

WHO DECIDES?

**BALANCING AND BRIDGING
LOCAL, INDIGENOUS
AND BROADER SOCIETAL
INTERESTS IN CANADIAN
ENERGY DECISION-MAKING**

**SYSTEM UNDER STRESS – INTERIM REPORT #1
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EXECUTIVE SUMMARY

Traditionally, most decisions relating to the energy system have been in the hands of provincial or federal authorities. However, a number of trends point to a growing power on the part of municipal governments and Indigenous governments. These trends include: widespread use of negotiated impact benefit agreements for energy infrastructure between local governments and proponents; implementation of co-management structures for land use planning and resource development; recent jurisprudence reinforcing inherent jurisdiction of First Nations on lands with Aboriginal title; and, a lack of public confidence in energy development leading some municipal and Indigenous authorities to assert an intent to regulate cross-border energy infrastructure within their borders. In the face of growing power of municipal and Indigenous authority, the question of “who decides” when it comes to energy policy-making, planning, regulation and assessments of individual projects is a major new stress point in the energy decision-making system.

This report identifies the range of roles for municipal and Indigenous governments in the energy decision-making system as well as concepts for analysis, and recommendations for policymakers and regulators. It builds on the workshop *“Who Decides? Balancing and Bridging Local and Higher-Order Interests in Canadian Energy Decision Making”* held March 20 and 21, 2017 at the University of Ottawa. This event featured a diverse range of participants from government, Indigenous organizations, industry, ENGOs and academia.

The question of “who decides?” and the role of municipal and Indigenous authorities in the Canadian energy decision-making system is complex and dynamic. Legal and constitutional divisions of power are key considerations but evolving jurisprudence and governance trends mean that there are a diversity of roles for local and Indigenous governments. Further complicating matters is the fact that orienting energy decisions toward the overall public interest inevitably requires significant coordination to overcome uneven benefits and impacts. Currently, Canadian energy decision-making employs a mix of governance arrangements with greater or lesser amounts of delegation of decision-making authority and

greater or lesser numbers of stakeholders involved in decisions. A framework of classifying these governance arrangements (traditional, consultative, multilevel, delegated) is presented in the report and then applied to a range of emerging roles for municipal and Indigenous authorities.

Innovative mechanisms and structures such as Impact Benefit Agreements and the First Nations Land Management Regime appear to have potential to build bridges between local and general interests in energy development. However, efforts by federal and provincial governments are needed to ensure coordination and build capacity. This report also emphasizes the practice of planning as a policy implementation activity that plays an important role in combining local and broader public interests.

The following recommendations are targeted at public authorities (federal, provincial, territorial policymakers and regulators; municipal governments; Indigenous governments). They were formulated by the Positive Energy research team in consultation with senior leaders from government, industry, Indigenous interests and ENGOs. The political feasibility of the recommendations were explored by assessing the views of Canadians on selected recommendations in nation-wide polling. Further polling of a panel of energy leaders is underway.

Energy development and investment require reasonably efficient and timely decisions as well as a certain amount of predictability. The trend to have more actors involved in decision-making makes it more complicated to achieve this. Serious contradictions and tensions are emerging and will continue to emerge without significant coordination and cooperation efforts. Efforts are needed not only for the sake of efficiency, but also to ensure a balance between local and broader societal interests. The recommendations below are oriented in this direction.

1 Recognize and encourage distributed decision-making while reaffirming a prominent role for federal / provincial / territorial authorities

- a Recognize that whether intentionally through formal co-management arrangements, or through the more *ad hoc* Impact Benefit Agreements / host-community agreements, the power of Indigenous and municipal governments has been elevated in the energy decision-making system. Most of this is occurring at the energy project decision-making level but also at the level of policy, planning and the development and implementation of regulation. (*report sections 2.1; 3.1; 3.2*)
- b Encourage the benefits that can arise through this distribution and decentralization of decision-making authority. Benefits include: increased legitimacy of decisions at local levels; confidence-building among the parties involved; reduced “social risk” for project proponents; better projects and increased sustainability of energy infrastructure; and greater opportunities for comprehensive and integrated planning. (*report section 2; 2.1; 3.2*)
- c Reaffirm and support the prominent role for federal / provincial / territorial authorities
 - i For linear energy infrastructure, provincial (within province) and federal (across provinces / international borders) authorities need to play prominent roles. This includes retaining ultimate authority to decide whether infrastructure is in the broad public interest. In other words, seek decision-making arrangements that are traditional, or consultative, or multilevel. (*report section 1.1; 2.1; 3.1; 3.2*)
 - ii For non-linear energy infrastructure, provincial / federal / territorial authorities also need to play prominent roles and retain authority to decide whether infrastructure is in the public interest. However, there is potentially more opportunity for more distributed decision-making arrangements, i.e., traditional, consultative, multilevel or delegated. (*report section 1.1; 2.1; 3.1; 3.2*)
 - iii For all types of energy infrastructure as well as for policy, planning and the development and implementation of regulation, explore greater use of formal co-management bodies that share authority among federal / provincial / territorial governments and collections of Indigenous or municipal governments. Draw on existing experiences. (*report section 2.1; What We Heard report¹ section 3*)
 - iv Explicitly identify Indigenous governments that are proximate to linear infrastructure and need to be engaged. This will reduce burden on Indigenous governments and on proponents. (*report section 3.2*)
 - v Play a coordinating role by supporting capacity building (*recommendation 2*) and connecting planning efforts. (*recommendation 3*)

1 *What We Heard — Who Decides? Balancing and Bridging Local and Higher-Order Interests in Canadian Energy Decision-Making*, a report summarizing participant views expressed at the March 2017 Positive Energy workshop. Available on the Positive Energy website or by request.

2 Support capacity building efforts for municipal and Indigenous governments

- a** Promote coordination and cooperation to find economies of scale as Indigenous governments take on environmental assessment activities in their territories. (*report section 3.2*)
- b** Consider establishing an expert body to build technical capacity (planning, finance, safety, regulatory process principles) within Indigenous and municipal governments. Draw on existing experiences like QUEST's Community Energy Planning program, Catalyst 2020 program and others. (*report section 3.1, What We Heard report #2*)
- c** Develop executive / personnel exchanges between industry, regulators, policymakers, Indigenous governments and municipal governments. This will strengthen leadership competencies; increase awareness of historical context and cultures, organizational / technical / investment constraints and imperatives; and, lead to better relationships. (*report section 3.3; What We Heard report #2; #6*)
- d** Explore funding sources for capacity building. Potential sources include government, industry, and foundations (e.g., philanthropic foundations, community foundations). (*report section 3.3; What We Heard report #2*)

3 Elevate prominence of energy in land use planning

- a** Work towards better integration of energy issues in the land use planning system. Build regional, provincial and federal energy policy goals or energy plans into the existing medium and long term planning tools (e.g., planning acts, provincial policy statements, regional and strategic impact assessment processes). (*report section 1.2; 3.1; 3.2; What We Heard report #4*)
- b** Federal and provincial support for community energy planning through, for example, provision of energy and GHG data, maintaining the federal gas tax agreement and mandated energy targets. (*report section 3.1*)
- c** Review the First Nations Land Management Regime program with a focus on increasing opportunities for First Nations to control land use decisions within their territories. (*report section 3.2; What We Heard report #2*)
- d** Track and monitor the content of IBAs to: avoid duplication in meeting regional priorities for infrastructure and development; identify best practices; and reduce transaction costs. (*report section 3.2; What We Heard report #3*)

4 Aim for predictability, efficiency and a climate that fosters innovation, investment and competitiveness

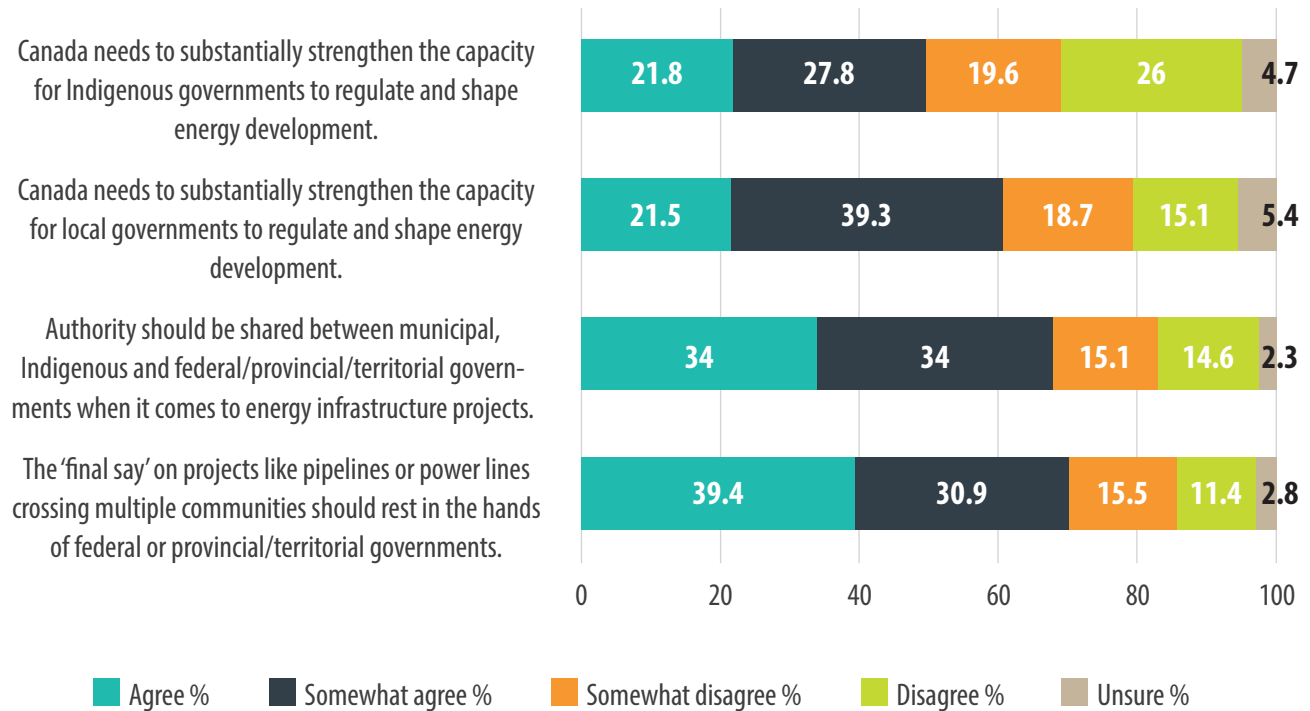
- a** Predictability and efficiency of the energy decision-making system should be a goal of any reforms. The above recommendations to improve planning and build capacity within municipal and Indigenous governments can help in this direction. Decision systems must also foster innovation, investment and competitiveness. (*report section 3.1; 3.3; What We Heard report #5*)

The recommendations relating to final decision-making authority (1.c.i), shared authority (1.c.iii) and supporting capacity building efforts for local and Indigenous governments were presented to Canadians in a nation-wide poll. The results (Figure 1) show support for retaining authority for linear infrastructure approvals in the hands of higher level governments but also a desire for significant roles for local and Indigenous governments in energy decision-making. Balancing and bridging these roles will require significant effort.

FIGURE 1

Views on recommendations among Canadians

Source: Nanos Research, RDD dual frame hybrid telephone and online random survey, September 23rd to 26th, 2017, n=1000, accurate 3.1 percentage points plus or minus, 19 times out of 20.



INTRODUCTION

The Positive Energy initiative² seeks to strengthen public confidence in Canadian energy policy, regulation and decision-making through research and analysis, engagement and recommendations for action. A research stream titled *System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform* has zeroed in on three core “stress points” in Canada’s energy decision-making system: (1) how to strengthen and clarify relationships and roles between policymakers and regulators; (2) how to balance local interests with higher-order regional, provincial, and national interests; and (3) how to strengthen engagement, information and capacity in energy decision-making (Cleland and Gattinger 2017). Each of these stress points has been the focus of a senior leaders workshop informed by a discussion paper, revised following the workshop as an interim report. The process began by focusing on the second stress point: how to balance local and higher-order interests. This document represents the interim report on that topic. Interim reports on the other two stress points will be published in the coming months. A final report synthesizing the findings and recommendations of all three interim reports will be published shortly thereafter.

A workshop “*Who Decides? Balancing and Bridging Local and Higher-Order Interests in Canadian Energy Decision Making*” was held March 20 and 21, 2017 at the University of Ottawa and featured a diverse range of participants from government, Indigenous organizations, industry, ENGOs and academia. This report incorporates discussion from the workshop and offers recommendations for policymakers and regulators. It also identifies the range of roles for municipal and Indigenous governments in the energy decision-making system as well as concepts for analysis.

There are two key terms used throughout this report that deserve early comment. We refer to local and Indigenous **authorities**. This is terminology used throughout the Positive Energy project to refer to policymakers (elected government officials and the public service implementing policy direction) and regulators. In the municipal and Indigenous context, *authorities* essentially means municipal and Indigenous governments, although as will be seen in the example of co-management, it can also extend to authority to exercise regulatory functions. Thus, to be clear, community groups, NGOs, industry proponents and other actors – whilst very important – are not *authorities*. The second key term is the **energy decision-making system**. This term refers to a system of multiple parts, including energy policymakers, energy regulators and planning activities, all of which are influenced and bound by the physical and market realities of energy. For more on the energy decision-making system, see the paper “*System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform*” (Cleland and Gattinger, 2017).

This report proceeds in four parts. First, it lays out the dimensions of the topic, including legal and constitutional division of powers and the concepts of public interest and planning. Secondly, it turns to the academic literature for a framework for thinking about shifting roles among government actors. Energy decision-making examples of traditional, consultative, multilevel and delegated governance arrangements are highlighted. In the third section, this framework is used to consider the range of roles that municipal and Indigenous authorities have in the energy decision-making system, both currently and in the future. The paper concludes with a series of recommendations for decision-makers.

2 <http://www.uottawa.ca/positive-energy/>

1. SETTING THE STAGE: CONSTITUTIONAL, LEGAL AND PUBLIC INTEREST CONSIDERATIONS

1.1 CONSTITUTIONAL AND LEGAL LANDSCAPE

The legal divisions of government authority over energy matters in Canada are set in Canada’s founding documents. The *Constitution Act, 1867* and amendments in 1982 stipulate that provinces enact laws related to developing energy resources, but that the federal government has explicit jurisdiction over interprovincial works (i.e., pipelines and international power lines) and has significant “residual power” under its constitutional responsibility for “peace, order and good government” to enact policy relating to energy matters (Powell 2014; Guy 2010). Local and municipal governments

are created under provincial law and their legal authority is typically restricted to local land-use by-laws influencing proposed locations for energy infrastructure. Indigenous government authority is more flexible and varied across the county and depending on circumstance, Indigenous governments may operate with the same powers as municipal or provincial governments on reserve lands and other territory (NRCan 2016). Table 1 provides a summary of some of the federal and provincial powers over energy matters. Municipal and Indigenous roles are taken up later in the document.

TABLE 1

Examples of federal and provincial powers over energy matters

Federal	Provincial
Interprovincial works (pipelines) and international power lines (Section 92.A <i>Constitution Act</i>), nuclear power regulation, energy development offshore and on frontier lands	Non-renewable natural resource exploration, development, management, electricity generation development, conservation and management (Section 92.A <i>Constitution Act</i>)
Powers related to energy markets from jurisdiction over interprovincial and international trade and commerce (including foreign investment), international treaty-making, taxation	Wide powers from environmental regulation to energy distribution to standards relating to buildings and energy using equipment (Section 92.13 <i>Constitution Act</i> “ <i>Property and Civil Rights</i> ”)
Regulation of environmental impacts of energy development on Canada’s fisheries (<i>Fisheries Act</i>); Species at Risk (<i>Species at Risk Act</i>); and more generally <i>Canadian Environmental Assessment Act</i> , <i>Canadian Environmental Protection Act</i>	

The contours of overlapping jurisdictions between federal, provincial, Indigenous and municipal authorities are evolving. Jurisdiction over energy decision-making, particularly over the siting of energy infrastructure, is often tested, and new influences, including international legal influences, are emerging. Several recent legal rulings and ongoing situations are worth highlighting:

- **Federal National Energy Board (NEB) authority over City of Burnaby by-laws confirmed:** In 2014, the City of Burnaby attempted to stop tree clearing for geological testing by the proponent of the Trans Mountain Pipeline expansion. The geological work was required in order to support application for the expansion to the NEB. The City stated the activities contravened City Park by-laws and issued orders to cease. The proponent asked the NEB for a ruling to forbid Burnaby from enforcing its by-laws. The NEB did so, citing federal paramountcy and immunity from municipal by-laws. The ruling was upheld by the Supreme Court of British Columbia (Bankes 2015, King et al 2015).
- **Constitutional requirements to meaningfully consult Indigenous groups overturn federal approval of Northern Gateway pipeline:** The *Constitution Act, 1982 Section 35* recognizes and affirms Aboriginal rights. This places a high standard for consultation on the federal government. In June 2016, the Federal Court of Appeal ruled that Canada's efforts were insufficient during the assessment process for the Northern Gateway Pipeline. This overturned the federal decision to approve the project (Mandell Pinder, 2016).
- **Proper justification required before provincial and federal governments can infringe Aboriginal rights and title:** The 2014 Supreme Court ruling in *Tsilhqot'in vs. British Columbia* concerned provincially regulated forestry activity in traditional territory of the Tsilhqot'in Nation. The court set new guidelines to account for culturally sensitive evidence of past occupation and found that BC breached its duty to consult. It reaffirmed earlier jurisprudence (e.g. *Delgamuukw 1997*) that any provincial and federal infringement of Aboriginal title should be avoided and must pass a three part "justification test": Did the government discharge its procedural duty to consult and accommodate?; Were the government's actions backed

by a compelling and substantial objective?; and, Was the governmental action consistent with the Crown's fiduciary obligation to the group? (McMillan 2014).

- **Requirements for "deep" consultation:** Supreme Court rulings in the summer of 2017 *Clyde River (Hamlet) v. Petroleum Geo-Services and Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* have clarified requirements of "deep" consultation with Indigenous peoples who have strong claim to rights (e.g. treaty rights). The Inuit of Clyde River and the Chippewas of the Thames First Nation both sought to overturn NEB decisions on the basis of inadequate consultation. The Supreme Court agreed with appellants in Clyde River but not the Chippewas, pointing out that the former lacked several features required for meaningful consultation including: participant funding for Indigenous groups to address the evidence of the impacts of the activity before the NEB; oral hearings; inquiry into the specific rights and impacts of the proposed activity on those rights. The decision in the *Clyde River* case also made clear that the Crown can rely on steps undertaken by a regulatory agency, such as the NEB, to fulfill its duty to consult. This has been a point of some contention for some as to whether or not a regulator like the NEB can fulfill that role. The Court ruled that the NEB has sufficient procedural powers to carry out meaningful consultation but this role must be made clear to the Indigenous group(s) involved (Mandell Pinder 2017, Safayeni and Hassan 2017).
 - **Québec review of proposed Energy East pipeline:** The proponent first refused then, in a politically charged context, later agreed to undergo an Environmental Impact Assessment and Review under the province's *Environmental Quality Act*. This situation raises questions about the extent to which provincial legislation can and should apply to interprovincial pipelines that are regulated federally under the *NEB Act* (Gralnick, 2016).
- In this context, it is worth mentioning that approval of other non-pipeline energy projects may fall under both federal and provincial jurisdiction. For example, both BC and Canada required environmental assessments for the Site C hydroelectric project and established a **Joint Review Panel** in order to do this.

- **Ontario overrules King Township by-laws intended to stop gas plant:** In 2010, King township passed an interim control by-law and started a process to amend its official plan to ban a 393 MW gas power plant. The provincial government exempted the plant from the provincial *Planning Act*, thus removing the authority of the municipality to restrict the construction of the generation facility (Bird, 2016).
- **Validity of social acceptability as reason to deny energy project approval:** In June 2017, following a challenge by Strateco Resources Inc, the Superior Court of Québec upheld the government’s refusal to grant uranium exploration permits for reasons of lack of sufficient social acceptability. The province issued a uranium mining moratorium in 2013 and directed its Bureau d’audiences publiques sur l’environnement (BAPE) to conduct a “generic” environmental review on uranium industry issues in Québec. The BAPE recommended continuing the moratorium. The BAPE recommendation was criticized by the federal nuclear regulator the Canadian Nuclear Safety Commission, which regulates and licenses uranium mines. (Strateco 2016; van der Linde 2016).
- **Provincial green energy policy curtailed by World Trade Organization:** International legal institutions can also curtail the authority of Canadian government energy authorities. Ontario has taken major steps to develop a provincial wind and solar energy industrial sector. However, the province’s “local content” requirements, which required a minimum made-in-Ontario content for wind and solar energy generation projects, were disputed through the World Trade Organization mechanisms (WTO 2016). The province was forced to drop the domestic content requirement in 2014.

Legal and constitutional considerations

- 1 **Cooperation between overlapping jurisdictions** can be a substantial challenge. The lack of unanimity amongst the provinces on federally enforced carbon pricing is one example of the difficulties in coordinating energy policy in Canada. Another example is the situation described above of the addition of a provincial environmental assessment to the federal assessment of the interprovincial pipeline (Energy East); without cooperation there could be contradictory results. Furthermore, if municipal and Indigenous authorities are to play a larger role in energy decision-making there must be coordination or “backstops” of some sort to ensure that local communities in the pursuit of their local interest avoid beggar thy neighbour actions and act in the larger interest as well as that of their immediate constituents.
- 2 **Indigenous peoples rights and consent** – constitutionally protected rights of Canada’s Aboriginal peoples means that Indigenous peoples and communities are rights holders and not only stakeholders in energy decisions. Canada’s recent commitment (GoC, 2016) to the UN Declaration on the Rights of Indigenous Peoples introduces into the dialogue the concept of free, prior and informed consent for resource development (UNDRP 2008: Article 32.2). However, the federal government has indicated it will not directly adopt the Declaration into Canadian law (Munson, 2016) and it is uncertain how it will be applied. Jurisprudence from the *Tsilhqot’in* and *Delgamuukw* cases at the Supreme Court described above, suggest that consent is ideal but, in its absence, federal and provincial governments can infringe on Aboriginal title, provided they meet the established tests for “justification”. Yet it is important to stress that the *Tsilhqot’in* decision affirmed that there is inherent jurisdiction on the part of First Nations to regulate lands to which they have a strong claim of Aboriginal title. Thus, the decision should also be interpreted as an opportunity to bring regulatory capacity to First Nations.

3 Emergence of “social license” and “governments grant permits, communities grant permission” terminology in policy

– From a strict legal and constitutional perspective, the emergence of “social licence” terminology in the energy policy and decision-making system, is problematic. There are no rules or guidelines on how to apply for, or to grant, the “licence” implied by “social licence”. Yet, this has not stopped governments from using the terminology in public policy. For example, the New Brunswick government placed a moratorium on hydraulic fracturing until a social licence is in place (New Brunswick, 2016). The Prime Minister has stated “governments grant permits, communities grant permission” (CBC, 2016). These pronouncements, while ostensibly embedded within the democratic ideal of the consent of the governed, raise questions about democratic accountability and process. Who speaks for communities? If not elected or other public authorities, what are the mechanisms for accountability and representation? These are questions of legitimacy.

There is also a related question of definition of those communities that would be entitled to “grant permission”. Municipalities that border a host municipality may also be affected by energy infrastructure. For example, Positive Energy research by Simard (2016) found that despite support for a wind energy project in one host community, neighbouring municipalities around the project were opposed, ultimately contributing to denial of project approval by public authorities.

1.2 CONCEIVING THE PUBLIC INTEREST(S) AND ROLE OF PLANNING

The energy decision-making system is oriented towards making decisions that are in the public interest. Yet the public interest is a difficult concept; it is continually evolving and is contested. For some parts of the decision-making system, this is less problematic. Energy policymakers (elected officials making policy and the public service implementing it) are representatives of the public and reflect current public will with mechanisms for accounting for changes in the public interest through parliament and elections. Energy regulators, however, are non-elected quasi-autonomous bodies that are tasked with identifying whether or not a given proposal is in the public interest. They adjudicate on the basis of evidence and according to any guidance that may exist in enabling legislation. Planners make up the third component of the energy decision-making system and also are tasked with making public interest decisions. They tend to view public interest as a point of view representing collective needs of a particular region or community (Hodge 1998).

The challenge is that the public interest is diverse. Just as there are multiple “publics”, there will be multiple public interests. Moreover, social scientists and planning theorists have criticized the notion of the public interest as a universalizing concept that denies differences in class, gender and race (Campbell and Marshall 2002). From this perspective, the interests of Indigenous Canadians, for example, are arguably too easily obscured by the presumption of one public or national interest. Despite these problems, policymakers and planners realize that doing away with the term “public interest” would not make matters simpler. The problems inherent in defining the public interest are also intrinsic to any planning activity with the aim of generating just outcomes for a plurality of interests (Lennon 2017). Still, approaches to determining the public interest are fraught with uncertainties. Pal et al (2004) provide a useful synthesis of the scholarly literature on public interest and identify five approaches (Table 2).

TABLE 2

Approaches to the public interest (adapted from Pal et al 2004)

Process	Focus on procedures as the basis for arriving at decisions in the public interest – fair representation of all interests; transparency; legality; due process, etc.
Majority opinion	The guide to regulatory and planning decisions is what a significant majority of citizens think about an issue
Utilitarian	Tries to balance different interests in the process to arrive at a solution that maximizes benefits for society as a whole but also is a compromise of different direct interests represented in that process
Common interest	Attempts to act on what all public(s) has in common – for example, public goods such as clean air, public safety, an innovative economy
Shared value	Shared values as the basis for interests, but also an ethical guide for decision-makers

These five approaches tend to be used simultaneously (Pal et al 2004) although one approach may be favoured. One example comes from a discussion paper for modernization of the National Energy Board, which suggests both a common interest and an utilitarian approach whereby the public interest “is inclusive of all Canadians and refers to a balance of economic, environmental and social interest” and that “the NEB is responsible for estimating the overall public good a project may create” (NEB 2017). A general trend in all policy, regulatory and planning fora is a greater emphasis on the **process** of arriving at decisions in the public interest with increased attention to public participation. This trend is in response to major social and value changes, including decline of trust in government, decline of deference and greater demands by publics to be involved in decision-making processes that affect them (see *System Under Stress* Cleland and Gattinger 2017 for more on this).

A public interest determination is by definition inclusive of all members of the public. However, issues of scale raise difficulties with the concept. The realities of multiple energy jurisdictions each with their own publics and the fact that there are uneven benefits or costs of a project or regulation are both related to scale. The localized nature of impacts (e.g., risk of accident / spill, emissions, visual impacts, etc.) and diffuse nature of benefits (e.g., reliable energy supply, expanding exports) mean that a project deemed to be in the public interest is often not the local interest and that some members of the public bear disproportionate impacts or risks. Secondly, regional or provincial jurisdictions are focussed on their own polity and their public interests that cannot always be scaled up easily. These scale issues come to the fore in the practise of planning.³

³ Another difficulty in determining public interest is that of multiple decision-making authorities each with their own responsibilities (e.g., market optimization versus environment). This relationship is covered in the Positive Energy interim report on the policy/regulatory nexus (Bird, *forthcoming*).

Planners tend to view public interest as a point of view representing collective needs of the region or community. According to a widely used Canadian planning text book: *“Whereas the private economic and social interests who participate in the community planning process generally advocate on behalf of a single issue (such as the environment), it is up to the community’s planners to prepare plans that ensure sound, amenable development for the community as a whole”* (Hodge, 1998, p 197). According to Hodge (1998), the primary voice representing the public interest is the local municipal government. Hodge points out that the wider public interest is not absent in this process. Other entities including, for example, provincial ministries and regional school boards also advocate for development decisions in the public interest yet these are usually mediated through local governments. Provincial statutes for planning and municipal affairs tend to delegate responsibility to local municipal governments to implement land use decisions in the public interest. From time to time provinces may issue policy statements to guide municipal land use decisions. For example, Ontario issues land use policy directions under its “Provincial Policy Statement” requiring lands to be reserved for future housing needs, access to recreational parks, protection of natural heritage areas, access to aggregate resources and so on. In special circumstances, provinces may exclude certain types of activities from municipal land use planning authority. This is the case in Ontario’s *Green Energy and Green Economy Act* for renewable energy generation projects.

Public interest considerations

- 1 Ways in which local and Indigenous governments consider “the greater good”** – The notion of the public interest often requires an acceptance that costs and risks borne locally are for “the greater good”. This can be achieved by legally enforced direction from higher-order governments, yet there other ways in which local authorities give primacy to “the greater good” and communicate to constituents. For the latter, the role of well-written and accessible decision documents by regulators is important. Other ways in which “the greater good” is enforced include compensation and other benefits negotiated via Impact Benefit Agreements with proponents.
- 2 Can there be a public interest without an overarching energy policy?** – Approaches to determining the public interest rely on the existence of shared values and common interests. However, in the absence of a national energy policy there is no clear statement of these values and interests as they relate to the energy system. This could be interpreted as a fatal flaw in public interest determinations that may make public interest determinations more susceptible to special interests. There are also questions of how governments’ policy and legislative commitments to the principle of sustainable development relate to public interest determinations.

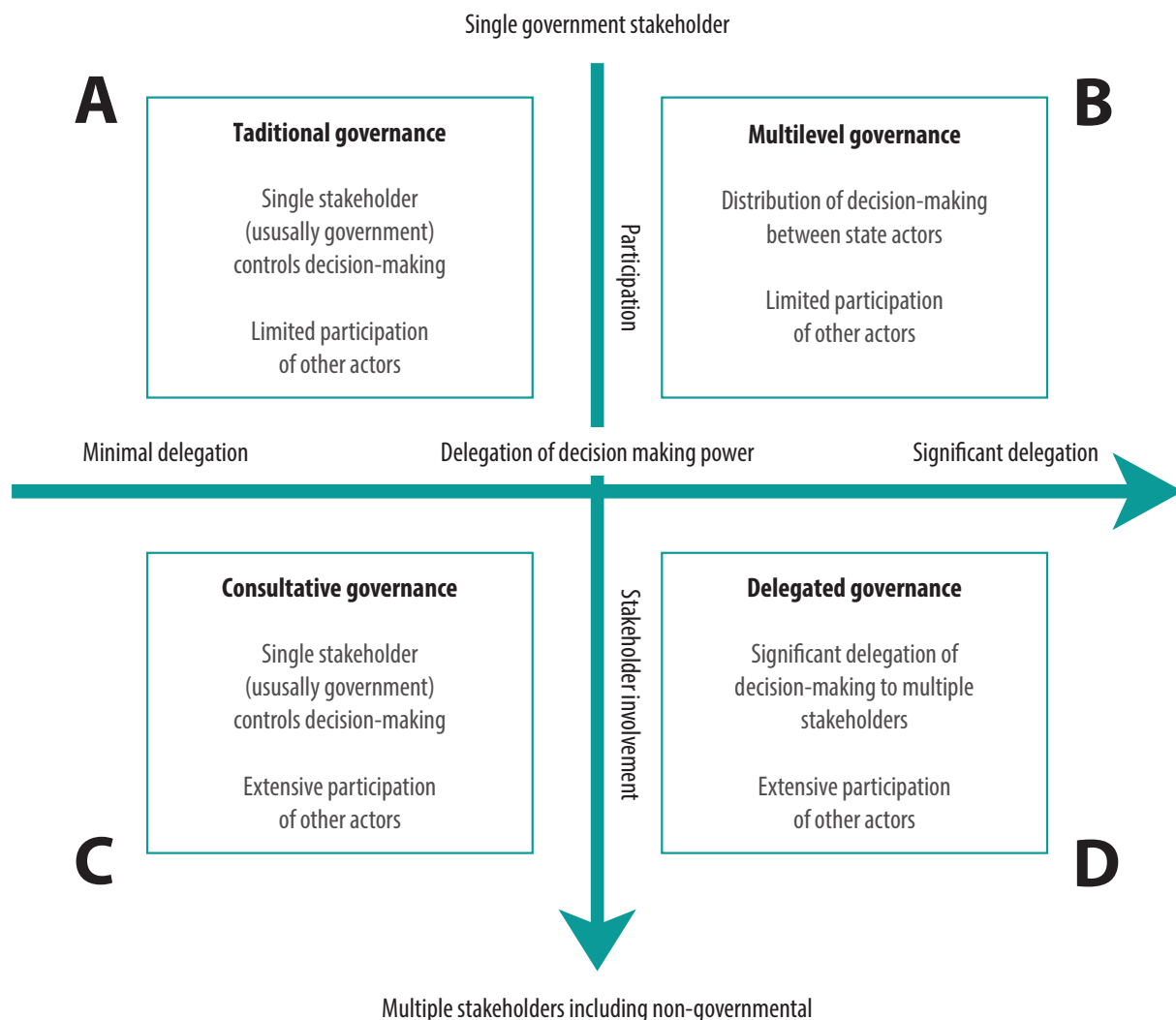
2. THINKING ABOUT ENERGY DECISION-MAKING AND GOVERNANCE: FRAMEWORK FOR ANALYSIS

One way to think about differences in authority and roles in the energy decision-making system is to refer to scholarship in the field of governance. The term governance is used to refer to the process of collective decision-making and policy implementation (Maclean and McMillan 2009). It draws attention to the role of non-government actors and networks, which is important given the shift away from solely state-centred political authority (Skogstad 2003). Furlong and

Bakker (2010) have described two simultaneous shifts in governance: one is a delegation of decision-making power, the second refers to increased participation in decision-making of multiple parties (Figure 2). This classification of governance arrangements along two axes provides a potentially fruitful way to think about some of the ways in which the Canadian energy decision-making system is adapting (or not) to integrate greater involvement of municipal and Indigenous authorities.

FIGURE 2

Two axes of governance change (Adapted from Furlong and Bakker (2010))



2.1 TRADITIONAL, MULTILEVEL, CONSULTATIVE AND DELEGATED GOVERNANCE EXAMPLES

Four examples of each of the types of governance arrangements described in Figure 2 are provided below for discussion purposes. These examples and classification into the four types of governance arrangements are for illustration purposes. Different observers might classify these examples differently.

a Traditional Governance Example: Rate reviews by Utility Commissions (e.g., Alberta Utilities Commission) – The Alberta Utility Commission (AUC) is an example of a provincial regulator of electric, gas and water utilities. As an economic regulator, the AUC ensures that these natural monopolies function in the public interest and make “certain that Albertans receive safe and reliable utility service at just and reasonable rates” (AUC 2017). Decision-making is controlled by one single public authority (the AUC). While there are opportunities for consumers and utilities to participate in rate hearings, these actors are not involved in decision-making.

b Multilevel Governance Example: Joint Review Panel (e.g., Site C Hydro facility) – BC Hydro’s Site C hydroelectric project required environmental assessment by both the provincial and federal governments. An agreement for a cooperative environmental assessment was established between Canada and British Columbia including agreement on scope, procedures, methods and the appointment of a *Joint Review Panel* with both federal and provincial Board members (CEAA 2014). The Panel’s report was submitted to the federal Minister of the Environment and BC’s Minister of Environment via the Executive Director of BC’s Environmental Assessment Office for final decision. Thus, there was distribution of decision-making between provincial and federal state actors. Other actors, including Indigenous groups and municipal governments, were consulted in setting up the EA process, and these actors, along with the public, were consulted throughout the EA (but they did not have decision-making authority).

c Consultative Governance Example: National Energy Board Modernization – The ongoing process to modernize the National Energy Board was launched by the federal energy policy department NRCan, which ultimately retains decision-making power to make changes to the NEB structure, role and mandate. The process involves extensive participation of non-state actors. An expert panel not affiliated with NRCan travelled the country to hear formal submissions, participate in dialogue sessions and information evenings and ultimately make recommendations to NRCan. Reports on thematic areas were commissioned from experts. On-line public comments were solicited. Funding was provided to Indigenous groups to participate in the review.⁴ Thus, there was significant stakeholder involvement and participation, while decision-making authority rested with the federal government.

d Delegated Governance Example: Nuclear Waste Management Organization – The federal government chose in 2002 to require Canada’s nuclear energy corporations to fund, construct and operate a long term waste management facility. This mix of crown and private corporations established the Nuclear Waste Management Organization (NWMO). The NWMO is responsible for designing and implementing Canada’s plan for the safe, long-term management of used nuclear fuel. The federal government has an oversight function but has delegated the selection process for a waste repository to the NWMO (NRCan 2017, NWMO 2017). The selection process extensively involves elected authorities from potential host communities as well as other community members and requires that the host is both willing and informed. Thus, there are multiple actors holding decision-making roles (federal government, NWMO, host communities) and extensive participation opportunities.

⁴ See <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html> and <http://www.neb-modernization.ca/neb-welcome> for details.

3. MOVING FORWARD: CONSIDERATIONS FOR INFORMED REFORM

The four quadrant model above provides a framework to consider the range of roles that municipal and Indigenous authorities have in the energy decision-making system, both currently and into the future. It highlights that there are two key dimensions to consider: the degree of delegation of decision-making power, and, the extent of stakeholder involvement. Municipal and Indigenous authorities can and do participate in all four types of governance arrangements, depending on the situation. In the sections that follow, several examples of roles for municipal and Indigenous authorities are noted. These are categorized as either part of a traditional, consultative, multilevel or delegated governance arrangement. They are also categorized as acting primarily at the policy level, planning level, regulation level or individual project level. Again, different observers might classify these examples differently. The point is to illustrate relationships in a potentially fruitful manner.

3.1 CONSIDERING THE ROLES FOR MUNICIPAL AUTHORITIES

Municipalities (municipal governments and all the private entities within their jurisdiction) account for 60% of energy used in Canada and over 50% of greenhouse gas emissions (Council of Energy Ministers, 2009). Municipal governments have a large direct and indirect influence over energy delivery and use through their urban, transportation and infrastructure planning authority and investment decisions. Zoning by-laws affecting densification and the building of public transit are two such examples. Municipalities may also play a role as an energy developer / proponent in the form of municipally owned utilities. Thus, municipal authorities occupy a range of roles in the energy decision-making system. The following table summarizes and categorizes a number of examples.

TABLE 3

A range of roles available to municipal authorities in the energy decision-making system

Energy decision-making system component	Available roles for municipal authorities	Governance arrangements
Policy	<ul style="list-style-type: none"> Stakeholder through lobby organizations like the Federation of Canadian Municipalities Develop local and regional policy (e.g., renewable energy commitments) 	<ul style="list-style-type: none"> <i>traditional</i> with federal or provincial govt as final decision-maker (DM) Could be <i>traditional</i> or <i>consultative</i> with municipality as DM or <i>multilevel</i> with municipality and province / federal as DM
Planning	<ul style="list-style-type: none"> Land use zoning, subdivision, and site control by-laws have strong influence on urban form and thus energy use. These are guided by the official plans of municipalities Community energy planning has many potential aspects: inventory and monitoring; provision of energy retrofit programs; district energy investment; energy labelling and conservation initiatives in municipally owned buildings; facilitating building permits for household generation⁵ 	<ul style="list-style-type: none"> Could be <i>traditional</i> or <i>consultative</i> with municipality as DM Could be <i>consultative</i>, <i>multilevel</i> or <i>delegated</i> with mainly municipality as DM
Development and implementation of regulation	<ul style="list-style-type: none"> Municipalities are obligated by provincial and federal law to provide opportunities for energy supply including electricity generation facilities and transmission and distribution systems for electricity and gas. The exact placement of pipelines and transmission lines can be influenced by municipalities through zoning 	<ul style="list-style-type: none"> Could be <i>multilevel</i> but more likely <i>traditional</i> with province as DM
Project decision-making	<ul style="list-style-type: none"> Owner of generation or distribution infrastructure Stakeholder in Environmental Assessments Intervenor in public hearings (e.g., NEB, provincial utility commissions) Negotiation with proponents for permits and zoning 	<ul style="list-style-type: none"> <i>traditional</i> or <i>consultative</i> with province / federal as DM <i>traditional</i> or <i>consultative</i> with province / federal as DM <i>traditional</i> or <i>consultative</i> with province / federal as DM <i>traditional</i> or <i>consultative</i> or <i>delegated</i> with municipality as DM

5 These examples have been selected from examples of current community energy plans in QUEST's Smart Energy Atlas of Canada <http://www.questcanada.org/hub/atlas>

Canadians tend to expect the federal or provincial government to assess and provide information on new energy infrastructure projects, however, there is also a significant expectation of municipal governments. Surveys of four communities across Canada commissioned by Positive Energy and the Canada West Foundation found that federal or provincial governments were the top or second choice for sources of information about new proposed energy projects for 2/3rds of community members surveyed. Approximately 1/3 ranked municipal governments as a top source, slightly higher than the proportion that selected energy regulators (Cleland et al 2016). Thus, in addition to the roles outlined in the table above, municipal authorities are also “go to” authorities for energy information, although this raises important questions about the current capacity for municipal authorities to fulfill this role.

Municipal authority considerations

1 Commitments of 100% renewable communities – A growing number of Canadian municipalities have adopted policies to source 100% of their energy from renewable sources (Vancouver, Victoria, Oxford County Ontario). Notwithstanding the practical difficulties of meeting such a target, there are opportunities and challenges when municipal governments decide on this type of policy that has traditionally been the purview of provincial authorities. It is not clear that there is sufficient authority in the tools available to municipalities to carry through with 100% renewable commitment and questions emerge about export energy passing through municipal territory. Even relatively simple multi-jurisdiction programs such as federal support for installing electric vehicle charging stations in municipalities to sell power to electric vehicle drivers require innovation in provincial regulatory rules.

2 Role of local planners in energy infrastructure development

– To what extent are the professional municipal and regional planners employed by local authorities involved in energy project decision-making? Municipal planners are experts at shepherding controversial developments through to completion. They have intimate knowledge of a community’s history and values and are generally trusted authorities (Hill and Knott 2010, Fast and Mabee 2015). Yet, municipal planners often lack familiarity of complex energy planning processes. Greater opportunities for comprehensive and integrated planning between municipal planners and those from other levels of government are possible.

3.2 CONSIDERING THE ROLES FOR INDIGENOUS AUTHORITIES

Natural resource development on Indigenous reserve lands or lands subject to Aboriginal claim occurs in a special context. The normal situation of provincial jurisdiction over natural resource development does not exist for three reasons: first, reserve lands fall under federal jurisdiction; second, Aboriginal and treaty rights are constitutionally protected; and, third, the Crown has a duty to consult with Aboriginal peoples (Wright and White 2012). Unlike the situation for municipal authorities in which municipalities mainly use the levers provided to them under Provincial Planning Acts to engage in energy decision-making, Indigenous authorities have a broader range of authority (Table 4).

TABLE 4

A range of roles available to Indigenous authorities in the energy decision-making system

Energy decision-making system component	Available roles for Indigenous authorities	Governance arrangements
Policy	<ul style="list-style-type: none"> • Stakeholder through representation in organizations like the Assembly of First Nations that lobby policy-makers • Co-management regimes • Target for policies to encourage Indigenous equity ownership in energy development (e.g., Québec and Ontario tenders for Aboriginal owned wind farms) 	<ul style="list-style-type: none"> • <i>traditional</i> or <i>consultative</i> with federal or provincial government as final decision-maker (DM) • <i>multilevel</i> with federal/provincial and Indigenous as DM • <i>traditional</i> or <i>consultative</i> with federal or provincial government as DM
Planning	<ul style="list-style-type: none"> • The First Nations Land Management regime provides for Indigenous creation of land codes on their lands which allow for restrictions and guidelines in land use planning • Co-management regimes 	<ul style="list-style-type: none"> • Initially <i>delegated</i> by federal government. After could be <i>traditional</i> or <i>consultative</i> with Indigenous as DM • <i>multilevel</i> with federal/provincial and Indigenous as DM
Development and implementation of regulation	<ul style="list-style-type: none"> • Under First Nations Land Management regime, Indigenous authorities can set rules for environmental protection • Co-management regimes • Stakeholder in development of regulation (e.g., Alberta Tailings Management Framework) 	<ul style="list-style-type: none"> • <i>traditional</i> or <i>consultative</i> with Indigenous as DM • <i>multilevel</i> with federal/provincial and Indigenous as DM • <i>consultative</i> with provincial as DM
Project decision-making	<ul style="list-style-type: none"> • owner of generation or distribution infrastructure through equity partnership or 100% ownership • rights holder that must be meaningfully consulted • negotiation of Impact Benefit Agreements • intervenor in public hearings (e.g., NEB, provincial utility commissions) 	<ul style="list-style-type: none"> • <i>traditional</i> or <i>consultative</i> or <i>delegated</i> or <i>multilevel</i> • <i>consultative</i> with Crown (via federal/provincial) as DM • <i>consultative</i> with proponent as DM • <i>traditional</i> or <i>consultative</i> with province / federal as DM

The context of a Nation-to-Nation relationship between the Crown and Indigenous communities brings the unique situation that Indigenous lands cannot be sold or leased for energy development without first being surrendered to the Crown (First Nation territory is “inalienable”). This can leave little room for Indigenous participation and control (Wright and White, 2012). For example, oil and gas development is governed by the *Indian Oil and Gas Act* 1985, where the federal government is responsible through a special agency of Indigenous and Northern Affairs Canada for granting licenses and holding any monies generated from development in trust for the band (IOGC, 2017). The *First Nations Land Management Act* 1999 has changed the natural resource management situation to some extent for some First Nations. Under this regime, land administration is transferred to First Nations who have adopted rules for use of their lands. This includes the authority to enact laws with respect to land, the environment, and resources (INAC 2017). The regime has been signed on to by 126 First Nations (LABRC, 2017). There are a number of notable caveats, including that federal environmental laws prevail in case of inconsistency between a First Nation law relating to environmental protection and federal ones, and that oil and gas extraction is still subject to older rules. The federal government through the *First Nations Land Management Regime (FNLML)* provides funding for developing a land code and ongoing operational funding for land management responsibilities. The *FNLML* has been called a success in terms of increasing speed of transactions (leases, permits, easements) and an important incremental step towards Indigenous self-determination (Boutilier, 2016).

The federal and provincial governments’ legal duty to consult with Indigenous peoples creates another lever of authority for Indigenous peoples. While the Crown has ultimate authority for ensuring adequate consultation, it is industry project proponents who undertake much of the practical aspects of consultation for energy projects. An increasing trend as part of the consultation is the use of **Impact Benefit Agreements (IBAs)**. The terms vary but can include payment, infrastructure and employment opportunities, increased participation in decision-making, and a role in project monitoring in exchange for support of the project on the part of Indigenous authorities. Since these agreements are often confidential, concerns have been expressed about proponents

being in a stronger negotiating position than Indigenous groups who may be unaware of the potential benefits included in other communities’ agreements (Wright and White 2012). Some IBAs are made public. For example the government of BC publishes natural gas pipeline benefit agreements (Government of BC, 2017) between the BC government and First Nations.

Indigenous authorities may also be engaged in the energy decision-making system through co-management of natural resources. The term **co-management** is described by natural resource scholars as an arrangement of shared management, decision-making, and responsibility between the state and non-state parties, the latter usually being local resource users (Carlsson and Berkes, 2005, p. 66; Dale, 2009, p. x). Woodward (2016) notes that co-management arrangements in the north and the Arctic can be particularly comprehensive and advanced. There are a number of examples, including the Comité d’examen des répercussions sur l’environnement (COMEX), which is a review body established under the James Bay and Northern Québec Agreement, signed by the government of Québec, Hydro-Québec and the Grand Council of the Cree of Québec. The committee is composed of Québec government appointed members and Cree Nation appointed members, it is responsible for conducting environmental and social assessment of proposed infrastructure (e.g., mining, road, electricity) in the James Bay region (COMEX 2017). The Mackenzie Valley Review Board (MVEIRB) is another example. It is a regulatory body in the Northwest Territories (NWT) that carries out environmental impact assessments and reviews in the Mackenzie Valley for non-renewable resource development. Half of the Board members are from Indigenous communities, the remaining from federal and territorial governments (EMMC 2016).

Indigenous authority considerations

- 1 Impact Benefit Agreements (IBAs)** – IBAs are widely used and can be beneficial to both proponents and local Indigenous governments, however they are not regulated and are confidential. Some have argued that this puts proponents in a better bargaining position (Wright and White 2012). Questions arise as to the role of federal authorities in monitoring IBAs and / or providing resources to increase capacity of Indigenous governments to enter into agreements and / or identify best practices. It should also be recognized that IBAs are not solely a phenomenon in Indigenous communities. The practise of negotiated agreements between proponents and host communities for support of energy projects is occurring in both Indigenous and non-Indigenous communities.
- 2 Indigenous representation** – Indigenous Chief and Band Council governments are elected by their communities and are the legal authorities for Indigenous communities. There are other bodies such as the Assembly of First Nations or the various regional associations (e.g., Federation of Sovereign Indigenous Nations (Sask) or the Association of First Nations Chiefs of New Brunswick) that represent a complex diverse mix of Indigenous interests at the policy level over energy matters. The question of representation can become further complicated when considering the relationship between elected Chief and Councils “Indian Act Chiefs” and traditional Chiefs.
- 3 Co-management** – Co-management arrangements are a potentially promising structure for bridging Indigenous interests and broader national, territorial or provincial interest. Benefits of delegation and distribution of decision-making authority include increased legitimacy of decisions at local levels and reducing the “social risk” of energy development for proponents. Yet there is a specific context to these arrangements, for example, the Mackenzie Valley Review Board is situated in the legal and land claim context of the North.

3.3 CONCLUSION AND RECOMMENDATIONS

The question of “Who decides?” and the role of municipal and Indigenous authorities in the Canadian energy decision-making system, is complex and dynamic. Legal and constitutional divisions of power are key considerations, but evolving jurisprudence and governance trends mean that there are a diversity of roles for local and Indigenous governments. Innovative mechanisms and structures such as Impact Benefit Agreements and the First Nations Land Management Regime appear to have potential to build bridges between local and general interests in energy development. However, efforts by federal and provincial governments are needed to ensure coordination and build capacity. This report has also emphasized the practice of planning as a policy implementation activity that plays an important role in combining local and broader public interests.

The following recommendations are targeted at federal and provincial policymakers and regulators. They were formulated by the Positive Energy team in consultation with senior leaders from government, regulators, industry, Indigenous interests and ENGOs.

Energy development and investment requires reasonably efficient and timely decisions as well as a certain amount of predictability. The trend to have more actors involved in decision-making makes it more complicated to achieve this. Serious contradictions and tensions are emerging and will continue to emerge without significant coordination and cooperation efforts. Efforts are needed not only for the sake of efficiency, but also to ensure a balance between local and broader societal interests. The recommendations are oriented in this direction.

1 Recognize and encourage distributed decision-making while reaffirming a prominent role for federal / provincial / territorial authorities

- a Recognize that whether intentionally through formal co-management arrangements, or through the more *ad hoc* Impact Benefit Agreements / host-community agreements, the power of Indigenous and municipal governments has been elevated in the energy decision-making system. Most of this is occurring at the energy project decision-making level but also at the level of policy, planning and the development and implementation of regulation. (*report section 2.1; 3.1; 3.2*)
- b Encourage the benefits that can arise through this distribution and decentralization of decision-making authority. Benefits include: increased legitimacy of decisions at local levels; confidence-building among the parties involved; reduced “social risk” for project proponents; better projects and increased sustainability of energy infrastructure; and greater opportunities for comprehensive and integrated planning. (*report section 2; 2.1; 3.2*)
- c Reaffirm and support the prominent role for federal / provincial / territorial authorities
 - i For linear energy infrastructure, provincial (within province) and federal (across provinces / international borders) authorities need to play prominent roles. This includes retaining ultimate authority to decide whether infrastructure is in the broad public interest. In other words, seek decision-making arrangements that are traditional, or consultative, or multilevel. (*report section 1.1; 2.1; 3.1; 3.2*)
 - ii For non-linear energy infrastructure, provincial / federal / territorial authorities also need to play prominent roles and retain authority to decide whether infrastructure is in the public interest. However, there is potentially more opportunity for more distributed decision-making arrangements, i.e., traditional, consultative, multilevel or delegated. (*report section 1.1; 2.1; 3.1; 3.2*)
 - iii For all types of energy infrastructure as well as for policy, planning and the development and implementation of regulation, explore greater use of formal co-management bodies that share authority among federal / provincial / territorial governments and collections of Indigenous or municipal governments. Draw on existing experiences. (*report section 2.1; What We Heard report⁶ section 3*)
 - iv Explicitly identify Indigenous governments that are proximate to linear infrastructure and need to be engaged. This will reduce burden on Indigenous governments and on proponents. (*report section 3.2*)
 - v Play a coordinating role by supporting capacity building (*recommendation 2*) and connecting planning efforts (*recommendation 3*).

⁶ *What We Heard — Who Decides? Balancing and Bridging Local and Higher-Order Interests in Canadian Energy Decision-Making*, a report summarizing participant views expressed at the March 2017 Positive Energy workshop. Available on the Positive Energy website or by request.

2 Support capacity building efforts for municipal and Indigenous governments

- a** Promote coordination and cooperation to find economies of scale as Indigenous governments take on environmental assessment activities in their territories. *(report section 3.2)*
- b** Consider establishing an expert body to build technical capacity (planning, finance, safety, regulatory process principles) within Indigenous and municipal governments. Draw on existing experiences like QUEST's Community Energy Planning program, the Catalyst 2020 program and others. *(report section 3.1, What We Heard report #2)*
- c** Develop executive / personnel exchanges between industry, regulators, policymakers, Indigenous governments and municipal governments. This will strengthen leadership competencies; increase awareness of historical context and cultures, organizational / technical / investment constraints and imperatives; and, lead to better relationships. *(report section 3.3; What We Heard report #2; #6)*
- d** Explore funding sources for capacity building. Potential sources include government, industry, and foundations (e.g., philanthropic foundations, community foundations). *(report section 3.3; What We Heard report #2).*

3 Elevate prominence of energy in land use planning

- a** Work towards better integration of energy issues in the land use planning system. Build regional, provincial and federal energy policy goals or energy plans into the existing medium and long term planning tools (e.g., planning acts, provincial policy statements, regional and strategic impact assessment processes). *(report section 1.2; 3.1; 3.2; What We Heard report #4)*
- b** Federal and provincial support for community energy planning through, for example, provision of energy and GHG data, maintaining federal gas tax agreement; mandated energy targets. *(report section 3.1)*
- c** Review the First Nations Land Management Regime program with a focus on increasing opportunities for First Nations to control land use decisions within their territories *(report section 3.2; What We Heard report #2)*
- d** Track and monitor the content of IBAs to: avoid duplication in meeting regional priorities for infrastructure and development; identify best practices; and reduce transaction costs. *(report section 3.2; What We Heard report #3)*

4 Aim for predictability, efficiency and a climate that fosters innovation, investment and competitiveness

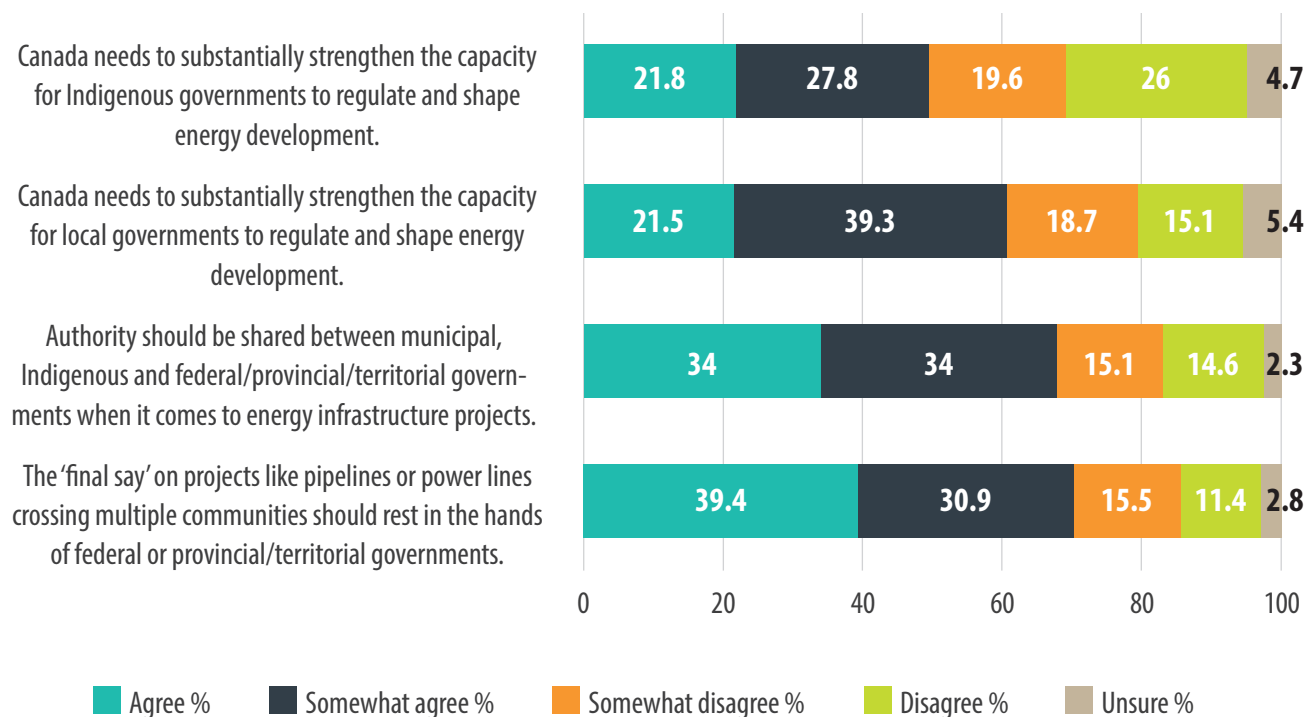
- a** Predictability and efficiency of the energy decision-making system should be a goal of any reforms. The above recommendations to improve planning and build capacity within municipal and Indigenous governments can help in this direction. Decision systems must also foster innovation, investment and competitiveness. *(report section 3.1; 3.3; What We Heard report #5)*

The recommendations relating to final decision-making authority (1.c.i), shared authority (1.c.iii) and supporting capacity building efforts for local and Indigenous governments were presented to Canadians in a nation-wide poll. The results (Figure 3) show support for retaining authority for linear infrastructure approvals in the hands of higher level governments but also a desire for significant roles for local and Indigenous governments in energy decision-making. Balancing and bridging these roles will require significant effort. Note that details on the polling results including demographic breakdown by region, age and gender are available on the Positive Energy website (Nanos 2017). The same recommendations were presented to a panel of energy leaders (results forthcoming).

FIGURE 3

Views on recommendations among Canadians

Source: Nanos Research, RDD dual frame hybrid telephone and online random survey, September 23rd to 26th, 2017, n=1000, accurate 3.1 percentage points plus or minus, 19 times out of 20.



3.4 FUTURE AND ONGOING RESEARCH AREAS

There are a number of knowledge gaps surrounding the question of “Who decides?”. Three recommended areas for future research are: (1) The relation of Impact-Benefit Agreements to planning and governance; (2) A state of the art assessment of co-management in Canada, especially in the south; and, (3) Assessment of proponents’ views on the impact of growing local decision-making authority on investment conditions and business.

Impact-Benefit Agreements are generally successful in fostering relationships between project proponents and local Indigenous communities and non-Indigenous communities, because they offer communities the opportunity to negotiate a share of project benefits. However, they are not regulated or coordinated by governments. There are two major implications of this. First, as discussed above, communities do not have the same resources or capacity to negotiate agreements as do project proponents (Wright and White, 2012). Second, regional planning efforts by governments (e.g., economic development areas, roads, schools, housing, land use, etc.) may be hampered as IBAs often set aside resources for these areas but may remain confidential. Furthermore, there are critiques that IBAs privatize federal duty to consult Indigenous peoples and restrict the scope of local decision authority to bargaining and trade-offs rather than wider policy deliberation (Cameron and Levitan 2014). Research that reviews IBAs and how they are or are not integrated into regional planning efforts would be timely.

As noted in section 3.3. above, the term co-management has a broad definition and is described by natural resource scholars as an arrangement of shared management, decision-making, and responsibility between the state and non-state parties, the latter usually being local resource users (Carlsson and Berkes, 2005, p. 66; Dale, 2009, p. x). A project that reviews the state of the art of co-management in Canada would provide some needed clarity on the range of arrangements suggested by this terminology. It would be particularly revealing to assess co-management efforts in Canada’s southern regions. For example, this could include the co-management agreements in 2000 and 2013 between Alberta’s Metis Settlements and Alberta regarding mineral exploration (Alberta 2017).

Finally, it would be revealing to systematically understand and highlight the perspective of energy project proponents about the trend towards greater local authority in the energy decision-making system. One possibility is an interview and/or survey project that investigates how proponents adapt (or not) to greater local decision-making roles, the impacts on investment, how project timelines have changed (or not), regional trends and the like.

ONGOING POSITIVE ENERGY WORK

This report is one in a sequence of three that are part of Positive Energy’s public authorities research stream. Two more reports on the topics of (1) how to strengthen and clarify relationships and roles between policymakers and regulators; and (2) how to strengthen engagement, information and capacity in energy decision-making are forthcoming in the coming months. A final synthesis report will follow. Visit the Positive Energy website for details.

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ABOUT POSITIVE ENERGY

The University of Ottawa's Positive Energy project seeks to strengthen public confidence in Canadian energy policy, regulation and decision-making through evidence-based research and analysis, engagement and recommendations for action.

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