

Review of National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference:

**Manitoba Metis Federation (MMF) Assessment of Comments and Concerns:
July 20, 2016**

The following is a summary of preliminary comments that the MMF has identified within the *Review of National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference* associated with the *National Energy Board Act, 1985*.

Panel Mandate

Subsection: “The NRCan Minister will establish an Expert Panel (the Panel) to conduct a targeted review of the NEB’s structure, role, and mandate pursuant to the National Energy Board Act (NEB Act).”

- **Comment:** The MMF would appreciate clarification on how the Minister will select the Panel members. Will members be nominated or will they apply to participate on the Panel? Will there be specific criteria the Panel members must meet in order to be selected by the Minister? Furthermore, will it be a requirement of Panel members to have extensive knowledge working with Indigenous groups? Furthermore, will there be representation from each of the three Constitutionally-recognized Aboriginal peoples (Metis, First Nations and Inuit)? A transparent selection process will aid in building public trust and demonstrate to participants that the Government of Canada wants to build trust from the outset of the process.

Scope of Review

Subsection: “Targeted engagement activities will focus on key areas where there may be opportunities to strengthen the NEB. For example, the Panel shall review the structure role, and mandate of other regulators (e.g., Alberta Energy Regulator) to identify potential best practices and guide its review.”

- **Comment:** The MMF has experienced various issues during regulatory processes (ex. Manitoba Clean Environment Commission). This is largely due to issues related to Crown-Aboriginal Consultation. The MMF would like to remind the Panel that although looking to other regulators for guidance may prove beneficial, it should be done with caution as other regulators may have their own process issues. It would be suggested to include participant feedback when the use of information about another regulator is relied on.

Scope of Review: Indigenous Engagement

Subsection: “Some Indigenous groups have raised concerns regarding the nature and process of their participation in all aspects of a pipeline’s lifecycle. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Enhancing the role of Indigenous communities in monitoring pipeline development and operations and in developing emergency response plans; and
- How the interests of indigenous peoples are balanced against many and varied societal interests in decision-making.”

- Comment: Another potential outcome that should be included is recommendations on how the NEB's regulatory process will inform Crown-Aboriginal consultation in a way that is satisfactory to Indigenous groups. A large area of concern for most Indigenous participants is how the Crown's duty to consult will be fulfilled honourably when the Crown is heavily relying on a process that does not have the mandate to address Crown-Aboriginal consultation.

Complementary Mandates

Subsection: "In preparing for and undertaking the review, the Panel will take into account the activities associated with the other mandated reviews, with the objective of sharing information received during the respective reviews, where relevant, and coordinating review activities, to the extent possible."

- Comment: The MMF would appreciate clarity on the expectations for participants who are participating in each of the complementary mandates. Is it in the best interests of the participants to provide duplicate information to each mandated Panel to ensure all relevant information is presented? Or will there be a process established for information sharing to avoid participants' duplicate efforts?

Subsection: "In assessing NEB activities the Panel shall consider the relationship between processes and the aboriginal and treaty rights of Indigenous peoples and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples."

- Comment: The MMF acknowledges and supports ensuring the principles of UNDRIP are properly reflected throughout this and all Aboriginal consultation processes being carried out by Canada.

The Review Process: The Panel

Subsection: "The Panel will consist of at least three members, including one Chairperson. In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister determines otherwise. In such circumstances, the Minister may choose to replace the Panel member."

- Comment: Please provide further clarity on the make-up of the Panel. The Terms of Reference indicate that that the Panel will consist of at least three members but there is no maximum number of members identified. In the scenario that there is only three Panel members and one resigns from their position, is it reasonable to proceed with only two Panel members? It may be suggested to raise the minimum number of Panel members to ensure a richly diverse Panel that should not have an issue proceeding in the scenario that a Panel member resigns.

Subsection: "The Panel shall continue with its review to the extent possible while waiting for a response from the Minister in order to comply with the timelines of these Terms of Reference."

- Comment: The MMF would like to suggest that a timeframe is established in the scenario that the Chairperson writes to the Minister to request clarification or an amendment to the Terms of Reference. Although the Terms of Reference identify that the Panel shall

continue with its review to the extent possible, awaiting a response from the Minister may cause serious delay in the process. If a timeframe for correspondence is established, it will provide further assurance that the process will remain within the timeframe identified in the Terms of Reference.

Subsection: “By way of letter from the Chairperson, the Panel may request an amendment to its Terms of Reference from the Minister.”

- Comment: Please provide clarity on how amendments to the Terms of Reference will be warranted and what the participants’ role is for reviewing any amendments. The Terms of Reference are currently going through a public review process but this process may be viewed as non-genuine if the Panel has the ability to unilaterally make amendments. Please provide clarity on how public trust will be managed in this scenario.

Subsection: “The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of Indigenous in-person consultation activities.”

- Comment: Due to a lack of internal capacity, it is challenging to prepare detailed and comprehensive responses in a short period of time. For this reason, the MMF would like to ensure that there is adequate notice prior to any consultation activities and that funding capacity to undertake these consultations are received in advance.

The Review Process: Indigenous Engagement and Consultation

Subsection: “The Panel shall ensure that a record of any Indigenous in-person engagement event is created and posted on the Panel’s website.”

- Comment: Please provide clarity on what the record would entail, such as event transcripts, etc.



MANITOBA METIS FEDERATION INC.

David Chartrand, LL.D. (Hon)
President

July 20, 2016

VIA E-MAIL

National Energy Board
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Calgary, AB T2R 0A8
Email: NRCan.NEBModernization-ModernisationONE.RNCan@Canada.ca

Re: Review of National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference

Dear Sir/Madam,

The Manitoba Metis Federation (MMF) is in receipt of information regarding the June 20th 2016 announcement by the Government of Canada concerning the review of Federal Environmental and Regulatory Processes. The following is the MMF's response to the Terms of Reference for National Energy Board (NEB) modernization that Natural Resources Canada has provided online.

The MMF has undertaken a preliminary review of the National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference, and has identified some comments and concerns that we would like to see emphasized/ addressed (see attached).

The MMF is the self-governing representative for the Metis Nation's Manitoba Metis Community (the Community), and as such, must promote, protect and advance the collective rights of its citizens. The MMF represents the citizens and harvesters of the Community, who use the lands, waters and resources throughout the province of Manitoba. It is of significant importance that the rights, claims and interests of the Community be recognized and respected.

Further to the MMF's responsibility in this regard, the MMF's 2007 Resolution No. 8 sets out a process for the MMF's engagement in discussions with governments, industry and other proponents in matters that relate to the interests and rights of the Community. The MMF home office is the central point of contact for all consultation and engagement on behalf of the Community. In engaging the MMF, on behalf of the Community, the Resolution No. 8 Framework calls for the implementation of five phases:

- Phase I: Notice and Response;
- Phase II: Funding and Capacity;
- Phase III: Engagement and Consultation;

Phase IV: Partnership and Accommodation; and
Phase V: Implementation.

As the proposed Terms of Reference will have an impact on the rights and interests of the Community, the process as set out above will need to be followed. Phase II: Funding and Capacity is the next step in the process and the MMF is pleased that participant funding will be available for this NEB modernization process for consultations with Indigenous groups. The MMF would like to request further details around the timeline, application requirements, and amount of funding available so we can adequately inform and prepare ourselves for the consultations set to begin in September 2016.

The MMF appreciates this initial process and looks forward to being involved in this process as well as future review processes on this and other matters. If you have any questions or require clarification on any matters addressed in this letter, please do not hesitate to contact me directly via telephone [REDACTED] and we would be happy to assist.

Best regards,

[REDACTED]