

**Written Submission  
to Federal Environmental Assessment Review Panel**

**on behalf of  
NunatuKavut Community Council (NCC)**

by Todd Russell, President, NunatuKavut Community Council (NCC)  
George Russell Jr, Manager, Natural Resources (NCC)  
Brigid Rowan, Senior Economist, The Goodman Group, Ltd. (TGG)  
with the participation of Derek Simon, Burchells LLP



December 23, 2016

## Table of Contents

1	Executive Summary .....	1
2	Preliminary Remarks.....	2
2.1	The Unequivocal Need for a Nation-to-Nation Approach .....	2
2.2	Indigenous Engagement Plan Terms of Reference.....	3
2.3	Issues with the Current Process.....	4
2.4	Clarification .....	4
3	Environmental Assessment in Context .....	4
3.1	Change the Context of the EA Consultation.....	4
3.2	Change the Context of the EA Consultation: How?.....	5
3.3	Change the Context of the EA Consultation: Alternatives to Resistance .....	6
3.4	Change the Context of the EA Consultation: Steps to Be Taken .....	7
3.5	Change the Context of the EA Consultation: Transformation.....	8
4	Overarching Indigenous Considerations: Facilitating Indigenous Partnership in the EA Process.....	9
4.1	Timelines .....	9
4.2	Capacity.....	10
4.3	Funding.....	10
4.4	Indigenous Traditional Knowledge (ITK).....	11
5	Overarching Indigenous Considerations/ Planning the EA: Correcting the Crown's Bias Towards Project Development .....	13
5.1	Transform (or Replace) CEAA to Make IGs Equal Partners and Sustainability a Core Objective.....	13
5.2	Transform the NEB From a Captive Regulator to a Watchdog for the Public Interest .....	13
5.3	Incorporate an Automatic Triggering Mechanism for an EA in CEAA .....	14

5.4	Require Proponent To Justify The Need For the Project And Consider Alternatives.....	15
5.5	Require Consideration Of Cumulative Effects and Avoid Project Splitting .....	16
5.6	Involve IGs Early In The Process (And At Every Step).....	17
5.7	Ensure That The Duty To Consult Is Carried Out In Good Faith And Supported By CEAA .....	17
5.8	Recognize The Principles Of UNDRIP In CEAA and Respect IGs' Right to Say No	18
6	Answers to the Two Undertakings of the EA Panel .....	19
6.1	Answer to Undertaking 1: NCC's Workload Related to EA Processes.....	19
6.2	Answer to Undertaking 2: Core Funding Required by NCC for Nation-to-Nation Partnership in the EA Process .....	22

# 1 Executive Summary

This written submission constitutes the recommendations of the NunatuKavut Community Council (NCC) to the Federal Environmental Assessment Review Panel. At the outset, NCC emphasizes that the Crown and Indigenous Groups (IGs) must approach the current review on a Nation-to-Nation basis. CEAA must be dramatically transformed and decolonized (a) to recognize Indigenous Groups as equal partners in a Nation-to-Nation relationship (with the Crown, CEAA and other IGs) in the EA process for projects impacting Indigenous territories; and (b) to make sustainability a core objective of the legislation. If CEAA is broken beyond repair and cannot be transformed, then it should be replaced with a next-generation EA regime that meets objectives (a) and (b).

Section 2 contains our Preliminary Remarks regarding the EA Review Process. We insist on the unequivocal need for a Nation-to-Nation approach to this entire process. Section 2.1 explains why it is so important that the Canadian government and IGs work together to get the EA process right. Section 2.2 outlines the Terms of Reference for the Indigenous Engagement Plan, which specifically direct the Panel to consider how to enhance Indigenous engagement in the EA Process. Section 2.3 describes NCC's issues regarding the EA Review Process to date. Section 2.4 clarifies our understanding of the EA Review Process as a Pre-Consultation, as well as our expectations for the coming formal consultations once the EA Panel Report is finalized.

The NCC's recommendations are provided in Sections 3, 4 and 5, and summarized below.

1. Change the context of the EA Consultation (Section 3: Environmental Assessment in Context):

The Canadian EA Process and Indigenous Consultation are broken and characterized by mistrust and resistance. To decolonize and establish a Nation-to-Nation relationship with IGs, the Canadian government must build trust. Recent findings in neuroscience (as applied to management) show that trust is essential to move us from conflict to co-creation. These findings are consistent with Indigenous traditions, where trust is essential and decision-making is less hierarchical.

To build trust, we must change the context of the EA Consultation. As the diagram in Section 3.5 illustrates, the Consultation should be transformed from

the current top-down hierarchical process into a more collaborative Nation-to-Nation relationship of equals. This transformation will move the relationship towards trust, partnership and eventually collaboration and co-creation.

2. Facilitate Indigenous partnership in the EA Process (Section 4: Overarching Indigenous Considerations):
  - Timelines should be more reasonable for IGs and imposed evenly on all parties.
  - Address IG capacity limitations by staggering consultations and taking into account seasonal cycles and availability of IGs.
  - Provide adequate funding (for capacity building, ITK, expert, legal and community) to enable meaningful participation.
  - Integrate ITK as a complement to Scientific Knowledge in evidence-based EA assessments.
  
3. Correct the Crown's bias towards project development (Section 5: Overarching Indigenous Concerns/Planning the EA):
  - Transform the NEB so it is no longer a captive regulator.
  - Incorporate an automatic triggering mechanism for an EA in CEAA.
  - Require the proponent to justify the need for the project and consider alternatives.
  - Require consideration of cumulative effects and avoid project splitting.
  - Involve IGs early in the process (and at every step).
  - Ensure that the duty to consult is carried out in good faith and supported by CEAA.
  - Recognize the principles of UNDRIP in CEAA.

Finally Section 6 provides NCC's answers to two undertakings from the Expert Panel about NCC's capacity related to EA processes. The Annual Core Funding Budget Required by NCC for Nation-to-Nation Partnership in the EA Process is included at the end of Section 6.

## **2 Preliminary Remarks**

### **2.1 The Unequivocal Need for a Nation-to-Nation Approach**

NCC salutes the Trudeau government's recognition that the current EA process is broken and that we must find solutions to improve Indigenous consultations.

**But let us be clear at the outset of this submission: this entire process must be viewed through a Nation-to-Nation lens. Unless we approach the EA process, Nation-to-Nation, there can be no fair and meaningful consultation and no co-creation of mutually beneficial solutions. Trust, respect and equal partnership are foundational to a Nation-to-Nation relationship.**

Prime Minister Trudeau has also recently acknowledged the need to review federal laws to decolonize Canada and relations with Indigenous peoples.

It is therefore vastly insufficient to merely tweak and tinker with the CEAA legislation. To fix the broken EA process, nothing short of a dramatic transformation and decolonization of CEAA is required. CEAA (or a next-generation EA regime) must (a) recognize IGs as equal partners in a Nation-to-Nation relationship (with the Crown, CEAA and other IGs); and (b) make sustainability a core objective of the legislation.

This submission provides NCC's recommendations for changing the context of the EA Consultation process to move towards a Nation-to-Nation relationship and a more trust-based, co-creative partnership. We are still a long way from such a relationship. The decolonization of the EA process therefore represents a great challenge for the federal government and Indigenous Groups, but also a great opportunity.

The EA process initiates the first point of contact between Indigenous Groups and other stakeholders, who are proposing development on our territories. Therefore, it is of paramount importance and tremendous mutual benefit for us all to work together, Nation-to-Nation, to decolonize the legislation, fix the EA process, and get this right.

## **2.2 Indigenous Engagement Plan Terms of Reference**

The Indigenous Engagement Plan (IEP) for the EA Review is guided by the Terms of Reference (TOR), which specifically direct the Panel to consider:

**How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects.**

NCC welcomes this direction, which is lacking in the current legislation.<sup>1</sup> However, the start of the current EA Review process has been less than promising.

---

<sup>1</sup> Legal guidance in the preparation of this submission was provided by Derek Simon of Burchells LLP.

### **2.3 Issues with the Current Process**

This EA review process has a very tight timeline. NCC was not given adequate advance notice or confirmation of funding in advance of the Panel presentations in Happy Valley-Goose Bay on October 7, 2016:

- NCC did not get approval from the funding agency until October 6.
- NCC chose not to make a presentation in HV-GB because the federal government did not engage with the community on an adequate level. NCC, however, made a presentation via teleconference on December 15, 2016.

To demonstrate a sincere desire to follow the TOR of the IEB, the federal government must remedy this less than promising start.

### **2.4 Clarification**

NCC understands that the Expert Panel portion of the EA Review process is not a consultation, but a Pre-Consultation. We expect that when the EA Panel Report is finalized, Indigenous Groups (IGs) will be engaged in formal consultations regarding its recommendations.

NCC expects to be consulted in a timely manner by the Minister regarding the Panel's recommendations. And NCC requires access to adequate funding to meaningfully participate.

The EA Review Process itself can be instructive in highlighting deep challenges to Indigenous consultation and engagement, but also in co-creating solutions with IGs. This process represents a real opportunity for the federal government and NCC to learn to work together as partners. We suggest that the Panel should be mindful of how this current process is carried out. The current process will set the tone for upcoming consultations and finding new ways for IGs and the government to collaborate.

## **3 Environmental Assessment in Context**

### **3.1 Change the Context of the EA Consultation**

There is a widespread recognition that the EA Process and Indigenous Consultation are broken and that trust needs to be built. Canada's Prime Minister also recognizes this and has recently reaffirmed the need to review and decolonize laws that have been detrimental to Indigenous peoples.

Prime Minister Justin Trudeau says his government will lead a wide review of all federal laws and policies to "decolonize" Canada and its relations with First Nations [...]

[H]e added that a wider review of laws and policies, part of an election campaign promise, would be needed to get rid of old practices that were not respectful of First Nations.

“It basically means looking at the impacts of the wide swath of federal laws and legal frameworks to remove and to eliminate the elements that, instead of providing justice and opportunity, and opportunities for reconciliation, have been impediments for opportunities for growth and success of indigenous communities across the country,” Trudeau said.<sup>2</sup>

But in order to decolonize and establish a Nation-to-Nation relationship with Indigenous peoples, the Canadian government must build trust.

Recent findings in neuroscience (as applied to management) show that trust is essential to move us from conflict to co-creation.<sup>3</sup> This transformation will yield better results for Indigenous Groups and broader society.

**These findings are consistent with Indigenous traditions/ITK, where trust is essential and decision-making is less hierarchical.**

### 3.2 Change the Context of the EA Consultation: How?

NCC suggests that the Context of the EA Consultation Process should be transformed as follows:

Mistrust	Trust
Top Down and Hierarchical	Equal Partnership/Nation-to-Nation
Tell/Ask	Share/Discover
Resistance	Collaboration/Co-Creation

Building trust requires an investment of time, funding and goodwill. However, this investment will be worthwhile if Canada wishes to reconcile with IGs and work collaboratively for mutual benefits.

<sup>2</sup> De Souza, Mike, “Trudeau to proceed with wide federal review to 'decolonize' Canada,” National Observer, December 12, 2016. <http://www.nationalobserver.com/2016/12/12/news/trudeau-proceed-wide-federal-review-decolonize-canada>

<sup>3</sup> Glaser, Judith E., Conversational Intelligence, Bibliomotion Inc., 2014. See also related website: <http://www.conversationalintelligence.com/home>; consultation with Julie Westeinde of Breakthrough Learning Associates, expert in facilitation in support of personal, organizational, and community systems transformation with 30 years of experience.



### 3.3 Change the Context of the EA Consultation: Alternatives to Resistance

NCC also wishes to find positive, collaborative alternatives to resistance in order to address disregard, disrespect and destruction on our territory. The following pictures represent the consequences of the failure of the EA process for Muskrat Falls. The first photo shows our Elders being arrested for standing for our rights at Muskrat Falls. And the second photo shows the destruction of a martin trap on a trap line at Muskrat Falls. The trap was left as pictured below in a claimed “mitigation measure.”



### 3.4 Change the Context of the EA Consultation: Steps to Be Taken

First, NCC suggests that the federal government ask Indigenous Groups how they would design a consultation. The consultation process should not be undertaken as a one-off, but on an ongoing basis. All parties should understand that the approach will evolve. Furthermore, NCC suggests that the design of consultations should integrate ITK, as well as recent findings in management and neuroscience, in order to build trust and emphasize collaboration.

We believe that to change the context of the EA Consultation, the steps to be taken can be divided into two major categories: (a) steps to facilitate Indigenous partnership in the process; (b) steps to correct the Crown's bias towards project development. Each of these steps will be elaborated on in subsequent sections.

Here are the **steps to facilitate Indigenous partnership in the EA process**:

- Timelines are unreasonably short and inflexible for IGs. Timelines should be more reasonable for IGs and imposed evenly on all parties.
- Multiple concurrent consultations are overwhelming the capacity of IGs. Consultations should be staggered and take into account seasonal cycles and availability of IGs, and respect local traditions.
- Provide adequate funding (for capacity-building, ITK, expert, legal, community) to enable meaningful participation.
- Integrate ITK as a complement to Scientific Knowledge in Evidence-Based EA Assessments.

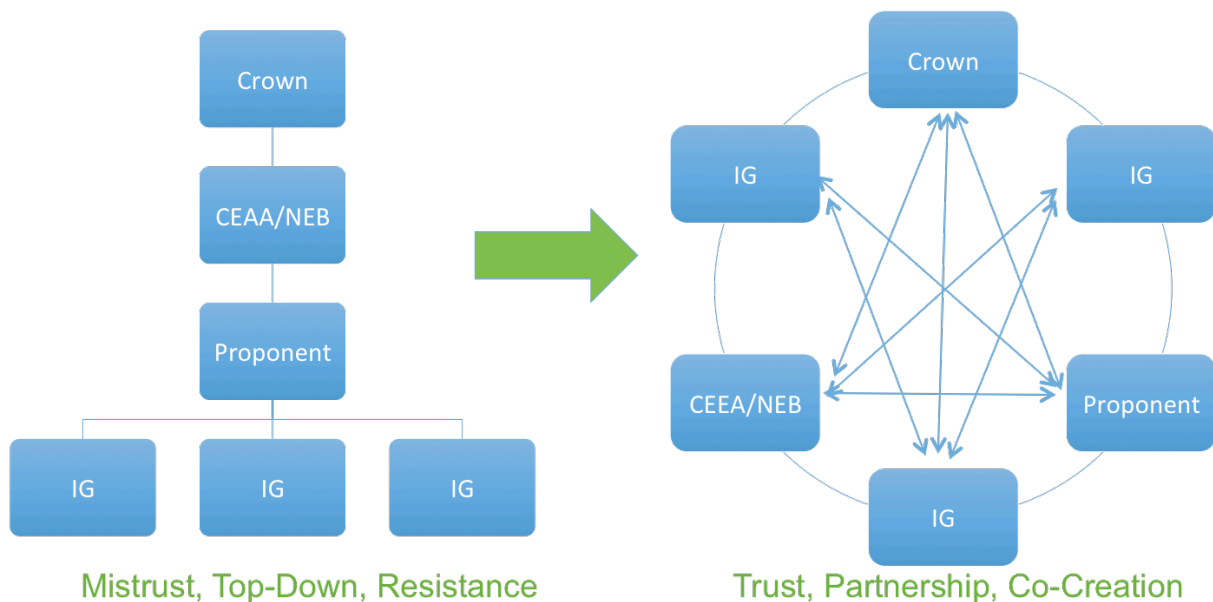
Here are the **steps to correct the Crown's bias towards project development**:

- Transform CEAA such that (a) IGs are equal partners in a Nation-to-Nation relationship (with the Crown, CEAA and other IGs) in the EA process for projects impacting Indigenous territories; and (b) sustainability is a core objective of the legislation.
- Transform the NEB so it is no longer a captive regulator. (This will be dealt with in the Modernization of the NEB consultation; but affects the EA process overall).
- Incorporate an automatic triggering mechanism for an EA in CEAA.
- Require proponent to justify the need for the project and consider alternatives.
- Require consideration of cumulative effects and avoid project splitting.

- Involve IGs early in the process (and at every step).
- Ensure that the duty to consult is carried out in good faith and supported by CEAA.
- Recognize the principles of UNDRIP in CEAA and respect IGs' right to say no.

### 3.5 Change the Context of the EA Consultation: Transformation

The diagram below is a conceptual illustration of how NCC envisages the transformation of the current top-down hierarchical EA consultation process (on the left) into a more collaborative Nation-to-Nation relationship of equals. The flattening to the hierarchy breeds trust, partnership and eventually a co-creative approach.



The chart on the left is illustrative of the current problematic hierarchy, in which the Crown discharges its duty to consult to CEAA or the NEB or a JRP. These agencies (or partnerships) then frequently delegate the duty to consult to the project proponent. These agencies also assess the quality of their own (or the delegated) consultation.

The discharge and delegation of the duty to consult are currently within an evolving legal context. In fact, the Supreme Court of Canada is now deliberating these very

issues: what it takes for Canada to fulfill its constitutional duty to consult Indigenous communities; and whether the Crown can discharge its duty to consult to the NEB.<sup>4</sup>

Regardless of what Supreme Court decides, if the Federal Government wishes to fix our broken EA Process and enable meaningful consultations with IGs, we must move from the top-down hierarchical chart on the left towards the chart of the right. The chart on the right illustrates what Nation-to-Nation equal partnership would look like: IGs would collaborate as equal partners in a respectful process involving the Crown, CEAA/NEB/JRP and project proponents.

We are still a long way from the chart on the right; but NCC has outlined two major categories of recommended steps to move towards a more trust-based, co-creative partnership in the previous section. Steps to facilitate Indigenous partnership in the process will be further described in Section 4. Section 5 will discuss the steps to correct the Crown's bias towards project development.

## **4 Overarching Indigenous Considerations: Facilitating Indigenous Partnership in the EA Process**

### **4.1 Timelines**

Indigenous Groups are often given inadequate and inflexible timelines (under CEAA 1992 and 2012) for their participation and submissions, whereas proponents are often granted longer timelines that are then further extended in response to proponents' requests. Proponents succeed in using their much greater resources (in terms of funding and ability to control timelines and information) to maximize their advantages in EA processes. In EAs under CEAA 1992 (notably for the Muskrat Falls Generating Station and Labrador-Island Transmission Link), IGs were given inadequate time for comments, whereas proponents benefitted from lengthy time periods.

NCC suggests that timelines should be more reasonable for IGs and respect their capacity levels. Furthermore, timelines should be imposed evenly on all parties, and the

---

<sup>4</sup>Gregoire, Lisa, "Chippewa kick off joint right case with Inuit at Supreme Court," Nunatsiaq Online, Nov. 30, 2016.

[http://www.nunatsiaqonline.ca/stories/article/65674chippewas\\_kick\\_off\\_joint\\_rights\\_case\\_with\\_inuit\\_at\\_supreme\\_court](http://www.nunatsiaqonline.ca/stories/article/65674chippewas_kick_off_joint_rights_case_with_inuit_at_supreme_court);

Gregoire, Lisa, "Supreme Court to hear Inuit appeal of seismic testing in Nunavut," Nunatsiaq Online, March 10, 2016.

[http://www.nunatsiaqonline.ca/stories/article/65674supreme\\_court\\_to\\_hear\\_inuit\\_appeal\\_of\\_seismic\\_testing\\_in\\_nunavut/](http://www.nunatsiaqonline.ca/stories/article/65674supreme_court_to_hear_inuit_appeal_of_seismic_testing_in_nunavut/)

proponents should not be given unfair flexibility.

## **4.2 Capacity**

Multiple concurrent federal consultations are now overwhelming the capacity of NCC.

These consultations are highly relevant to the future of our territory, our people and our way of life. NCC wishes to give careful consideration and to participate meaningfully in each consultation.

NCC suggests that consultations should be better staggered for meaningful participation and to respect IGs' capacity. The consultation process should take into account the seasonal cycles and availability of IGs, and respect local traditions (especially with respect to community consultations and to integration of ITK).

## **4.3 Funding**

Funding for Indigenous participation was inadequate under CEAA 1992 and continues to be inadequate under CEAA 2012. Full Indigenous partnership requires public consultation and ITK input. EA processes typically also require high-quality technical expertise (complementary science/ITK, engineering, economic), combined with competent and specialized legal assessment. Therefore, access to adequate levels of intervenor funding is essential to allow IGs to meaningfully participate and to hire high-quality expert and legal assistance.

The current very low levels of intervenor funding for IGs and other intervenors substantially disadvantage IGs and can substantially advantage proponents. Moreover, proponents can often recover costs from customers.

Many positive changes could help fix broken EA process and build trust with IGs. But this whole EA review will be an empty gesture absent dramatic enhancement of intervenor funding (and a workable process for intervenors to access it) to allow for meaningful participation and skilled expert and legal assistance.

Inadequate funding is particularly problematic given that the Crown relies on EA process to assist in discharging the duty to consult with Indigenous on various projects.

In Section 6.2, we answer to the Panel's question regarding the level of core funding required to build NCC's capacity to enhance participation in the EA process. As will be further discussed in Section 6.2, a multi-year core-funding budget is essential to enable fair and meaningful Nation-to-Nation partnership in the EA process. With the availability of adequate core funding, NCC could more effectively engage in the EA process. A

stable and predictable core-funding budget on a multi-year basis would also free up NCC from the inefficiency of continual one-off funding request applications. In summary, an adequate level of core funding represents an important and necessary first step in leveling the playing field for NCC and decolonizing the EA process.

#### 4.4 Indigenous Traditional Knowledge (ITK)

CEAA 2012 has no requirement for the consideration of ITK, but provides that Aboriginal traditional knowledge MAY be included in EA. Lack of an ITK requirement is inefficient and the result is that time and money must be spent negotiating with proponents and government to ensure ITK is considered. Oftentimes, agreements are reached too late in the process to take ITK into account.

Lack of consideration of ITK under CEAA 1992 has been highly problematic for NCC's communities, particularly in the context of the Muskrat Falls and Labrador-Island Transmission Link EAs. The failure to integrate ITK and the disregard of NCC's warnings about local soil composition has contributed to serious problems of leakage in the cofferdams, as well as impacts on salmon (which the EA maintained did not exist in the Lower Churchill River).

NCC makes the following recommendations regarding ITK:

- ITK should be an integral part of any EA review with impacts on IGs' territories and ITK consideration must be adequately funded. Funding of ITK is also essential to NCC when engaged in an EA consultation so as to enable understanding of potential impacts to community members and their rights.
- ITK should be led by communities and not the proponent or CEAA.
- **EAs should be evidence-based and incorporate complementary (non-Indigenous) scientific knowledge (SK) and ITK findings. EAs should consider evidence deriving from multiple sources, including both SK and ITK.**

Under CEAA 1992 and especially CEAA 2012, scientists have complained of a lack of evidence-based rigour and a lack of predictions well grounded in science. Instead, EAs have been replete with unjustified guesses.<sup>5</sup>

---

<sup>5</sup> See for example, Scientist and EA Expert, Scott Findlay's submission during his Panel Presentation on November 1, 2016 in Ottawa:  
Findlay, C. Scott, "Some Comments on the Federal Environmental Assessment Process," Oct. 30, 2016, pp. 4-6.  
(footnote continued on next page)



To address the problem of lack of both SK and ITK evidence in the EA process, NCC (inspired by Dr. Findlay's Comments) recommends the design and implementation of an Operational Policy Statement that specifies that all predictions about environmental effects and the significance thereof be accompanied by:

- an explicit statement about the underlying causal hypotheses (if any);
- an explicit account of the project-specific evidence (based on complementary findings of SK and ITK) that, in the view of the assessor, justifies the predictions;
- an explicit assessment of the extent to which the predictions are consistent with the weight of current scientific (complemented by ITK) evidence; and
- if they are not, an explanation for the discrepancy.<sup>6</sup>

There must be serious consideration of a process by which ITK is integrated into an EA so it can be complementary. It should not be a matter of merely "adding ITK" to check a box.

One way forward can be found in a number of useful studies on the integration of conventional scientific and traditional knowledge.<sup>7</sup> These were undertaken by collaborative initiative by the Institute of the Environment (IE) at the University of Ottawa, the Assembly of First Nations and Indigenous community partners across Canada. These studies use fuzzy cognitive mapping (FCM) as a technique to extract, present and compare Canadian Indigenous and conventional science perspectives. The process described in these papers is being used in a range of settings. These include the integration of ITK and SK in the context of polar bear management in Nunavut and the incorporation of ITK in Committee on the Status of Endangered Wildlife in Canada (COSEWIC) reports for species at risk under SARA, as well as the exploration of Indigenous views of health in relation to diabetes.

---

(footnote continued from previous page)

[http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/nov.1-14h10-scott-findlay-federal-ea-panel-review...ct-2016.pdf](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/nov.1-14h10-scott-findlay-federal-ea-panel-review...ct-2016.pdf)

<sup>6</sup> Findlay, p. 6.

<sup>7</sup> Giles, Brian G. et al, "Exploring Aboriginal Views of Health Using Fuzzy Cognitive Maps and Transitive Closure," Canadian Journal of Public Health, Sept-Oct 2008, pp. 411-417.

<http://journal.cpha.ca/index.php/cjph/article/view/1677/1862>; and

Giles, Brian G. et al, "Integrating conventional science and aboriginal perspectives on diabetes using fuzzy cognitive maps," Social Science and Medicine 64, February 2007, pp. 562-576.

<http://www.sciencedirect.com/science/article/pii/S0277953606004758>

NCC recommends that the Panel investigate the literature and consult with experts on the integration of ITK and SK and provide guidelines for best practices for the EA process.

## **5 Overarching Indigenous Considerations/ Planning the EA: Correcting the Crown's Bias Towards Project Development**

### **5.1 Transform (or Replace) CEAA to Make IGs Equal Partners and Sustainability a Core Objective**

NCC recommends that CEAA must be dramatically transformed and decolonized (a) to recognize Indigenous Groups as equal partners in a Nation-to-Nation relationship (with the Crown, CEAA and other IGs) in the EA process for projects impacting Indigenous territories; and (b) to make sustainability a core objective of the legislation. If CEAA is broken beyond repair and cannot be transformed, then it should be replaced with a next-generation EA regime that meets objectives (a) and (b).

### **5.2 Transform the NEB From a Captive Regulator to a Watchdog for the Public Interest**

NCC notes that another Panel will deal with the Modernization of the NEB, per se. However, the NEB is one of the agencies, which carries out EAs for certain projects that it regulates. Moreover, a number of EAs are carried out by JRPs made up of the NEB and CEAA.

NCC views the NEB as a captive regulator, that is, the tool of the industry it is supposed to regulate.

From NCC's perspective, the NEB (and to an extent CEAA) are biased towards industry:

- The NEB is composed disproportionately of regulators with industry backgrounds.
- The duty to consult is discharged to the NEB/CEAA/JRP, which then frequently delegates this duty to project proponents; these agencies also assess the quality



of their own (or the delegated) consultation; this situation creates an unfair bias in favour of the proponent.

- The NEB (and CEAA) do not take into account ITK and community concerns.
- The NEB (and CEAA) often fail to require the proponent to answer the questions of IGs and/or directly affected communities.
- Many IGs (e.g. Clyde River) complain that the NEB fails to ensure that proponents undertake meaningful community consultations; instead meetings are held and IGs are told what is going to happen.
- As in CEAA processes, NEB processes are characterized by tight and inflexible timelines for IGs and more generous and flexible timelines for the proponents.

Recent reports of conflict of interest have surfaced that further confirm that the NEB is a captive regulator. In particular, it has been shown that NEB panel members for Energy East met secretly with TransCanada lobbyist Jean Charest. Finally, Marc Eliesen, former CEO of BC Hydro, withdrew from the NEB hearing to review Kinder Morgan's Trans Mountain Expansion Project, claiming the regulator was captured by industry.<sup>8</sup>

NCC emphasizes that both the NEB and CEAA need to be drastically transformed. Even if CEAA is transformed, any EA process conducted by the industry-captured NEB (or by a JRP involving the NEB) will continue to be deeply flawed and biased towards industry. Therefore to fix the broken EA process and enable Nation-to-Nation partnership with IGs, the NEB must also be overhauled and transformed as soon as possible.

### **5.3 Incorporate an Automatic Triggering Mechanism for an EA in CEAA**

Within CEAA 2012 there does not exist an automatic triggering mechanism for an EA. CEAA 1992 contained an automatic EA requirement, which was triggered whenever a project touched on federal jurisdiction.

CEAA 2012 provides that a "designated project" will require an assessment, if it meets certain requirements, but the definition of "designated project" is subject to the Minister's discretion after a screening process in which environmental impact is only one of several things the Minister can consider. The screening process is based primarily on the proponent's description of the project and does not allow for adequate input by IGs. The Minister has the discretion to allow a project to proceed without an EA, even where

---

<sup>8</sup> Eliesen, Marc, "Industry-captured National Energy Board urgently needs overhaul Trudeau Promised," National Observer, Sept. 8, 2016. <http://www.nationalobserver.com/2016/09/08/opinion/industry-captured-national-energy-board-urgently-needs-overhaul-trudeau-promised>

significant environmental impacts are likely, and without input from IGs. This does not allow for adequate protection of our rights.

This change has resulted in a huge decrease in the number of projects that have to go through the CEAA process and an increase in instances where projects can avoid an EA through the discretion of the Minister. **It is estimated that 95% of the projects that required an EA in CEAA 1992 are now exempt under CEAA 2012.** Moreover, under the current legislation, project proponents can tailor projects to avoid the CEAA 2012 triggers and avoid environmental assessment altogether.

Avoidance of the EA process is detrimental for NCC as it can limit meaningful consultation on a given project and NCC's ability to make an informed decision. The EA process makes project information available particularly regarding impacts on the environment and Indigenous rights. If there is no EA for a project, IGs may still be involved in consultation discussions, but probably will have significantly less information on the project and its likely impacts.

As well, when there is no EA, there is little incentive for a proponent to consider and integrate ITK. This again hinders NCC's ability to understand the impacts of a project on our communities and our rights.

NCC strongly recommends that an automatic triggering mechanism must be restored to CEAA or any replacement environmental regime. This automatic triggering is particularly important for projects that impact Indigenous territories because our territories are remote and our capacity is limited. The automatic triggering of an EA is the means by which IGs are notified about a project, consulted, and given an opportunity to respond appropriately.

#### **5.4 Require Proponent To Justify The Need For the Project And Consider Alternatives**

Many experts believe that project proponents should be required to justify the project itself and that this justification should be presented along with consideration of alternatives.

This justification was standard operating practice under CEAA 1992. The requirement was removed in CEAA 2012. "The result has been dramatic decline in project justifications and consideration of alternatives."<sup>9</sup>

In our experience, justification of the need for a project:

---

<sup>9</sup> Findlay, p. 3.

- puts the burden of proof on the proponent to justify why the project is needed versus the burden on IGs to justify why the project may not be needed/wanted;
- helps protect the affected communities by putting the onus on the proponent to justify why the project should be built;
- protects Indigenous rights: the proponent must justify why the project should be built on Indigenous territory;
- promotes environmental justice by discouraging the selection of Indigenous territories as sites for polluting energy projects; our territories are often targeted because of their remoteness and the ease with which proponents have historically been able to build there with minimal opposition.

NCC strongly recommends that any new EA legislation must restore the requirement for proponents to justify the need for project and consider alternatives.

### **5.5 Require Consideration Of Cumulative Effects and Avoid Project Splitting**

In our experience, proponents often split projects in order (a) to avoid a full review of the cumulative effects of a project, which are often greater than the sum of the parts; and (b) to avoid a higher level of scrutiny and oversight because individual smaller projects are perceived as being less harmful and sometimes fail to trigger deeper reviews.

NCC has experienced negative impacts from project splitting for the Muskrat Falls Hydro Project. Nalcor was allowed to separate the generating station and the two transmission links into distinct environmental assessments, despite the fact that each of the project components was connected to the other. As a result of the project-splitting:

- the impacts of the dam and the transmission lines were looked at individually and not cumulatively;
- the transmission lines were subject only to the lower level Comprehensive Study Review and not the full Panel Review; and
- NCC was not included in the review of the Maritime Link, despite the evidence of cumulative impacts between the Labrador-Island Link and the Maritime Link.

Other IGs, environmental groups and affected communities report similar negative impacts from project-splitting.

Consequently, NCC strongly recommends that CEAA should require consideration of cumulative effects and avoid project splitting.

## **5.6 Involve IGs Early In The Process (And At Every Step)**

Despite a number of landmark court cases that have established the federal government's minimal obligations in its duty to consult with Indigenous Peoples, consultation with Indigenous Groups often does not occur sufficiently early in the process. When IGs are brought in late in the process, the opportunity for consulting in a less adversarial environment is lost. Frequently, IGs are not consulted until soon before the project is scheduled for development. In other words, if IGs question the need for the project, wish to explore alternatives, or flat out oppose it, their concerns are in direct opposition to that of the proponent.

Often, consultations consist of the proponent holding a series of meeting in affected communities, telling the communities what they are going to do, and failing to answer questions.

As discussed in Section 3, the context of the EA must change in such a way that IGs are consulted on a Nation-to-Nation basis as equal partners. If the hierarchical top-down organizational chart in Section 3.5 is transformed to a collaborative Nation-to-Nation partnership, then (a) IGs become an integral part of the decision-making process; (b) IGs will be consulted early on and at every step in a respectful and collaborative manner; and (c) IGs and other parties can evaluate the need for the project on Indigenous territories and consider alternatives, including the right to refuse projects whose negative impacts exceed the positive ones.

It is implicit in this kind of transformed environment that CEAA must involve IGs early in the process and at every step.

## **5.7 Ensure That The Duty To Consult Is Carried Out In Good Faith And Supported By CEAA**

We have recognized the importance of the federal government's constitutional duty to consult Indigenous communities. However NCC wishes to emphasize that in any EA process the duty to consult should be carried out in good faith and supported by CEAA.

Currently there is a lack of clarity in the CEAA Regime about the duty to consult. As discussed in Section 3.5, the discharge and delegation of the duty to consult are currently within an evolving legal context.

As previously indicated, the Crown relies on EA processes to assist in discharging duty to consult with IGs on various projects. However CEAA 2012 does not support the duty to consult.

First, the Purpose of CEAA 2012 does not support Aboriginal Peoples s. 35 Rights Status and Crown's obligation to consult and accommodate.

Under s. 4(1) (d) one of the purposes of CEAA 2012 states;

- (d) To promote communication and cooperation with aboriginal peoples with respect to environmental assessments;

This statement does not recognize nor take into account the duty of the Crown to consult and accommodate Indigenous people and which must be coordinated within the legislation. A 2012 Senate Committee also recognized this problem and recommended that the EA process be modified to better incorporate, coordinate and streamline Aboriginal consultation and accommodation during the EA process.

Second, despite the fact that consultation with Aboriginal Peoples is explicitly included in the objects of CEAA 2012, there is no direction in the legislation as to how consultation would be carried out.

Under S. 105(g) of CEAA 2012, the Canadian Environmental Assessment Agency (Agency) has listed as one of its objects; *"to engage in consultation with Aboriginal Peoples on policy issues related to this Act"*. This statement on its face would seem to be supportive of Aboriginal inclusiveness and Aboriginal Issues, but this is not the case. Nowhere else in CEAA 2012 does it say how this mandate will be upheld, who will be responsible, or when Aboriginal people will be consulted and on what policies. Nor does it recognize the necessity to consult on s. 35 rights (as discussed above).

Given that Canada continues to rely on the CEAA process as its main means of discharging its duty to consult with Indigenous groups, NCC strongly recommends that there be greater clarity under the CEAA regime (or any new EA regime) about how this will work in practice, and the respective roles played by CEAA, proponents and IGs.

## **5.8 Recognize The Principles Of UNDRIP In CEAA and Respect IGs' Right to Say No**

NCC wishes to join Indigenous Groups across Canada in demanding that the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In particular, the UNDRIP principle of "free, prior and informed consent," should be recognized in CEAA (or any new EA regime). NCC also emphasizes that the other parties in the EA process should respect Indigenous Groups' right to say no to a project if we deem that its negative impacts exceed its benefits. The right to consent also includes the right not to consent if we judge a project to be against the interests of our communities.

## 6 Answers to the Two Undertakings of the EA Panel

During NCC's Panel Presentation, we were given two undertakings about NCC's capacity related to the EA processes. Our understanding of these undertakings is as follows:

1. Provide us with a description of NCC's workload related to EA processes. Walk us through your experience of these processes from the NCC perspective.
2. What level of core funding is required to build up NCC's capacity to enhance participation in the EA process? Describe the resources needed to build this capacity.

Given the deadline for the current submission, NCC had only one week to respond to these undertakings. We therefore reserve the right to refine our answers in upcoming consultations.

### 6.1 Answer to Undertaking 1: NCC's Workload Related to EA Processes

Among NCC's paid staff, George Russell Jr, Manager of NCC's Natural Resources, has almost sole responsibility for all of NCC's participation in the EA processes. **The responsibility for EA processes alone requires approximately 75% of Mr. Russell's time.**

George has four employees. Two of these employees (a Fish and Wildlife Coordinator and a Fisheries Coordinator) are occasionally called upon to assist Mr. Russell with the EA processes. However, their official responsibilities do not concern the EA processes. George is currently working with NCC's lawyer for legal advice and with a consultant, who is assisting him with the EA Review Process.

In terms of other assistance, George relies on an informal network of unpaid volunteers, Elders and other community members to participate in the EA processes. In particular, NCC has a council of elected volunteers (who are paid a small honorarium) and who offer important guidance in the form of ITK. Mr. Russell also consults with the Senior Fisheries Guardian, another employee of NCC, regarding the state of fisheries in the NunatuKavut territory. Similarly, Mr. Russell also relies on Elders for ITK and on other community members, who are out on the land about the state of the environment in the territory.

Mr. Russell must perform the following tasks related to EA processes:

- coordinating with NCC's lawyer and consultants;
- reviewing all EA applications (which can include thousands and sometimes tens of thousands of pages of documentation);
- responding and commenting on all EA project applications;
- engaging our people via community meetings to discuss new projects affecting our territory;
- monitoring the state of the environment on the territory through the informal and volunteer network described above;
- seeking ITK input from the informal and volunteer network, to enable the inclusion of ITK in various EA processes;
- following up with project proponents;
- coordinating with other Indigenous groups involved in the EA process;
- coordinating with CEAA and other government agencies involved in the EA processes;
- coordinating NCC's participation in an Independent Expert Advisory Committee (IEAC) related to Muskrat Falls<sup>10</sup>
  - Recruiting a methylmercury scientific expert for the IEAC
  - Conferring and coordinating with NCC's scientific expert;
- reviewing permit applications (which range from small mining exploration permits to complex engineering projects (e.g., bridges and dams));
- reviewing Environmental Protection Plans and Environment/Wildlife Monitoring Plans;
- writing an endless series of one-off funding proposals to pay for participation in EA processes and negotiating with the funding bodies to obtain these funds;
- controlling funding and finances for EAs, which often are characterized by numerous delays and scheduling/adjustment changes (e.g., Howse Project and Joyce Lake).

In addition to EA processes, Mr. Russell's other responsibilities (which take up approximately 25% of his time) include:

- managing the Natural Resources department and his four employees;
- reporting to the NCC Board;
- managing the Community Freezer Program;

---

<sup>10</sup> The IEAC has been mandated to seek an independent, evidence-based approach that will determine and recommend options for mitigating human health concerns related to methylmercury throughout the reservoir as well as in the Lake Melville ecosystem. The IEAC is made up of representatives of NCC, the Innu Nation and the Nunatsiavut Government, and federal, provincial and municipal governments. As such the IEAC is not directly part of the federal EA process. However, this additional work has been largely generated by the failed EA process for Muskrat Falls (under CEAA 1992).

- managing hunting permits for harvesters;
- managing NunatuKavut's Aboriginal Fisheries Program, the Migratory Bird Hunt, the Species at Risk Program, the Caribou management plans, and the forestry program;
- following up with other (non-EA) project proponents operating in NunatuKavut;
- participating in Parks Canada processes and exploring ways to move our isolated communities off diesel power;
- engaging our people via community meetings to discuss changes to programs and new (non-EA) projects affecting our territory;
- seeking ITK input from the informal and volunteer network, to enable the inclusion of ITK in various non-EA processes;
- coordinating the work of external consultants, who are assisting him with various non-EA projects and consultations.

Mr. Russell has far too many responsibilities for one professional. He does not have the time or resources to manage the volume of work generated by EA processes, much less to be able to thoroughly review due diligence on each submission.

**At best, NCC finds itself in an emergency room triage situation with respect to the EA processes.** That is, George must often skim through tens of thousands of pages of the proponents' applications in order make sure NCC is not missing something important to their interests.

**The current situation in no way enables fair and meaningful consultation. Without the resources to properly review and respond to the continuous onslaught of work, NCC will be unable to engage in the EA processes as an equal partner. Project proponents have vastly superior resources and a system that is biased in their favour. Under the status quo, they will continue to enjoy substantial advantages relative to IGs. Therefore, the EA process itself must be decolonized.**

**The process remains riddled with colonial vestiges, which impede Indigenous Groups' abilities to make informed decisions about their own territories. At the same time, the uneven playing field promotes the economic gains of project proponents, while often causing unacceptable, uncompensated and irreversible damage to Indigenous territories.**

**As a necessary first step in remedying this situation and leveling the playing field, NCC proposes that the federal government should provide annual core funding to enable an effective and fair Nation-to-Nation partnership in the EA process.**



## 6.2 Answer to Undertaking 2: Core Funding Required by NCC for Nation-to-Nation Partnership in the EA Process

The Panel's second undertaking was the following:

What level of core funding is required to build up NCC's capacity to enhance participation in the EA process? Describe the resources needed to build this capacity.

The Annual Budget Required by NCC for Nation-to-Nation Partnership in the EA Process is included below.

As discussed above, annual core funding is essential to enable fair and meaningful Nation-to-Nation partnership in the EA process. The budget proposes core funding for a small core team of in-house specialists (in ITK, sciences, social sciences and consultation), as well as external experts (in law, environment and legislation, sciences and economics/social sciences). We also include office space and equipment for the team. With this core funding, NCC could more effectively engage in the EA process. As indicated above, such core funding would be an important first step in leveling the playing field for NCC and decolonizing the EA process.

NCC asks that this budget be guaranteed over a multi-year period to allow us to attract and hire full-time staff and build capacity. We suggest an initial period of three-years with the option to revisit and extend funding for a subsequent multi-year period.

A multi-year budget would provide some predictability to enable better management of the EA process on an ongoing basis. It would also increase NCC's efficiency. Some of Mr. Russell's time would then be freed up to manage a small team devoted to the EA process, instead of dealing with an endless series of one-off funding proposals. Of course, a small team of full-time specialists devoted to the EA process, as well as adequate funding for external consultants and legal counsel, would greatly enhance NCC's ability to participate as more equal partners in the EA process.

Given the remoteness of our territory, we are also including videoconferencing equipment in the budget. Assuming other stakeholders have such equipment, this investment would allow us to attend some meetings with federal government representatives, proponents and other Indigenous Groups in a more efficient way. High-quality videoconferencing equipment could help us avoid extensive and unnecessary travel, time away from work in our territory, weather delays, not to mention GHG emissions and travel expenses.

This budget proposal is meant to be foundational and not exhaustive. Given the short time NCC had to respond to the Panel's undertakings, NCC reserves the right to refine the budget in upcoming consultations.

Finally NCC notes that the federal government and all Indigenous Groups could glean important teachings from this core funding and capacity building commitment. It could be effective in leveling the playing field for other groups in terms of EA Processes and other consultations. A concrete commitment to core funding sends a signal to NCC that the federal government is serious in its intent to decolonize the EA process and partner with Indigenous Groups on a Nation-to-Nation basis. An even playing field and a Nation-to-Nation relationship are essential in building trust in order to co-create solutions for our environment and economic development.