving NGTL's 2021 System Expansion Project, cabinet made significant amendments to five of the conditions proposed in the Recommendation Report. These conditions addressed an issue that had been reviewed extensively during the CER Commission's review in an open and comprehensive process. Further, the subject-matter of the conditions – the protection of caribou habitat – might reasonably be considered to be within the broad expertise of the CER Commission, as being concerned with wildlife management. Cabinet, however, was clearly of the view that the conditions as proposed by the CER Commission were not good enough and saw fit to "strengthen" them,[37] in effect rejecting the advice of a specialist tribunal established for the very purpose of considering such matters.

Cabinet also added a condition that had been considered and explicitly rejected by a majority of the CER Commission. Cabinet rejected the recommendation of the majority and instead adopted the view of and condition proposed by the dissenting commissioner.

These condition amendments and the addition of a further condition were made by cabinet without adopting any public review process. Furthermore, the burden of the additional requirements was imposed directly on NGTL, as the Project proponent. So far as is known, NGTL was not provided an opportunity to make any submission subsequent to the release of the Recommendation Report and prior to cabinet's decision.

To this point, it might be considered that the legitimacy of cabinet's changes to the recommendations of the CER Commission was questionable – on substantive, procedural and policy grounds relating to maintaining the integrity and transparency of the regulatory process.

37. News release, *supra* note 23.


MAMMOET

THE FEDERAL COURT OF APPEAL DECISIONS

However, in proceeding as it did, cabinet was (with one critical exception that is discussed below) merely following the guidance of two Federal Court of Appeal decisions dealing specifically with the duty of the Crown to consult and accommodate in the context of cabinet's consideration of the recommendations arising from a regulatory review process.

In *Gitxaala Nation et al. v. Attorney General of Canada et al. (Gitxaala)*,[38] the Court considered several challenges to cabinet's approval of the proposed Northern Gateway Project. The approval had been recommended in the report of a Joint Review Panel acting under the *Canadian Environmental Assessment Act, 2012*[39] and the *National Energy Board Act* (post-2012).[40] In *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al (Tsleil-Waututh First Nation)*,[41] the Court considered several challenges to cabinet's approval of the proposed expansion of the Trans Mountain Pipeline (referred to as TMX) based on the recommendation of the National Energy Board. Both decisions were concerned with (among other issues) the Crown's duty to consult following completion of the respective regulatory review processes and prior to cabinet's consideration of the regulatory recommendations.

The Court noted in *Tsleil-Waututh Nation* that when the two consultation frameworks were compared "there is little to distinguish them."[42] In both cases, the Court found that the Crown had not satisfied its obligation to consult.

The Court concluded that consultation at the stage immediately prior to cabinet's consideration of the respective recommendations required "meaningful two-way dialogue"[43] that was more than "simply to allow Aboriginal peoples 'to blow off steam'..."[44] Rather, consultation at that stage was "an opportunity to address errors and omissions in the Report on subjects of vital concern to Aboriginal Peoples"[45] and "to fill the gaps."[46] Canada had the responsibility "to dialogue about the asserted flaws in the Board's process and recommendations", which it failed to do.[47] The Crown had not given serious consideration to whether "any of the Board's findings were unreasonable or wrong [or] to amending or supplementing the Board's recommended conditions."[48]

38. 2016 FCA 187.
39. *Supra* note 21.
40. *Supra* note 2.
41. *Supra* note 10.
42. *Ibid.,* at para. 518. The consultation phases that the court was concerned with were identified as Phase IV in the Northern Gateway process and Phase III in the TMX process.
43. *Tsleil-Waututh Nation, supra* note 10, at para. 558.
44. *Gitxaala, supra* note 38, at para. 233.
45. *Ibid.*, at para. 274.
46. *Ibid.*, at para. 326.
47. *Tsleil-Waututh Nation, supra* note 10, at para. 628.
48. *Ibid.*, at para. 757.

Canada had initially taken the position that it did not have authority to amend conditions that had been recommended or to add new conditions at the stage of cabinet's decision. In both cases, the Federal Court of Appeal concluded otherwise,[49] however, and by the time of argument in *Tsleil-Waututh Nation*, Canada had conceded the point.[50] Further, the Court assumed that such amended or additional conditions would bind the project proponent.

In its consideration of the NGTL Recommendation Report, cabinet, not unreasonably, appears to have read these various *dicta* as requiring it to carefully review the Recommendation Report, with a view to "strengthening" it,[51] or, it might be said, "improving" on the recommendations of the CER Commission. The CCR itself noted:

> *In considering whether, and the extent to which amendments could be made to the conditions recommended by the Commission, NRCan took into account the interpretation and guidance provided by the Federal Court of Appeal in Gitxaala . . . and Tsleil-Waututh Nation.*[52]

However, cabinet overlooked an important caveat in *Gitxaala*, namely, that a project proponent that would be bound by proposed condition amendments or additional conditions would have an opportunity to comment. After dialogue in the Phase IV consultation process (after submission of the Joint Review Panel Report), the Court said "recommendations, including any new proposed conditions, needed to be formulated **and shared with Northern Gateway for input**"[53] before being placed before the Governor in Council. No such sharing with NGTL appears to have occurred before the CCR was put before cabinet – an apparent fundamental breach of procedural fairness.

This requirement, for an opportunity for a proponent to provide input on proposed condition changes or additions, was not referred to in *Tsleil-Waututh Nation*, presumably because, as had been noted in *Gitxaala*, "[i]t goes without saying . . . as a matter of procedural fairness..."[54]

49. In *Gitxaala, supra* note 38, see paras. 163-168; in *Tsleil-Waututh Nation, supra* note 10, see paras. 633-634.
50. *Tsleil-Waututh Nation, supra* note 10, at para. 635.
51. News release, *supra* note 23.
52. *Supra* note 27, at p. 50.
53. *Supra* note 38, at paras. 327 and 337, emphasis added.
54. Ibid., at para. 337

RECONSIDERATION PROCESS

It is important to emphasize here that the *NEB Act* (post-2012) established a formal process by which cabinet could refer the NEB's recommendation or any of the recommended terms and conditions back to the Board "for reconsideration taking into account any factor specified in the [GIC's] order. . ."[55] The NEB Act does not prescribe the process to be followed in undertaking such a reconsideration but it would have been open to the CER Commission to establish a process that would have at the least provided NGTL with an opportunity to comment on the proposed condition amendments and the additional condition.

It can only be speculated that cabinet chose not to invoke the reconsideration process out of concern about the additional time that would be required – delays in the regulatory process had already caused a delay of a year in the commencement of the Project.[56]

It is to be noted here that, in quashing cabinet's approval of the TMX Project in *Tsleil-Waututh Nation*, the Federal Court of Appeal remitted the matter back to the GIC "for prompt redetermination."

> *In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the [National Energy] Board, or its successor, for reconsideration. Pursuant to section 53 of the National Energy Board Act, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council.*[57]

The NEB was so directed by cabinet.[58] After a formal open process, in which the proponent was a full participant (along with other interested parties), the NEB submitted its reconsideration report to cabinet, recommending a second approval of the project.[59] On June 18, 2019 cabinet adopted the NEB's recommendations and approved the project.[60]

55. *NEB Act, supra* note 2, subsection 53(1). A similar process is provided for in subsection 184 of the *CER Act, supra* note 4.
56. *Supra* note 13.
57. *Supra* note 10, at paras. 768-9.
58. https://orders-in-council.canada.ca/attachment.php?attach=36879&lang=en
59. With modifications: https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3614457/3751789/3754555/A98021-1_NEB_-_NEB_Reconsideration_Report_-_Reconsideration_-_Trans_Mountain_Expansion_-_MH-052-2018_-_A6S2D8.pdf?nodeid=3754859&vernum=-2
60. Order in Council 2019-12143: https://orders-in-council.canada.ca/attachment.php?attach=38576&lang=en. A subsequent application to the Federal Court of Appeal for judicial review of this decision was dismissed: *Coldwater First Nation v. Canada (Attorney General),* 2020 FCA 34.

CONCLUSIONS

Analysis of cabinet's review and ultimate disposition of the CER Commission's Recommendation Report on the 2021 NGTL System Expansion Project suggests that tension may arise between two fundamental public responsibilities in the context of reviewing proposals for major resource development projects. The first of these is to fulfill, and respect, the requirements of the constitutional duty of the Crown to consult and, where appropriate, accommodate Indigenous peoples. The second is to maintain the integrity and effectiveness of the applicable regulatory framework, particularly by being transparent, and by complying with the requirements of procedural fairness.

When considered exclusively in terms of maintaining the integrity of the regulatory process, the NGTL case raises several serious concerns, particularly with respect to a lack of transparency. Transparency is a bedrock principle for maintaining a robust, effective regulatory framework. Without transparency, there is no effective means of holding decision-makers to account.

Cabinet's changes in approving the 2021 NGTL System Expansion Project were based on a re-evaluation of the CER Commission's Recommendation Report by an internal government process that produced the Crown Consultation Report. The CCR second-guessed – in cabinet's view, "strengthened" – the findings of the Recommendation Report, based on bilateral consultations with affected Indigenous interests, in effect rejecting the findings of the CER Commission on a matter that the Commission had reviewed exhaustively in a comprehensive, and transparent, process. Furthermore, cabinet's additional condition directly rejected the relevant recommendation of the CER Commission and adopted instead the recommendation of a dissenting commissioner, again on the basis of the internal report prepared by NRCan. Parties who had participated in the CER Commission process but whose views had not been adopted by the CER Commission in its Recommendation Report succeeded in rearguing their case during the cabinet review phase of the process, a process that was not transparent.

It also appears that cabinet simply disregarded the requirements of procedural fairness, particularly with respect to the interests of NGTL, notwithstanding the admonition by the Federal Court of Appeal in *Gitxaala* that an applicant should be provided with an opportunity for input with respect to any proposed changes to conditions resulting from the Crown consultation process undertaken after completion of a regulator's review of a proposed project.[61]

However, while the cabinet review process might be challenged for its disregard of general principles that support the integrity of the regulatory process, cabinet acted throughout in accordance with the guidance of the Federal Court of Appeal in *Gitxaala* and *Tsleil-Waututh Nation*, with one notable exception: cabinet failed to provide NGTL with an opportunity for input on the condition changes that had been proposed in the CCR, notwithstanding that a formal process for seeking such input was available.

The Crown's duty to consult and, where appropriate, accommodate is a duty owed to a specific class of persons, grounded in the honour of the Crown; fulfillment of the duty may not necessarily involve a public, transparent process. As illustrated by this case study, there is therefore the possibility that transparency may be compromised in specific cases.

61. *Supra* note 53, at paras. 327 and 337.

However, the requirements of procedural fairness must still be respected. As noted earlier, the Federal Court of Appeal was clear in Gitxaala:

> ***It goes without saying*** *that as a matter of procedural fairness, all affected parties must have an opportunity to comment on any new recommendations that the coordinating Minister proposes to make to the Governor in Council.*[62]

Such an opportunity was not provided to affected parties in the NGTL case, including the proponent as the party on which the burden of complying with the revised conditions falls.

Cabinet could have invoked the reconsideration process under the NEB Act and referred the matter back to the CER Commission. Had it done so, presumably the CER Commission would have convened a process that would have provided NGTL (and other interested parties) with an opportunity to comment. At the least, the reconsideration process might have addressed concerns about procedural fairness. It could also have gone some way towards addressing concerns about transparency, thereby enhancing the integrity of the overall review process.

A two-step process in which cabinet makes its own decisions to approve or reject proposed infrastructure projects, after considering the recommendations of a prior regulatory process, inevitably introduces challenges for maintaining transparency. The cabinet approval step may be seen by aggrieved interests as an opportunity to reargue their positions – as a *de facto* appeal from the findings of the regulatory process. Cabinet should, therefore, generally be cautious about its approach to deviating from the regulator's recommendations.

However, in the context of fulfilling the Crown's duty to consult and, where appropriate, accommodate Indigenous concerns, further considerations arise. It is clear from the decisions of the Federal Court of Appeal in *Gitxaala* (Northern Gateway) and *Tsil-Waututh Nation* (TMX) that fulfillment of that duty requires the Crown to give serious consideration itself to whether "any of the Board's findings were unreasonable or wrong [or] to amending or supplementing the Board's recommended conditions." As is clear from this case study, cabinet's process for doing so may not be open and transparent.

In the absence of an open and transparent process, accountability is illusory. The respective Ministers responsible for the amendments to the NEB Act in 2012 and for the CER Act in 2018 each stressed accountability in proposing the respective Bills to Parliament.[63]

In future, where cabinet concludes that amended or additional conditions to those recommended by the regulatory review process are warranted – in fulfillment of the Crown's duty to consult – cabinet should, as a matter of course, refer the matter back for reconsideration by the CER Commission, as is provided for in the CER Act. Resort to the reconsideration process under the CER Act would both improve transparency of the overall review framework and address concerns about procedural fairness.[64]

62. *Supra* note 37, at para. 337. Emphasis added.
63. See Ministerial statements *supra* at note 7.
64. The CER is now taking a more direct role in fulfilling the Crown's duty to consult, in parallel with the CER Commission's hearing process and otherwise. See, for example, "Canada Energy Regulator Approach to Crown Consultation", 30 November 2020: https://www.cer-rec.gc.ca/en/consultation-engagement/crown-consultation/canada-energy-regulator-approach-crown-consultation.html. However, the role of cabinet in considering recommendations from the CER Commission remains.

NOTES

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