Submissions to the Government of Canada Regarding Environmental and Regulatory Reviews – Discussion Paper

September 15, 2017

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the update of the review of environmental and regulatory processes. In addition to reports from Standing Committees and Expert Panels relative to specific legislative and regulatory reviews, a general update was provided in a discussion paper entitled "Environmental and Regulatory Reviews – Discussion Paper," released June 2017.

NCC's comments on the Discussion Paper are separated into four distinct submissions, reflecting each major environmental/regulatory process review as follows:

- The Review of the *Fisheries Act*
- The Review of the *Navigation Protection Act*
- The Review of Environmental Assessment Processes
- The Modernization of the National Energy Board.

This organization allows each responsible regulatory agency to access the section that relates to the agency's specific review.

Appendix A contains NunatuKavut Community Council submission on changes to Fisheries Act, January 31, 2017.

Appendix B contains NCC's Submission to the Parliament of Canada Standing Committee on Transport, Infrastructure and Communities – Review of the *Navigation Protection Act*, December 7, 2016.

Appendix C contains NCC's Written Submission - The Review of Environmental Assessment Processes, December 23, 2016.

Appendix D contains NCC's Final Submission to the Expert Panel on the Modernization of the National Energy Board, April 17, 2017.

Submissions to Transport Canada Regarding The Review of the *Fisheries Act*

September 15, 2017

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the review of the *Fisheries Act* (the "*Act*") to Fisheries and Oceans Canada as part of the ongoing process of environmental and regulatory reviews being undertaken by the Government of Canada.

NCC previously made a written submission to the Minister of Fisheries, dated January 31, 2017, as part of the Minister's review of the Act.

Rather than re-hashing the background, analysis or conclusions in that submission in detail, it is attached as an Appendix to provide background for understanding the submissions herein.

In preparing the present submission, NCC is informed by the following broad principles in its approach to all of the environmental and regulatory reviews:

- A **Nation-to-Nation Relationship, the principles of which are described below**;
- **Distinguish Indigenous rights and interests from "the public interest**" and Indigenous communities from "stakeholders";
- The need for **early engagement**;
- **Capacity building:** adequate and accessible ongoing funding and support so that NCC can build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis;
- **Adequate participation funding on a project by project basis** to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance;
- **Meaningful inclusion** of NCC's **Indigenous Knowledge, Indigenous rights, and Indigenous perspectives** in the process;
- A meaningful role for NCC in **decision-making**;
- A meaningful role for NCC in **monitoring and enforcement**;
- A **holistic and comprehensive approach** to regulatory processes that takes into account all project impacts, including **cumulative and regional impacts**.

In preparing this submission, NCC also reviewed in particular the following documents:

- "Review of Changes made in 2012 to the *Fisheries Act*: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries – Report of the Standing Committee on Fisheries and Oceans", February 2017 ("Committee's Report")
- "Environmental and Regulatory Reviews – Discussion Paper", June 2017 ("Discussion Paper")
- "Review of the 2012 changes to the *Fisheries Act*: Restoring Lost Protections and Incorporating Modern Safeguards – What We Heard from Indigenous Groups and Resource Management Boards", June 2017
- "Review of the 2012 changes to the *Fisheries Act*: Restoring Lost Protections and Incorporating Modern Safeguards – Overview of What We Heard and Next Steps" - Presentation dated July 5, 2017, delivered to the Nunatukavut Community Council – August 9, 2017

We have outlined below the issues as we see them with the Committee's Report, the Discussion Paper, and the responses from Transport Canada, as well as our recommendations.

A. PRELIMINARY COMMENTS: THE REVIEW PROCESS TO DATE

As indicated in our submission of January 31, 2017, the review process undertaken by the Standing Committee on Fisheries and Oceans ("Committee") did not allow for fulsome engagement with our communities on these issues, nor did it allow us adequate time for a full technical review of the legislation and its impacts on our Aboriginal and Treaty Rights.

In fact, NCC was not provided with the opportunity to appear before the Standing Committee, nor were we provided with adequate time or funding to make a written submission to the Committee. As such, NCC's concerns did not form part of the Committee's Report.

Further, while it appears from the "What We Heard" Report that many Indigenous Groups were afforded the opportunity to meet directly with DFO officials between August 2016 and January 2017, NCC received no such opportunity. While concerns from Indigenous Groups are meant to be summarized in the "What we Heard" Report, that Report contains no listing of the Groups that provided submissions and/or other input to the Report, and as such it is not clear how the concerns of NCC and other Groups were included.

This second phase of the engagement has been similarly rushed. The Federal Discussion Paper was provided in June 2017. However, we did not have a chance to hear a detailed response from the Department of Fisheries and Oceans until a meeting on August 9, 2017, and then we were asked to provide a written response by August 28, 2017, a deadline that was subsequently extended until September 15, 2017. While we appreciate the opportunity to meet face-to-face, this short timeframe did not allow NCC sufficient time to consider the additional information provided in the meeting, which contained much more detail than the Discussion Paper vis-à-vis changes to the *Fisheries Act* specifically. Further, August is a time when many of our community members are on the land, making it difficult to get adequate input on these matters.

We understand that Canada still considers these discussions to be a form of pre-consultation engagement, and that Canada still intends to initiate formal consultation with Indigenous Peoples on these topics at some point in the future. We hope that the consultation process will not be similarly rushed and will allow for fulsome consideration of the potential impact of any legislative or policy changes on our Aboriginal and Treaty Rights.

B. NUNATUKAVUT AND THE NATION-TO-NATION RELATIONSHIP

NCC's response is based on a number of principles as outlined above. One of these is the importance of a Nation-to Nation-relationship.

To the NunatuKavut Community Council, this means the Government of Canada (a) will engage with the people of NunatuKavut as equals, and as a distinct, self-governing, rights-bearing Inuit people within our territory of NunatuKavut; (b) will respect our unique rights, interests and circumstances; (c) will not simply lump us in with other Indigenous Groups, with stakeholder groups or consider our interests as simply one part of the "public interest;" and (d) will move towards a collaborative and trust-based relationship.

Our fisheries and waters remain central to our way of life. Most of NunatuKavut's people follow at least some of the most important traditions of our ancestors, including the harvesting of seals, fish, and waterfowl. Nearly everyone in NunatuKavut eats food from our local fisheries on a regular basis, which means the protection and nurturing of habitat in harvesting areas is essential. Protection of habitat is of great importance for more than just fisheries, as other wildlife populations that can sustain harvesting for country food depend on high-quality habitat.

We recommend that the Government of Canada's response be informed not just by the Committee's Report and the Government's Discussion Paper, but also by the ten "Principles respecting the Government of Canada's relationship with Indigenous peoples" announced by the Government of Canada on July 14, 2017.

C. RESPONSE TO PROPOSED CHANGES

1) Habitat Protection

NCC supports a number of recommendations made by the Committee, notably its recommendations to restore the provisions of the Act concerning the harmful alteration, disruption or destruction of fish habitat, or "HADD" provisions (Recommendations 1 and 3), the extension of the HADD provisions to all ocean and freshwater habitats (Recommendation 6), and that protection include cumulative effects of multiple activities (Recommendation 7). If the definition of HADD is being reviewed and refined (Recommendation 3), NCC would expect to be consulted as part of that process.

NCC is also supportive of the ecosystem approach to the protection and restoration of fish habitat (Recommendation 2). An ecosystem-based approach would look at the health of the overall ecosystem and all of the species in it, recognizing the relationships between the different species, and not just particular species of concern.

In keeping with this approach, NCC recommends that Fisheries and Oceans Canada ("DFO") carefully evaluate its focus on individual species-by-species management. The habitat protection provisions of the Fisheries Act apply both to Commercial, Recreational and Aboriginal (CRA) species as well as fish species that support them. However, non-fish species and factors that determine their abundance (such as habitat quality) may also influence the population growth rates of fish stocks. For example, because beaver are major habitat modifiers, changes in beaver abundance can dramatically influence stream hydrology and habitat suitability for a

number of CRA species. Yet beaver – or beaver predators, which may influence beaver abundance – are not regulated under the *Act*.

NCC has reservations about Recommendation 4, which suggests that DFO place priority on habitats that "contribute significantly to fish production." Our reservations flow from concerns about how this criterion will be operationalized. Notwithstanding the potential inconsistency with a precautionary approach (as pointed out elsewhere in the Committee's Report), the determination of how much a particular habitat contributes to fish production is scientifically challenging[1]; evaluating its "significance" even more so.

2) Research and Indigenous Knowledge

NCC welcomes increased resources for research (Recommendation 5). NCC notes that increased resources need to be made available for the gathering and inclusion of Indigenous Knowledge (IK) as well, and that Indigenous Knowledge research should be done alongside or even prior to scientific research, as it can often help direct scientific research or open up new avenues for scientific inquiry.

Such resources would need to be provided directly to NCC and other Indigenous Groups, on a Nation-to-Nation basis, so that IK research can take place in accordance with the protocols of our Nation, and the wishes of our elders and land users. Canada and NCC would need to enter into appropriate agreements governing the sharing and use of that knowledge.

3) Assessment of Impacts

NCC welcomes the recommendations that the *Fisheries Act* should rely less on proponent self-assessment (Recommendation 18), and that the use of *Fisheries Act* authorizations as triggers for environmental assessment should be reviewed (Recommendation 26).

It is NCC's position that *Fisheries Act* authorizations should be triggers for environmental assessment. We have seen a number of projects in our territory, including dams, transmission lines, and highway construction, where environmental assessment was critical, and where the *Fisheries Act* authorization was the primary trigger for environmental assessment.

4) Indigenous Inclusion in Monitoring, Enforcement and Decision-Making

NCC welcomes the focus in the Discussion Paper on "Partnering with Indigenous Peoples," including enhancing "participation of Indigenous Peoples in the conservation and protection of

[1] Some might say impossible. For example, Dr. Brett Favaro recently noted that DFO has "no scientific ability to divide fish into categories of fish that support a fishery and those that don't". See Committee Report p. 10, Fisheries and Marine Institute, Memorial University of Newfoundland, As an Individual, Evidence, 31 October 2016.

fish and fish habitats" and ensuring "meaningful and ongoing engagement and participation in planning and integrated management".

The Report does contain a number of recommendations (Recommendations 21-25) oriented toward increasing hiring, training and resources in enforcement and habitat protection. NCC welcomes this. As we noted in our January 31 submission, the closure of the DFO habitat office in Happy Valley-Goose Bay was a significant loss for our region. It will be important to ensure that new resources are directed to areas that need it, such as Happy Valley-Goose Bay, and that increased enforcement capacity is directed to Indigenous Groups like NCC. As the traditional stewards and guardians of our territory of NunatuKavut, our people are in the best position to provide relevant knowledge, and to make decisions, monitor and enforce protections with respect to fisheries in our territory.

Nonetheless, the *Fisheries Act* still does not allow for DFO to enter into agreement with Indigenous Groups to share or delegate authority, programs or projects in the same way DFO does with Provinces. This deficiency in the *Act* is inconsistent the Nation-to Nation approach that NCC maintains is critical to the repair and strengthening of relationships with Indigenous communities.

Although this issue was raised directly with the Committee, it did not address it, instead opting for a weaker recommendation on "co-operation" with Indigenous Groups (Recommendation 27).

NCC submits that if Canada is serious about meaningful involvement of Indigenous Peoples in decision-making, enforcement and conservation activities, the Act must be amended to allow for delegation and sharing of authority and responsibility between DFO and Indigenous Groups.

NCC further submits that the Committee's Report did not directly address concerns about Ministerial discretion being too broad, opting instead for weak recommendations about increased transparency and disclosure (Recommendations 28 and 29). NCC recommends that clearer criteria be established around how Ministerial discretion is exercised.

D. CONCLUSION, LEGISLATIVE AND IMPLEMENTATION RECOMMENDATIONS

Overall, NCC welcomes many of the recommendations of the Standing Committee, and the direction suggested in the Discussion Paper. **In particular, the return of the HADD provisions is a step in the right direction.** However, in some respects the Committee's Report and the Discussion are lacking in detail and/or don't go far enough to fulfill the federal government's promise to "restore lost protections and incorporate modern safeguards."

As such, NCC recommends the following for the Government of Canada's legislative amendments to the *Fisheries Act* and effective implementation of the *Fisheries Act* regime as it relates to Indigenous Groups:

- **DFO should carefully evaluate its focus on individual species-by-species management to ensure the implementation of an ecosystem-based approach to**

the protection and restoration of fish habitat. This evaluation may require amendments to the "CRA" provisions of the *Act*, as well as amendments to provisions related to the non-fish species that support CRA species.

- **DFO should carefully evaluate any amendments to the Act that would give priority to habitats that contribute to "fish production."** Any such amendments should be consistent with the precautionary approach and an ecosystem-based approach, and based on Western science as well as IK. Furthermore, any such amendments should also take into account the cultural (as well as economic) significance of habitats to Indigenous Peoples.

- **DFO should develop criteria under which contemplated *Fisheries Act* authorizations would trigger an environmental assessment**.

- **The *Act* must be amended to allow for delegation and sharing of authority and responsibility between DFO and Indigenous Groups**. This should apply to information gathering, decision-making, monitoring, and enforcement.

  DFO should establish clearer criteria (either as statutory amendments or implementation policy) around how Ministerial discretion is exercised.

- **A "Purpose of the Act" section should be added to the Act that mentions recognition and respect for Indigenous rights and interests**. This is important for signaling the Government's awareness of the need to protect Indigenous rights and interests as it relates to fisheries.

- **Increase resources available directly to Indigenous Groups (such as NCC) for the gathering and inclusion of Indigenous Knowledge.** Canada and Indigenous Groups would need to enter into appropriate agreements governing the sharing and use of that knowledge.

- **New resources for habitat monitoring and enforcement should be directed to Indigenous communities and regions in need of these resources**, such as NCC and its territories.

We look forward to a fulsome consultation on the specific legislative, regulatory and policy proposals being developed by the Government of Canada in relation to the amendment of the *Fisheries Act*.

Submissions to Transport Canada Regarding The Review of the *Navigation Protection Act*

September 15, 2017

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the review of the *Navigation Protection Act* ("*NPA*" or "the Act") as part of the ongoing process of environmental and regulatory reviews being undertaken by the Government of Canada.

NCC previously made a written submission to the Standing Committee on Transport, Infrastructure and Communities ("Standing Committee" or "Committee"), dated December 7, 2016, as part of the Committee's review of the NPA. Rather than re-hashing the background, analysis or conclusions in that submission in detail, it is attached as an Appendix to provide background for understanding the submissions herein.

In preparing the present submission, NCC is informed by the following broad principles in its approach to all of the environmental and regulatory reviews:

- A **Nation-to-Nation Relationship, the principles of which are described below**;
- **Distinguish Indigenous rights and interests from "the public interest**" and Indigenous communities from "stakeholders";
- The need for **early engagement**;
- **Capacity building:** adequate and accessible ongoing funding and support so that NCC can build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis;
- **Adequate participation funding on a project by project basis** to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance;
- **Meaningful inclusion** of NCC's **Indigenous Knowledge, Indigenous rights, and Indigenous perspectives** in the process;
- A meaningful role for NCC in **decision-making**;
- A meaningful role for NCC in **monitoring and enforcement**;
- A **holistic and comprehensive approach** to regulatory processes that takes into account all project impacts, including **cumulative and regional impacts**.

In preparing this submission, NCC also reviewed in particular the following documents:

- "A Study of the Navigation Protection Act – Report of the Standing Committee on Transport, Infrastructure and Communities", March 2017 ("Committee's Report")
- "Government of Canada Response to the Eleventh Report of the Standing Committee on Transport, Infrastructure and Communities: 'A Study of the Navigation Protection Act'," June 2017 ("Government Response")
- "Environmental and Regulatory Reviews – Discussion Paper," June 2017 ("Discussion Paper")
- "Update on Review of the Navigation Protection Act – Presentation to the Nunatukavut Community Council" – August 9, 2017
- "Supporting Paper #1 - Context for the Navigation Protection Act Review," provided to NCC on August 8, 2017
- "Supporting Paper #2 - Restoring Lost Protections," provided to NCC on August 16, 2017

- "Supporting Paper #3 - Partnering with Indigenous Peoples,", provided to NCC on August 16, 2017
- "Supporting Paper #4 - Open, Accessible, and Transparent Processes", provided to NCC on August 16, 2017

We have outlined below the issues as we see them with the Committee's Report, the Discussion Paper, and the responses from Transport Canada, as well as our recommendations.

A. PRELIMINARY COMMENTS: THE REVIEW PROCESS TO DATE

As indicated in our submission of December 7, 2016, the review process undertaken by the Standing Committee did not allow for fulsome engagement with our communities on these issues, nor did it allow us adequate time for a full technical review of the legislation and its impacts on our Aboriginal and Treaty Rights. While we did have time to provide a preliminary analysis in our written submission, we were not afforded the opportunity to appear before the Committee in support of our submission.

This second phase of the engagement has been similarly rushed. The Federal Discussion Paper was provided in June 2017. However, we did not have a chance to hear a detailed response from Transport Canada until a meeting on August 9, 2017, and further supporting papers were provided to us only on August 16, 2017. Nonetheless, we were asked to provide a written response by August 28, 2017, a deadline that was subsequently extended until September 15, 2017. While we appreciated the opportunity to meet face-to-face, and receiving the additional supporting documents, the short timeframe did not allow NCC sufficient time to consider the additional information provided in the meeting or in the additional documents, which contained much more detail than the Discussion Paper vis-à-vis changes to the NPA specifically. Further, August is a time when many of our community members are on the land, making it difficult to get adequate input on these matters.

We understand that Canada still considers these discussions to be a form of pre-consultation engagement, and that Canada still intends to initiate formal consultation with Indigenous Peoples on these topics at some point in the future. We hope that the consultation process will not be similarly rushed and will allow for fulsome consideration of the potential impact of any legislative or policy changes on our Aboriginal and Treaty Rights.

B. NUNATUKAVUT AND THE NATION-TO-NATION RELATIONSHIP

NCC's response is based on a number of principles as outlined above. One of these is the importance of a Nation-to-Nation relationship.

To the NunatuKavut Community Council, this means the Government of Canada (a) will engage with the people of NunatuKavut as equals, and as a distinct, self-governing, rights-bearing Inuit people within our territory of NunatuKavut; (b) will respect our unique rights,

interests and circumstances; (c) will not simply lump us in with other Indigenous Groups, with stakeholder groups or consider our interests as simply one part of the "public interest;" and (d) will move towards a collaborative and trust-based relationship.

Our waterways remain the lifeblood of our territory, and are critical for both summer and winter travel. While in summer people travel by boat, in winter, when our rivers are frozen, our people use them to travel by snowmobile or sled. Long trips to inland areas, often on or along major rivers, happen not only for harvesting country foods, but also for woodcutting and working traplines for the fur trade and occasionally for other activities such as gathering plants or juniper berries for traditional medicines. Winter is also a critical time for transporting goods to our remote communities.

Obstructions to navigation can also impede winter travel, something that does not appear to currently factor into Transport Canada or the Committee's considerations in talking about the protection of navigation. This is a serious gap which reflects a lack of understanding of our way of life and further underscores the need for NCC and Indigenous Groups in general to be consulted much more carefully as the Government develops proposals for overhauling the NPA.

Major rivers such as the Alexis River near Port Hope Simpson, the St. Lewis River near Mary's Harbour, the Hawke River, the North River, the Sandhill River, and the Eagle, White Bear and Paradise Rivers, all of which empty into Sandwich Bay, are just some of the many highly important rivers in NunatuKavut which do not appear on the NPA Schedule. It is essential to our wellbeing and way of life that all of our waterways be protected under the NPA.

We similarly recommend that the Government of Canada's response be informed not just by the Committee's Report and the Government's Discussion Paper, but also by the ten "Principles respecting the Government of Canada's relationship with Indigenous peoples" announced by the Government of Canada on July 14, 2017.

C. NCC RESPONSE TO PROPOSED CHANGES

1. Scheduled Waters

NCC is disappointed that the Committee's Report, the Government Response and the Discussion Paper all ignored the call by NCC and most Indigenous Groups to remove the Schedule of protected waterways from the legislation, and return to the state of affairs prior to the 2012 changes, where all navigable waters were presumptively protected by the Act. Neither the Committee's Report nor the Government Response provides any explanation for why they chose to ignore the clear recommendation of so many Indigenous Groups, and instead opted for

the weaker recommendation (Recommendation 1 of the Committee's Report, supported in the Government Response[1]) of improving the process for adding waterways to the Schedule.

It remains unclear why the Government's default position is that waterways are not protected, and that it is left to Indigenous Groups and others to justify why they should be protected. NCC submits that the correct position should be one of requiring that all waterways be protected, and requiring the Government or proponents to justify why a specific waterway should be excluded from the protection of the NPA.

Also, since the Committee and the Discussion Paper did not propose much in the way of specific improvements to the process for additions to the Schedule, it is impossible for NCC to comment on any proposed improvements. The Committee Recommendations 4, 6, and 7 call on the Government to clarify various aspects of the process for adding waterways to the Schedule, but no specific improvements are proposed in the Committee's Report, the Discussion Paper nor from Transport Canada. This reinforces our view that the Schedule does not provide adequate protection.

However, in the event that the recommendation of NCC and numerous other Indigenous Groups to remove the Schedule from the NPA is not taken, NCC recommends that a process for amending the Schedule be developed in a manner similar to that used for determining the Schedule of Species at Risk under the Species at Risk Act (SARA) (the list of designated species to which the protection provisions applies). Under the SARA, an independent committee of scientific experts from government, academia, and civil society uses a set of explicit validated criteria to evaluate the extinction risk of candidate species. These evaluations are published, and a summary transmitted to the responsible Minister, who in turn makes a recommendation to the Governor in Council (GIC). The GIC then amends (by adding or removing species) from the Schedule by way of Ministerial Order. A similar process could be developed in partnership with Indigenous Groups to amend the NPA List of Scheduled Waters. However, such a process would need to specify the procedure for both proposing and evaluating candidate waterways, as well as incorporating criteria that reflect Indigenous values, Indigenous Knowledge and considerations of historical use.

The Discussion Paper further indicates that the Government of Canada is "also considering whether there are priority navigable waters that should be added to the Schedule now, in advance of any new process coming into effect."[2]

NCC strongly maintains that the Schedule should be removed from the NPA, and that full protection be restored to all of our waterways.

Without prejudice to that position, if the Government is not prepared to restore the Schedule, all of the waterways identified in the previous section of our submission should no doubt be

[1] Given that the Government Response document supports all 11 recommendations of the Standing Committee, we will not continue to repeat that the recommendation appears in both documents. We will simply refer to the Committee's numbered recommendations.

[2] Discussion Paper, p. 21. This possibility of adding new waterways in advance of NPA's amendment is also mentioned in the Government Response, under Recommendation 5.

included. However, it is by no means a complete list, and we would need more time and resources to adequately engage with our community members to determine a more complete list of our waterways, which specifically require protection.

We conclude that the Committee has failed to follow its mandate to "restore lost protections," and instead has chosen to expand the existing protections in an incremental way, which is an inadequate approach to properly protect the waterways of our territory. Unfortunately, the proposed approach to retain the Schedule does not serve one of the key stated goals of the current environmental and regulatory reviews of advancing reconciliation with Indigenous Peoples.[3] NCC strongly recommends that the Schedule be removed and protection to all waterways be restored.

2. Respecting the Special Relationship Indigenous Peoples have with Waterways

Recommendation 3 suggests that the government examine ways of preserving, protecting and respecting navigation on waterways in our traditional lands, and recognizing our special relationship with our waterways.

However, the Committee's Report repeatedly lumps Indigenous Groups in with "other stakeholders" as opposed to recognizing us as rights holders and custodians of our lands and waters. This runs completely counter to one of the key principles we identify at the outset of this submission, in relation to all of the environmental and regulatory reviews. This point is also discussed in the next section.

Further, in Recommendation 4, the Committee suggested entrenching the "aqueous highway" test over the "floating canoe" test. In our view, this recommendation further entrenches the importance of protecting "commercially valuable" waterways over those that are traditionally used by Indigenous Peoples. NCC submits that in fact this goes contrary to the notion of recognizing "the special relationship that Indigenous communities have with waterways," mentioned in Recommendation 3.

3. Consultation with Indigenous Groups vs "Stakeholders"

Recommendation 3, along with Recommendation 8, suggest imposing a requirement that proponents notify Indigenous Groups and other "stakeholders" and provide for opportunities for consultation. This view is echoed in the Discussion Paper.

This is highly problematic. NCC and other Indigenous Groups are constitutional rights holders, and not simply stakeholders. Therefore the Government has a legal obligation to consult them on decisions affecting their rights.

[3] Discussion Paper, p. 3, and Supporting Paper No. 3 "Partnering with Indigenous Peoples" (July 2017).

Additionally, Recommendations 3 and 8 appear to suggest a blanket delegation to proponents of the Crown's duty to consult. While proponents are occasionally in a better position to carry out certain procedural aspects of consultation, many do not have a good understanding or appreciation of Indigenous rights.

NCC respectfully submits that the obligation to give notice and consult with Indigenous Groups should remain with Government, and delegation should only be done on a case-by-case basis, clearly in writing, with the consent of the Indigenous Group, and with Government retaining the duty to ensure that consultation has been adequately carried out.

4. Indigenous Inclusion in Monitoring, Enforcement and Decision-Making

NCC welcomes Recommendations 9 and 10, which suggest the creation of administrative and complaints mechanisms.

Further, NCC welcomes the suggested changes in the Discussion Paper on incorporating Indigenous Knowledge, early engagement, and involving Indigenous Peoples at all stages of the NPA regime, including monitoring, enforcement and decision-making. The proposed changes, however, lack specificity, and would need to be the subject of consultation with Indigenous Groups on a Nation-to-Nation basis.

As the traditional stewards and guardians of our territory of NunatuKavut, our people are in the best position to provide relevant knowledge, and to make decisions, monitor and enforce protections with respect to projects in our territory.

In keeping with our principles above, NCC notes that any increase in our role in the NPA process must include capacity funding. Only through access to sufficient capacity funding can NCC participate meaningfully in monitoring, enforcement and decision-making activities related to the NPA.

D. CONCLUSION AND LEGISLATIVE/IMPLEMENTATION RECOMMENDATIONS

NCC submits that the proposed changes to the NPA do not fulfill the federal government's promise to "restore lost protections and incorporate modern safeguards". NCC concludes that the proposed changes do not go far enough to address our concerns about the loss of protection for waterways in our territory. In fact, we submit that, unfortunately, the proposed changes to the NPA do little to recognize "the special relationship that Indigenous communities have with waterways,"[4] something that the Government of Canada has said it would recognize as it undertakes review and amendment of the NPA.

With these points in mind, NCC offers the recommendations below:

[4] Government of Canada Response, June 2017, response to recommendation 3 of the Committee's Report.

- **Remove the Schedule to the NPA and restore protections to all navigable waterways in our territory.**

    - **Without prejudice to the recommendation above**, NCC recommends that if removal of the Schedule is not possible, **then the criteria as well as the process for adding new waterways to the schedule must be developed in conjunction with Indigenous Groups.** The process used for SARA/COSEWIC may offer a model that could be adapted for this purpose.

    - In addition, NCC has identified several "priority waterways" to which protection should be restored, but would need more time and resources to adequately engage with community members to determine a more complete list of waterways, which need to be protected.

- **Reject the "aqueous highway" test in favour of the "floating canoe" test.** Close consultation with Indigenous Groups is required in conjunction with the development of any such test.

- **Ensure that the duty to consult regarding projects in navigable waters remains with the Crown, and that procedural aspects of the duty are delegated only on a case to case basis**, in writing, in clear language, and with the consent of the Indigenous Group affected.

- **Expand and strengthen inclusion of Indigenous Peoples, rights, knowledge and perspectives in decision-making, monitoring and enforcement, on a Nation-to-Nation basis.**

- **A "Purpose of the Act" section should be added to the Act that reinforces recognition and respect for indigenous rights and interests**. This is important for signaling the Government's awareness of the need to protect Indigenous rights and interests as it relates to navigable waters.

We look forward to a fulsome consultation on the specific legislative, regulatory and policy proposals being developed by the Government of Canada in relation to the amendment of the *Navigation Protection Act.*

Submissions to the Government of Canada Regarding the Review of Environmental Assessment Processes

September 15, 2017

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the Review of Environmental Assessment Processes ("EA Review") as part of the ongoing process of environmental and regulatory reviews currently being undertaken by the Government of Canada.

NCC previously made both an oral presentation and a written submission to the Expert Panel for the Review of Environmental Assessment Processes ("Expert Panel"). The oral presentation was made on December 15, 2016 to the Panel in Nanaimo, BC by teleconference with a PowerPoint Presentation, filed on the same date. An associated written submission (entitled Written Submission to Federal Environmental Assessment Review Panel), dated December 23, 2016, was subsequently filed. The written submission contained the answers to two undertakings provided by the EA Panel about NCC's capacity related to EA processes and the level of core funding required to build up the capacity. We attach the December 23, 2016 written submission as an Appendix to provide background for our present submission.

In preparing the present submission, NCC is informed by the following broad principles in its approach to all of the environmental and regulatory reviews, which are described in more detail in Section B below:

- A Nation-to-Nation Relationship;
- Distinguish Indigenous rights and interests from "the public interest" and Indigenous communities from "stakeholders";
- The need for early engagement;
- Capacity building: adequate and accessible ongoing funding and support so that NCC can build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis;
- Adequate participation funding on a project by project basis to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance;
- Meaningful inclusion of NCC's Indigenous Knowledge, Indigenous rights, and Indigenous perspectives in the process;
- A meaningful role for NCC in decision-making;
- A meaningful role for NCC in monitoring and enforcement;
- A holistic and comprehensive approach to regulatory processes that takes into account all project impacts, including cumulative and regional impacts.

In preparing this submission, NCC also reviewed in particular the following documents:

- BUILDING COMMON GROUND: A New Vision for Impact Assessment in Canada, The Final Report of the Expert Panel on the Review of Environmental Assessment Processes, Released on April 5, 2017 ("Expert Panel Report" or "Report")
- Environmental and Regulatory Reviews – Discussion Paper, June 2017 ("Discussion Paper")
- Review of Environmental Assessment Processes, PowerPoint Presentation, presented to NCC on August 9, 2017 ("Presentation").

In the present submission, we provide our comments on the issues most important to us in relation to the Environmental Assessment Review proposals as presented to date in the Expert Panel Report, the Discussion Paper, and the Presentation given to NCC by Government of Canada representatives on August 9, as well as our recommendations.

A. PRELIMINARY COMMENTS: THE REVIEW PROCESS TO DATE

As indicated in our submission of December 23, 2016, this EA Review process has had 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, 2016.
- 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.

At the time we urged the federal government to remedy this less than promising start. We also indicated that NCC understood that the Expert Panel portion of the EA Review process was not a consultation, but a pre-consultation.

Although the Government has made some efforts to accommodate NCC, this second phase of the engagement has been very rushed. The Federal Discussion Paper was provided in June 2017. However, we did not have a chance to hear a detailed response from the Canadian Environmental Assessment Agency (CEAA) until a meeting on August 9, 2017; and then we were asked to provide a written response by August 28, 2017, a deadline that was subsequently extended until September 15, 2017. While we appreciated the August meeting, this short timeframe did not allow NCC sufficient time to consider the additional information provided in the meeting, which provided more information on the progress of the EA Review. Further, August is a time when many of our community members are on the land, making it difficult to get adequate input on these matters.

As we continue to move forward with the EA Review Process, NCC expects to be consulted in a timely manner by the Minister. And NCC requires access to adequate funding to meaningfully participate.

We understand that Canada still considers these discussions to be a form of pre-consultation engagement, and that Canada still intends to initiate formal consultation with Indigenous Peoples on these topics at some point in the future. We strongly recommend that the consultation process allow for fulsome consideration of the potential impact of any legislative or policy changes on our Aboriginal and Treaty Rights. A thorough and formal consultation is essential to the issue of building trust and advancing reconciliation.

B. GENERAL COMMENTS ON THE EA REVIEW RECOMMENDATIONS IN LIGHT OF NCC'S KEY PRINCIPLES

NCC's response to the Government's proposals for the Review of Environmental Assessment Processes is based on a number of principles as outlined above. In this section, we offer general comments on the EA Review recommendations (to date) as they relate to each of these principles. More specific responses to the proposals presented in the Expert Panel Report and Discussion Paper are found in Sections C and D below.

1) NATION-TO-NATION RELATIONSHIPS – CORNERSTONE OF SUCCESS

To the NunatuKavut Community Council, this means the Government of Canada (a) will engage with the people of NunatuKavut as equals, and as a distinct, self-governing, rights-bearing Inuit people within our territory of NunatuKavut; (b) will respect our unique rights, interests and circumstances; (c) will not simply lump us in with other Indigenous Groups, with stakeholder groups or consider our interests as simply one part of the "public interest;" and (d) will move towards a collaborative and trust-based relationship.

In the context of Environmental Assessments, a Nation-to-Nation approach is essential for achieving fair outcomes related to projects being assessed – meaning outcomes that protect Indigenous rights and interests. Typically, these rights and interests relate to activities done on the land and/or water affected by proposed projects. Major resource development projects, in particular, frequently touch the territories of Indigenous Peoples, putting their rights and interests – along with livelihoods, health, culture and a host of other impacts – at risk of being affected in a negative way.

Muskrat Falls is a sober lesson about the consequences of a deeply flawed EA process, which failed to engage affected Indigenous communities in a respectful and timely Nation-to-Nation manner and failed to take Indigenous rights, perspectives and IK into account. In NunatuKavut, many members of our community have been affected by the Muskrat Falls. If Muskrat Falls goes into service, significant negative impacts to fisheries and other country foods (which in turn impact our health and way of life) are expected from this project. NCC's comments regarding the importance of Nation-to-Nation collaboration are informed by these ongoing (and potentially disastrous impacts) of the failed EA process for Muskrat Falls.

Whether in NunatuKavut or elsewhere in Canada, where there are large high-impact projects under assessment that affect Indigenous Groups, the fair and effective way to proceed is through Nation-to-Nation collaboration, founded on mutual trust, partnership and a collaborative approach.

With this in mind, we recommend that the Government of Canada's proposals for Review of Environmental Assessment Processes be informed not just by the Expert Panel Report and the Government's Discussion Paper, but also by the ten "Principles respecting the Government of Canada's relationship with Indigenous peoples," announced by the Government of Canada on July 14, 2017.

We are pleased to note that many of the recommendations of the Expert Panel Report appear to be informed by a Nation-to-Nation approach. We urge the Government to continue in this encouraging direction as we move into more formal consultations to fix our broken EA process in a spirit of reconciliation and collaboration.

2) DISTINCTION BETWEEN INDIGENOUS RIGHTS AND INTERESTS AND "PUBLIC INTEREST"

NCC asserts that Indigenous rights and interests and "the public interest" are distinct in critical ways that relate to Constitutional protection of Indigenous rights in Canada.[1] As such, Indigenous rights and interests must not be conflated with the notion of "public interest" nor subsumed under it. Similarly, Indigenous communities should not be conflated with stakeholders in EA processes. The current environmental and regulatory reviews being undertaken by the Government of Canada provide an opportunity to make the appropriate distinctions among these concepts, distinctions with numerous implications for the protection of Indigenous rights and interests in the face of projects under assessment.

NCC notes that the Expert Panel Report appears for the most part to understand the distinction between Indigenous rights and the public interest. Moreover, the Report's recommendations for the most part distinguish between Indigenous Groups and stakeholders and recognize the unique legal status of Indigenous Peoples under the Canadian Constitution, which differentiates us from stakeholders. We urge the Government to continue in this encouraging direction and to maintain these distinctions as we move into more formal consultations.

3) EARLY ENGAGEMENT (AND AT EVERY STEP OF THE PROCESS)

NCC has emphasized that early engagement (and indeed engagement at every step in the process) in relation to projects under assessment is essential and consistent with both a Nation-to-Nation approach and meaningful engagement in the EA process. When Indigenous Groups are brought in late in the EA process, the opportunity for consulting in a less adversarial environment is lost. In Newfoundland and Labrador, evidence abounds of the numerous problems and serious risks (including community health and geophysical risks) of not engaging with Indigenous communities as early as possible in the environmental assessments of major projects.[2]

We welcome a requirement for explicit (and legislated) early planning and engagement phase in a new federal Impact Assessment (IA) process that would include early

[1] *Constitution Act, 1982*, s. 35.

[2] The example of Muskrat Falls, as discussed above, is an example of the negative consequences of the failure to engage Indigenous communities in a timely and respectful manner, early in the EA process.

engagement of Indigenous Groups (Presentation, Slide 4 and Section 3.2.2.1, Expert Report).

4) CAPACITY BUILDING

NCC defines Capacity Building as adequate and accessible ongoing funding and support to allow us to build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis. NCC, like many Indigenous Groups, lacks the capacity to respond to the heavy consultation and regulatory demands required for meaningful engagement related to (a) resource development projects on our territories; (b) important environmental and regulatory reviews by government (such as the current review review).

To the extent that the Government of Canada wishes to engage in serious, ongoing, collaborative discussions with Indigenous Groups around changes to the EA processes, NCC's current capacity is already stretched too thin to make meaningful participation in such activities possible. Absent the necessary resources to build the capacity needed for interacting with the Government of Canada on a Nation-to-Nation basis in relation to environmental assessment processes, our capacity will remain insufficient. Consequently, many of the initiatives and activities proposed by the Government to build trust and advance reconciliation with Indigenous Peoples will be hollow gestures.

With access to adequate resources for Capacity Building, NCC can establish internal capacity in such a way that it is not solely reliant on project-by-project funding. Annual core funding for capacity building is essential to enable fair and meaningful participation in an efficient way for Indigenous Groups.

NCC strongly supports the Government's recommendations (Section 2.3.3 on Capacity, Expert Report and Presentation, Slide 10) that acknowledge the need to improve participant funding programs for Indigenous peoples and to work with Indigenous peoples to build capacity and enable their participation in assessments. We urge the Government to follow through on these recommendations and to implement them in a new federal EA (or IA) processes.

As will be discussed in Section D, the broadening of the scope of assessment (from EA to IA) will increase demands on the capacity of Indigenous Groups when this capacity is already stretched thin. As such, the heavy demands of Indigenous Groups will be even higher as this scope is broadened. Consequently the capacity gap will be even greater unless Government dramatically increases ongoing core funding, as well as project-specific participant funding.

5) PARTICIPANT FUNDING ON A PROJECT-BY-PROJECT BASIS

NCC also requires adequate participant funding on a project-by-project basis to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance. Generally, participant funding for Indigenous participation in EA processes has been inadequate. Full Indigenous partnership requires public consultation and Indigenous Knowledge (IK) input. EA processes typically require high-quality technical expertise (complementary science/IK, engineering, economic), combined with competent and specialized legal expertise. Therefore, access to adequate levels of participant funding is essential to allow Indigenous Groups to meaningfully participate and to hire high-quality expert and legal assistance.

As noted in Section 4.3 of NCC's Written Submission to the EA Panel of December 23, 2016 (included herein as an Appendix), the current very low levels of intervenor funding for Indigenous Groups and other intervenors substantially disadvantage Indigenous Groups and can substantially advantage proponents. Moreover, proponents can often recover costs from customers. Many positive changes could help fix the broken EA process and build trust with Indigenous Groups. But this entire EA Review will be an empty gesture absent dramatic enhancement of project participant funding – as well as ongoing capacity funding (and a workable process for intervenors to access it).

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.

As emphasized in the previous subsection, NCC strongly supports the Government's recommendations (Section 2.3.3 on Capacity, Expert Report and Presentation, Slide 10) that acknowledge the need to improve participant funding programs for Indigenous peoples and to work with Indigenous peoples to build capacity and enable their participation in assessments. We urge the Government to follow through on these recommendations and to implement them in a new federal EA (or IA) process.

As will be discussed in Section D, the broadening of the scope of assessment (from EA to IA) will increase demands on the capacity of Indigenous Groups when this capacity is already stretched thin. As such, the heavy demands on Indigenous Groups will be even higher as this scope is broadened. Consequently the capacity gap will be even greater unless Government dramatically increases ongoing core funding, as well as project-specific participant funding.

6) MEANINGFUL INCLUSION OF INDIGENOUS KNOWLEDGE AT ALL STAGES OF ASSESSED PROJECTS TOUCHING INDIGENOUS RIGHTS AND INTERESTS

Indigenous Knowledge is essential for the wise, prudent and fair EA of projects in areas that impact Indigenous rights and interests. In NunatuKavut, we know the land and its waters as we know ourselves. This is perhaps the fundamental point, although only the starting point, for asking the Government to ensure that EA include early, meaningful, respectful and fair use of IK at all stages of a project's life. To meet this objective, the Government of Canada needs to provide the resources necessary for this transfer of valuable knowledge to proponents and government officials. See also previous section on Participant Funding for IK.

Similarly, all environmental assessments affecting Indigenous territories should also include meaningful consideration of Indigenous rights and Indigenous perspectives.

Again, NCC is pleased to note that the Expert Panel Report has recommended "that IA legislation require that Indigenous knowledge be integrated into all phases of IA, in collaboration with, and with the permission and oversight of, Indigenous Groups." (Section 2.3.4) Furthermore, IK should inform project planning, assessment and decision-making; and should be incorporated alongside other sources of evidence (Presentation, Slide 13). This recommendation is consistent with NCC's recommendation in Section 4.4 of NCC's Written Submission to the EA Panel of December 23, 2016.

As will be discussed in Section D, however, we urge the Government to giver deeper consideration regarding the integration of IK early on and throughout the EA process.

7) MEANINGFUL ROLE IN DECISION-MAKING, MONITORING AND ENFORCEMENT FOR ASSESSED PROJECTS

A Nation-to-Nation approach requires that Indigenous Groups be involved as early as possible and at every stage thereafter in the life cycle of project being assessed. Indigenous Groups need to be offered the opportunity for meaningful and ongoing engagement related to the management of projects on their territories, including decision-making, monitoring and enforcement related to the projects. This long-term engagement result in multiple benefits: (a) less adversarial and more collaborative approach to resource development projects; (b) sharing in economic and commercial benefits of projects on our territories; (c) benefits related to the sharing of IK with proponents and the Government. Furthermore, such engagement can stand as testament to the sincerity of Government's desire to build trust and enhance trust and advance reconciliation.

NCC supports the approach outlined in the Expert Report (Section 3.3.2) and Presentation (Slide 14), which is consistent with our position regarding a meaningful role in monitoring and enforcement of projects. The Presentation recommends:

- Inclusive monitoring and compliance activities, so that life-cycle regulators and permitting departments work closely with Indigenous peoples, communities and landowners[.]
- Creating opportunities for Indigenous partnerships and co-development in monitoring – building on systems in Canada's North and co-development work initiated for some projects[.]

We urge the Government to follow through on these recommendations and to operationalize them in the new federal EA (or IA) process.

8) HOLISTIC AND COMPREHENSIVE APPROACH TO REGULATORY PROCESSES THAT CONSIDERS CUMULATIVE AND REGIONAL IMPACTS

NCC's way of viewing NunatuKavut is to see the land and all its inhabitants, human, animal, plant, as part of one dynamic whole. This view is at the heart of the way we live on the land and care for the resources that it provides to us. With this in mind, we would consider it essential that any new IA process should consider the various impacts of the project not in isolation, but rather as a whole.

This includes cumulative impacts that projects may have with existing projects of a similar or different nature, as well as cumulative impacts over time. Also included should be impacts of a regional nature, including impacts that are particular in quality or magnitude due to the inherent characteristics of a particular region.

NCC acknowledges that the broadening of the scope of assessment could provide a more comprehensive approach to the assessment of projects. However, we have concerns about the operationalization of these broader parameters given capacity constraints at the Government and Indigenous levels (as will be further discussed in Section D). NCC notes that the Expert Panel Report (Section 3.5) addresses cumulative effects and suggests that a Regional IA be used to assess baseline conditions and the cumulative impacts of all projects and activities within a defined region. Again, we welcome the assessment of cumulative impacts. However we have some concerns regarding how the Regional IAs will be effectively implemented given capacity constraints at the government and Indigenous levels (as will be further discussed in Section D).

C. GENERAL COMMENTS ON THE EA REVIEW RECOMMENDATIONS TO DATE

In Section B, NCC provided general comments on the EA Review recommendations as they relate to NCC key principles (informing its approach in environmental and regulatory reviews).

To date, NCC is pleased to conclude that the recommendations made by the Expert Panel (and in the Discussion Paper and the August 2017 Presentation) are generally consistent with NCC's key principles. In fact, within the comprehensive suite of the regulatory and legislative reviews

undertaken since 2016 by the Government, the EA Review recommendations are most closely aligned with NCC's own approach. Overall, many of the recommendations respect Indigenous rights, perspectives, values and IK.

We urge the Government to continue in this encouraging direction as we move into more formal consultations to fix our broken EA process in a spirit of reconciliation and collaboration.

Of course, the strength of the recommendations and indeed the test of the EA Review Process itself will depend on how the recommendations are implemented. A number of the recommendations are lacking in specifics regarding their implementation. NCC's concerns regarding the operationalization of some of the recommendations, and particularly the ambitious broadening of the scope of assessment (from EA to IA) will be discussed in the next section.

D. SPECIFIC COMMENTS ON THE EA REVIEW RECOMMENDATIONS TO DATE

These comments represent NCC's areas of greatest concern identified in the limited time we have had to review the EA Panel Report, Discussion Paper and Presentation; but by no means do the comments constitute a complete list. We reserve the right to add to these comments in an additional written submission over the coming months or during the consultation process.

1) From EA to IA: Broadening of the Scope of Assessment and Establishment of a Single Authority Responsible for all federal IAs

As discussed about, NCC supports a holistic and comprehensive approach to EA processes. Therefore, any new process should consider the various impacts of the project not in isolation, but rather as a whole. As such, the recommendation to broaden the scope of assessment to include environmental, economic, social and health considerations could be consistent with this principle.

However, NCC has a number of significant concerns regarding (a) how a broader IA could be operationalized and (b) the establishment of a single authority responsible for all federal IAs. Broadening of the scope of assessment has many procedural implications that have not been detailed in the Expert Panel Report.

These concerns are as follows:

i. The process will become more labour-intense and more challenging for the federal regulatory agencies and participants (i.e., Indigenous groups and stakeholders) involved. The addition of economic, social and health considerations will compound the effort and complexity compared to the existing EA process, as well as the potential for conflict among the diverse participants. Valued components (VCs) will have to be measured across each pillar of sustainability and then the sustainability criteria to measure each VC will have to be established.

ii. The limited capacity of the current Canadian Environmental Assessment Agency (CEAA) and other federal regulatory agencies could be overwhelmed by these changes. In our

experience, the capacity of CEAA (and other federal regulatory agencies) is already stretched just to do adequate narrow EA, which takes into account Indigenous rights, perspectives and IK. Our concern is that a broader scope might overwhelm and exceed the capacity of CEAA (or its successor). Broadening of the scope of assessment has many procedural implications that have not been detailed in the Expert Panel Report.

iii. The even more limited capacity of NCC (and other Indigenous Groups) is already overwhelmed. The broadening of the scope of assessment (from EA to IA) will increase demands on the capacity of NCC (and other Indigenous Groups) when this capacity is already stretched to (and beyond) the limit. The heavy demands on Indigenous Groups will be even greater as this scope is broadened. Consequently the capacity gap between Indigenous Groups and proponents will be even greater than currently, unless Government dramatically increases ongoing core funding, as well as project-specific participant funding.

iv. These changes could exacerbate the existing large gap between the capacity and resources of industry, compared to Government agencies, Indigenous Groups and other participants. Industry has adequate capacity and resources to operate effectively and advocate for its interests in the context of a broader assessment undertaken by a single authority. Government agencies, Indigenous groups and other participants are much less likely to have adequate capacity and resources, especially initially. Hence, these changes could unduly advantage industry to advocate for diminishing environmental and Indigenous right protections. More specifically, a broader assessment of impacts could unduly advantage industry, if the broader impacts considered are weighted towards those favorable to industry (such as claimed economic benefits). Likewise, industry could be unduly advantaged by a single authority, which may have limited resources, experience, and expertise, especially initially.

v. Assuming that CEAA will be transformed into the single authority responsible for all federal IAs, its workload will increase dramatically given not only the broadening of the scope of assessment but also because the new agency will be responsible for all other federal assessments. In particular, the NEB's EA responsibilities will be transferred to the new IA agency. Given the highly technical and specialized nature of the NEB's processes and projects reviewed, this transfer alone will represent a considerable increase in the workload of the new agency (as well as the sophistication required for the EAs). If the responsibility for the NEB EA (and indeed assessments from other federal departments) also requires a broader scope of analysis, the capacity demands on the new agency could be overwhelmed.

If Government moves forward with its recommendations to (a) broaden of the scope of assessment and (b) establishment of a single authority responsible for all federal IAs, NCC recommends the following:

i. A significant increase in the capacity and resources of CEAA (or its successor) to be able to effectively undertake IAs.

ii. A dramatic increase in the ongoing core funding and project-specific participant funding for Indigenous Groups to be able to meaningfully engage in expanded IAs. In our Written Submission of December 23, 2016, NCC already identified that capacity funding and participant funding would have to be increased dramatically; however with an expanded

scope of assessment the capacity gap will grow and therefore funding requirements will also increase.

iii. A transition period while the IA process is being designed to ensure that: (a) CEAA (or its successor) and other regulators/agencies have capacity to handle the expanded IA; (b) the process is properly designed with input from Indigenous Groups (and stakeholders) to avoid some of the operational pitfalls described above, including gaming by industry.

2) Widening of the Capacity Gap

As noted above, NCC has serious concerns that the implementation of the recommendations proposed in the EA Review will widen the existing Capacity Gap between Indigenous Groups and proponents. We are concerned that NCC and other Indigenous groups, whose capacity is already stretched to the limit, will have even less capacity to meaningfully engage in EA/IA processes.

In Section 6.2 of NCC's Written Submission to the EA Panel of December 23, 2016 (included herein as an Appendix), we answered 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 was 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.

NCC notes that it has not received an answer from CEAA about this core funding request. Moreover, in the nine months since the request was made, and the capacity burden grows ever greater. Moreover, government consultations have multiplied given the Government's comprehensive review of environmental and regulatory processes. NCC is concerned about its ability to continue to meaningfully engage in the current consultations, as well as in a new IA review process with a broader scope. The core funding budget estimated in December 2016 will likely have to be increased to take the broadened scope of the project assessments into consideration.

We respectfully request that the Government consider the core funding budget submitted in December 2016 and provide us with some feedback on this request. In the interim, the Government should provide NCC and Indigenous Groups with adequate capacity funding to continue to engage in this comprehensive review process, which is further overwhelming our limited capacity. As indicated above, this entire EA Review will be an empty gesture absent dramatic enhancement of project participant funding – as well as ongoing capacity funding (and a workable and timely process for intervenors to access it).

3) Integration of IK

As discussed above, the Expert Panel Report has recommended "that IA legislation require that Indigenous knowledge be integrated into all phases of IA, in collaboration with, and with the permission and oversight of, Indigenous Groups." (Section 2.3.4) Furthermore, IK should inform project planning, assessment and decision-making; and should be incorporated alongside other sources of evidence (Presentation, Slide 13). This recommendation is consistent with NCC's recommendation in Section 4.4 of NCC's Written Submission to the EA Panel of December 23, 2016.

However, NCC is concerned that Government has not given adequate consideration to the operationalization of the integration of IK early on and throughout the EA process. As recommended in Section 4.4 of our December 2016 Submission (in Appendix), there must be serious consideration of a process by which IK is integrated into an EA, so it can be complementary with Western Science. It should not be a matter of merely "adding IK" to check a box. NCC Written Submission provides some suggestions on how IK could be integrated with Western Science using a number of useful studies including some on fuzzy cognitive mapping. NCC recommends that the Government investigate the literature and consult with experts on the integration of IK and Western Science (including the authors of the studies cited in Section 4.4 of our Written Submission). This literature review would provide guidelines for best practices for the integration of IK and Western Science in the EA process.

4) Cumulative Effects and Project Splitting

NCC has noted that the Expert Panel Report (Section 3.5) addresses cumulative effects and suggests that a Regional IA be used to assess baseline conditions and the cumulative impacts of all projects and activities within a defined region. As mentioned above, we welcome the assessment of cumulative impacts, which is one of our key principles and one of the recommendations in our December 2016 Written Submission. However we have some concerns regarding how the Regional IAs will be effectively implemented, given capacity constraints in the Government agencies and within Indigenous communities.

We also note that although cumulative effects were addressed in the Expert Panel Report, project splitting was not explicitly addressed. As NCC emphasized on our December 2016 Written Submission (Section 5.5):

> 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.

In light of the above, NCC strongly recommends that the Government design the new IA review process to avoid project splitting. We also point out that the goal of a broader IA approach is to be more comprehensive; but project splitting does the opposite and is thus wholly inconsistent with an IA approach.

E. CONCLUSION AND RECOMMENDATIONS

NCC appreciates the opportunity to provide input and recommendations for the current environmental and energy reviews, and looks forward to deeper discussions on details in the context of Consultation on draft legislation. In the meantime, NCC has the following recommendations and conclusions with respect to the EA Review Process to date as it relates to NCC and Indigenous groups generally:

The recommendations made by the Expert Panel (and in the Discussion Paper and the August 2017 Presentation) are generally consistent with NCC's key principles and favorable to Indigenous Groups. Overall, many of the recommendations respect Indigenous rights, perspectives, values and IK. We urge the Government to continue in this encouraging direction as we move into more formal consultations to fix our broken EA process in a spirit of reconciliation and collaboration.

NCC has a number of concerns regarding the operationalization of some of the recommendations.

In particular, we are concerned that the implementation challenges presented by the broadening of the scope of assessment and establishment of a single authority responsible for all federal IAs. These recommendations will compound the effort and complexity of project assessment and thus overwhelm the limited capacity of both Government regulatory agencies and Indigenous Groups. Conversely, the recommendations may inadvertently unduly advantage industry to further exploit its resource advantage and advocate for diminished environmental and Indigenous rights protections.

NCC recommends that if the scope of the assessments is broadened and a new IA agency is created with a mandate for all federal IAs, then the IA agency should receive significant capacity funding in order to effectively undertake IAs. Indigenous Groups should receive a dramatic increase in the ongoing core funding and project-specific participant funding for IGs to be able to meaningfully engage in expanded IAs. Finally, NCC recommends a transition period while the IA process is being designed to ensure that the participants have sufficient capacity and that the design is adequate to avoid operational pitfalls discussed.

NCC is seriously concerned that the community and other Indigenous Groups, whose capacity is already stretched to the limit, will have even less capacity to meaningfully engage in EA/IA processes. We remind the Government that we submitted a core-funding request budget in December 2016. We respectfully request that the Government consider granting us this funding and provide us with some feedback on this request. In the interim, NCC strongly recommends

the Government to provide NCC and Indigenous Groups with adequate capacity funding to continue to engage in this comprehensive review process, which is further overwhelming our limited capacity.

NCC has also made recommendations to urge the Government to consider how IK and Western Science could be integrated in an effective and complementary manner. We also express some concerns regarding how cumulative assessments will be operationalized and recommend that the Government design the IA review process to avoid project splitting.

NCC reiterates that the recommendations from our December 2016 Written Submission (summarized on pp. 1-2) are still valid.

We look forward to a fulsome consultation on the specific legislative, regulatory and policy proposals being developed by the Government of Canada in relation to the EA Review Process.

Submissions to the Government of Canada Regarding The Modernization of the National Energy Board

September 15, 2017

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the Modernization of the National Energy Board (NEB) as part of the ongoing process of environmental and regulatory reviews currently being undertaken by the Government of Canada. The Modernization of the NEB is a targeted review of the NEB structure, role and mandate under the *National Energy Board Act* (the "*Act*").

NCC previously made a written submission to the Expert Panel on the Modernization of the National Energy Board ("Expert Panel"), dated April 17, 2017,[1] as part of the NEB review process. We attach our earlier submission as an Appendix to provide background for our present submission.

In preparing the present submission, NCC is informed by the following broad principles in its approach to all of the environmental and regulatory reviews, which are described in more detail in Section B below:

- A **Nation-to-Nation Relationship**;
- **Distinguish Indigenous rights and interests from "the public interest**" and Indigenous communities from "stakeholders";
- The need for **early engagement**;
- **Capacity building:** adequate and accessible ongoing funding and support so that NCC can build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis;
- **Adequate participation funding on a project by project basis** to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance;
- **Meaningful inclusion** of NCC's **Indigenous Knowledge, Indigenous rights, and Indigenous perspectives** in the process;
- A meaningful role for NCC in **decision-making**;
- A meaningful role for NCC in **monitoring and enforcement**;
- A **holistic and comprehensive approach** to regulatory processes that takes into account all project impacts, including **cumulative and regional impacts**.

In preparing this submission, NCC also reviewed in particular the following documents:

- *Forward, Together – Enabling Canada's Clean, Safe, and Secure Energy Future*, Report of the Expert Panel on the Modernization of the National Energy Board (Expert Panel Report" or "Report"), Released on May 15, 2017.
- *Forward, Together – Enabling Canada's Clean, Safe, and Secure Energy* Future, Volume II, Annexes, Report of the Expert Panel on the Modernization of the National Energy Board. Undated ("Expert Panel Report Annexes")
- "Environmental and Regulatory Reviews – Discussion Paper", June 2017 ("Discussion Paper")

[1] Please note that NCC had submitted a draft version of its comments on March 31, 2017, and was given permission by the Expert Panel's staff to submit a final version a few weeks later. Hence, the April 17, 2017 filing date.

- "National Energy Board Modernization: Considerations for a Modern Energy Regulator", PowerPoint Presentation, presented to NCC on August 9, 2017 ("Presentation").

In the present submission, we provide our comments on the issues most important to us in relation to the National Energy Board ("NEB") reform proposals as presented to date in the Expert Panel Report, the Discussion Paper, and the Presentation given to NCC by Government of Canada representatives on August 9, as well as our recommendations.

A. PRELIMINARY COMMENTS: THE REVIEW PROCESS TO DATE

We understand that Canada still considers these discussions to be a form of pre-consultation engagement, and that Canada still intends to initiate formal consultation with Indigenous Peoples on these topics at some point in the future. We hope that the consultation process will allow for fulsome consideration of the potential impact of any legislative or policy changes on our Aboriginal and Treaty Rights. A thorough and formal consultation is essential to the issue of building trust and advancing reconciliation. We urge the Government of Canada to implement the following recommendation by the Expert Panel Report in upcoming consultations related the environmental and regulatory reviews: "The panel recognizes that Indigenous peoples should be Consulted [sic] during the legislative drafting process."[2]

B. GENERAL COMMENTS ON THE NEB MODERNIZATION REVIEW IN LIGHT OF NCC'S KEY PRINCIPLES

NCC's response to the Government's proposals for reform of the *National Energy Board Act* in order to modernize Canada's energy regulator is based on a number of principles as outlined above. In this section, we offer general comments on the modernization of the NEB from the vantage point of these principles. More specific responses to the proposals presented in the Expert Panel Report and Discussion Paper are found in section C, below.

1) NATION-TO-NATION RELATIONSHIPS – CORNERSTONE OF SUCCESS

To the NunatuKavut Community Council, this means the Government of Canada (a) will engage with the people of NunatuKavut as equals, and as a distinct, self-governing, rights-bearing Inuit people within our territory of NunatuKavut; (b) will respect our unique rights, interests and circumstances; (c) will not simply lump us in with other Indigenous Groups, with stakeholder groups or consider our interests as simply one part of the "public interest;" and (d) will move towards a collaborative and trust-based relationship.

In the context of energy project reviews before the NEB, a Nation-to-Nation approach is essential for achieving fair outcomes on energy projects – meaning outcomes that protect

[2] Expert Panel Report Annexes, p. 7.

Indigenous rights and interests. Typically, these rights and interests relate to activities done on the land and/or water through which a proposed energy infrastructure would pass, if approved by the NEB. Large energy infrastructure projects frequently touch the territories of Indigenous Peoples, putting their rights and interests – along with livelihoods, health, culture and a host of other impacts – at risk of being affected in a negative way. In NunatuKavut, many members of our community have had their lives affected, by the Muskrat Falls hydroelectric project (part of the proposed Lower Churchill Hydroelectric Generation Project). If Muskrat Falls goes into service, significant negative impacts to fisheries and other country foods are expected from this project. NCC has not yet had the occasion to come before the NEB in relation to a proposed energy project on our territories. However, our long-term experience with the Lower Churchill Project and the related Joint Review Panel process has left us in a position to give valuable input to the Government of Canada as it readies reforms to the National Energy Board Act.

Whether in NunatuKavut or elsewhere in Canada, where there are large energy projects affecting Indigenous Groups, the fair and effective way to proceed is through Nation-to-Nation collaboration, founded on mutual trust, partnership and a collaborative approach.

With this in mind, we recommend that the Government of Canada's proposals for reforming the NEB Act be informed not just by the Expert Panel Report and the Government's Discussion Paper, but also by the ten "Principles respecting the Government of Canada's relationship with Indigenous peoples" announced by the Government of Canada on July 14, 2017.

2) DISTINCTION BETWEEN INDIGENOUS RIGHTS AND INTERESTS AND "PUBLIC INTEREST"

NCC asserts that Indigenous rights and interests and "the public interest" are distinct in critical ways that relate to Constitutional protection of Indigenous rights in Canada.[3] As such, Indigenous rights and interests must not be conflated with the notion of "public interest" nor subsumed under it. Similarly, Indigenous communities should not be conflated with stakeholders in NEB processes. The current environmental and regulatory reviews being undertaken by the Government of Canada provide an opportunity to make the appropriate distinctions among these concepts, distinctions with numerous implications for the protection of Indigenous rights and interests in the face of large-scale energy projects.

[3] *Constitution Act, 1982*, s. 35.

3) EARLY ENGAGEMENT (AND AT EVERY STEP OF THE PROCESS)

NCC has emphasized that early engagement (and indeed engagement at every step in the process) in relation to energy projects is essential and consistent with both a Nation-to-Nation approach and meaningful consultation on energy projects. When Indigenous Groups are brought in late in the process, the opportunity for consulting in a less adversarial environment is lost. In Newfoundland and Labrador, evidence abounds of the numerous problems and serious risks (including community health and geophysical risks) of not engaging with Indigenous communities as early as possible in the development of energy projects.[4]

4) CAPACITY BUILDING

NCC defines Capacity Building as adequate and accessible ongoing funding and support to allow us to build the internal capacity to meaningfully participate in consultation and regulatory processes on an ongoing basis. NCC, like many Indigenous Groups, lacks the capacity to respond to the heavy consultation and regulatory demands required for meaningful engagement related to (a) resource development projects on our territories; (b) important environmental and regulatory reviews by government (such as the current review). To the extent that the Government of Canada wishes to engage in serious, ongoing, collaborative discussions with Indigenous Groups around changes to energy legislation, regulations and policy, NCC's current capacity is already stretched too thin to make meaningful participation in such activities possible. Absent the necessary resources to build the capacity needed for interacting with the Government of Canada on a Nation-to-Nation basis in relation to energy projects and energy legislation, regulation and policy, our capacity will remain insufficient. Consequently, many of the initiatives, venues and activities proposed by the Government to build trust and advance reconciliation with Indigenous Peoples will be hollow gestures.

With access to adequate resources for Capacity Building, NCC can establish internal capacity in such a way that it is not solely reliant on project-by-project funding. Annual core funding for capacity building is essential to enable fair and meaningful participation in an efficient way for Indigenous Groups.

[4] NCC fully recognizes that the hydroelectric generation and transmission project on the Lower Churchill River was not reviewed under the authority of the NEB. Nonetheless, the severe and ongoing problems related to the project serve as a cautionary tale of the harmful consequences created when consultation happens late in the process and when Indigenous Knowledge is neither sought nor respected in a meaningful way. The specific problems alluded to here are described in our April 2017 submission.

5) PARTICIPANT FUNDING ON A PROJECT-BY-PROJECT BASIS

NCC also requires adequate participant funding on a project-by-project basis to allow for meaningful Indigenous involvement with the necessary expert, technical and legal assistance. Generally, participant funding for Indigenous participation at the NEB has been inadequate. Full Indigenous partnership requires public consultation and Indigenous Knowledge (IK) input. NEB processes typically also require high-quality technical expertise (complementary science/IK, engineering, economic), combined with competent and specialized legal expertise. Therefore, access to adequate levels of participant funding is essential to allow Indigenous Groups to meaningfully participate and to hire high-quality expert and legal assistance.

The current very low levels of intervenor funding for Indigenous Groups and other intervenors substantially disadvantage Indigenous Groups and can substantially advantage proponents. Moreover, proponents can often recover costs from customers. Many positive changes could improve the NEB processes and build trust with Indigenous Groups. But this entire NEB review will be an empty gesture absent dramatic enhancement of project participant funding – as well as ongoing capacity funding (and a workable process for intervenors to access it).

NCC has recommended at the August 9, 2017 meeting (at which the NRCan presented an update on the NEB Modernization Process) that the NEB review the participant funding models and practices of provincial energy regulatory boards, and particularly the Ontario Energy Board and Québec's Régie de l'énergie. While intervenor funding and processes in other non-federal jurisdictions may not be optimal, the Régie and the OEB in ON typically provide sizable levels of intervenor funding for experts and lawyers. In our experience, the Régie and OEB practices and funding typically allow intervenors to play a more meaningful and effective role in the regulatory process than in some of the federal processes (notably recently at the NEB).

Furthermore, intevenor funding for both provincial boards encourages expert participation as follows:

- Much higher funding levels available for experts and lawyers
- Generally no funding caps for big cases
- Advance justification and approval of budget required
- Post-facto justification of budget overages permitted.

6) MEANINGFUL INCLUSION OF INDIGENOUS KNOWLEDGE AT ALL STAGES OF ENERGY PROJECTS TOUCHING INDIGENOUS RIGHTS AND INTERESTS

Indigenous Knowledge is essential for the wise, safe and fair development of energy infrastructure in areas that impact Indigenous rights and interests. In NunatuKavut, we know the land and its waters as we know ourselves. This is perhaps the fundamental point, although only the starting point, for asking the Government to ensure that projects regulated by the NEB include early, meaningful, respectful and fair use of IK at all stages of a project's

life. To effectuate this objective, the Government of Canada needs to provide the resources necessary for this transfer of valuable knowledge to proponents and government officials. See also previous section on Participant Funding for IK.

Similarly, all NEB processes and reviews affecting Indigenous territories should also include meaningful consideration of Indigenous rights and Indigenous perspectives.

7) MEANINGFUL ROLE IN DECISION-MAKING, MONITORING AND ENFORCEMENT FOR ENERGY PROJECTS

A Nation-to-Nation approach requires that Indigenous Groups be involved as early as possible and at every stage thereafter in the life cycle of an energy project. Indigenous Groups need to be offered the opportunity for meaningful and ongoing engagement related to the management of resource projects on their territories, including decision-making, monitoring and enforcement related to the projects. This long-term engagement result in multiple benefits: (a) less adversarial and more collaborative approach to resource development projects; (b) sharing in economic and commercial benefits of projects on our territories; (c) benefits related to the sharing of IK with proponents and the Government. Furthermore, such engagement can stand as a testament to the sincerity of a government's desire to build trust and enhance trust and advance reconciliation.

8) HOLISTIC AND COMPREHENSIVE APPROACH TO REGULATORY PROCESSES THAT CONSIDERS CUMULATIVE AND REGIONAL IMPACTS

NCC's way of viewing NunatuKavut is to see the land and all its inhabitants, human, animal, plant, as part of one dynamic whole. This view is at the heart of the way we live on the land and care for the resources that it provides to us. With this in mind, we would consider it essential that any energy project under the NEB's jurisdiction would consider the various impacts of the project not in isolation, but rather as a whole. This includes cumulative impacts that projects may have with existing projects of a similar or different nature, as well as cumulative impacts over time. Also included should be impacts of a regional nature, including impacts that are particular in quality or magnitude due to the inherent characteristics of a particular region.

C. SPECIFIC RESPONSES TO PROPOSED CHANGES

In this section, NCC presents its responses to the specific recommendations for "Modern Energy Regulation" outlined in the Discussion Paper.[5] However, given that the Government has not issued a report indicating clear support or rejection of the 26 specific recommendations in the Expert Panel Report, NCC has chosen to also reference certain of the 26 numbered recommendations in the Expert Panel Report in order to express our concerns about specific issues.

Our responses are organized according to the themes and specific recommendations stated in the Discussion Paper under the rubric of "Modern Energy Regulation."[6] The themes presented in the Discussion Paper are as follows (slightly reordered from the original):

- Mandate
- Indigenous (which we re-label, below, as "Indigenous Peoples")
- Modern and Effective Governance
- Decision Making
- Operations.

Following are NCC's responses to the Government's proposals for modernizing the NEB, discussed in light of NCC's core principles, stated at the outset of this submission.

1) Mandate

Government recommendation:

- Leveraging existing venues for policy dialogues outside of project hearings (e.g. Generation Energy, Pan-Canadian Framework for Clean Growth and Climate Change)

NCC has several strong concerns about this approach to the mandate, as described below.

NCC opposes any wholesale or strict removal of policy issues from regulatory hearings. It would be premature to attempt full exclusion of policy issues from regulatory hearings because the necessary trust for doing this does not yet exist. Trust levels toward the regulator must be reestablished before this approach can succeed, and this trust-building will take time, good faith, and a demonstration by the Government that it is "walking the walk" by undertaking actions that build and earn trust. NCC and other Indigenous Groups are not willing to drop discussion of policy issues based on (a) as yet unfulfilled promises; and (b) the recommendation

[5] Discussion Paper, p. 20. Please note that since all of the recommendations relating to the NEB and energy regulation are included on page 20 of the Discussion Paper, we will refrain from footnoting each individual recommendation as we discuss them in this section.
[6] Discussion Paper, p. 20.

that they should discuss policy issues elsewhere, in venues that are untested for that purpose and/or have been ineffective in the past.

NCC acknowledges that it is challenging for the NEB to be dealing with broader policy issues on a case-by-case basis. However, unless and until the broader policy issues have been addressed in a meaningful way, they will keep coming up in project assessments and reviews. The failure to deal with broader policy issues in the past is one of the dynamics that has led to the need to modernize the NEB, overhaul the environmental assessment process and make other changes needed to address the broken processes of the Harper era.

Furthermore, while NCC is sensitive to the Government's desire for focus and efficiency in regulatory hearings, we believe the Government must recognize that one person's policy discussion can be another person's valid and central argument in the debate over impacts of energy projects. While we appreciate the potential advantages of having a dedicated forum for policy dialogues, the examples mentioned are relatively new and untested, and the Government provides no detail as to how these venues could be used by Indigenous groups as a policy forum.

NCC does not support the use of such "existing venues for policy dialogue" with limited details on how such a venue would work in practice. If the Government is committed to the creation of a dedicated forum for a policy dialogue and to the restoration of the lost trust in the NEB, we recommend a new dedicated venue for energy policy dialogue be chosen collaboratively with Indigenous Groups and other regulatory participants. For such a forum to achieve its objective as a dedicated venue for energy dialogue, the Government must consider details of appropriate design, as well as how such a forum would inform a more formal NEB hearing process. NCC suggests that appropriate design should include the creation of new ongoing mechanisms intended to allow for the proper conveyance of views on policy by Indigenous Groups in a Nation-to-Nation manner.[7] Indigenous Groups should also be invited to provide input on the creation of such a forum.

It is not acceptable to have Indigenous Group participation be treated, in policy dialogue venues, on the same level with other participants ("stakeholders"). To do so is to encourage continuation of the situation in which Indigenous rights and interests are lumped in with "stakeholder interests" and the Nation-to-Nation approach remains only an aspiration.

Government recommendation:

- Developing a separate model to deliver timely and credible energy information to Canadians

NCC favours the idea of separating energy information gathering and dissemination activities from regulation and the establishment of a separate energy information agency.

[7] More details on NCC's views on the Nation-to-Nation relationship in the context of the Government's proposed reform of the NEB are provided in Sections B1) and C 2).

We thus favour the creation of a new Canadian Energy Information Agency (CEIA) to handle these functions, currently carried out within the NEB. The CEIA could serve the same general role as the U.S. Energy Information Agency, adapted of course to the Canadian context. In this way, the energy information provided to all sectors of the public, including Indigenous Groups like NCC, should be of higher quality, as a consequence of having information gathering and dissemination activities carried out in a way that is wholly independent of the regulator. This, in turn, will help build a solid foundation upon which all Canadians can examine our energy realities and use this information to work together toward a sustainable low-carbon future.

Government recommendation:

- Changing the wording to determining public interest to explicitly include environment, safety, social and health considerations

NCC is opposed to the subsuming of Indigenous rights and interests within the general concept of "public interest," and we ask that this item and all similar items be reworded to reflect the important distinction between Indigenous rights and public interest. Indigenous rights and interests are too often subsumed – explicitly or implicitly -- under "public interest" in Canadian legislation, and NCC asserts that this is not only incorrect, but also a failure to recognize the unique legal status of Indigenous Peoples under the Canadian Constitution and international law. Indigenous Peoples, and Indigenous Groups hold certain rights that other members of the public do not, by virtue of s. 35 of the *Constitution Act, 1982*, which provides constitutional protection to the Aboriginal and treaty rights of Aboriginal peoples in Canada. As such, Indigenous rights and interests are distinct from the rights of "stakeholders" and even the public at large. This distinction must be recognized by the Government during this review of environmental and regulatory policies, including in the context of energy policy, regulation and legislation.

Additionally, it is essential that the Government of Canada recognize that the history of legal battles concerned with infringement of Indigenous rights in the name of public interest has left bitterness and mistrust among many Indigenous Groups around the use of the term "public interest." To rectify this situation, NCC recommends that the NEB take the time and effort necessary, during the drafting of policies, regulation and legislation, to ensure that Indigenous Groups are not simply grouped together, haphazardly, with other people in the public interest "pie".

Government recommendation:

- Adding provisions to provide authority to regulate renewable energy projects and associated power lines in offshore areas that are under federal jurisdiction

NCC strongly recommends that any expansion of NEB's (or its successor's) mandate to include offshore renewables and their associated power lines under federal jurisdiction must be accompanied by careful, early and fulsome consultations. As we stated in our April 17, 2017 submission, NCC recommends that the NEB's mandate be expanded, as

appropriate, to keep pace with the expansion of emerging sources of energy. At a minimum, this should include staying abreast of developments and ensuring that the public has up-to-date information on renewable energy and energy efficiency. Another reason why the NEB should be mandated to track and monitor new and evolving energy sources is that it will better equip the NEB to compare proposed energy infrastructure projects to renewable alternatives -- something NCC also recommends. NCC believes that respect for Indigenous rights and interests requires full respect for inter-generational rights, which in turn necessitates consideration of upstream as well as downstream impacts of energy projects and proper consideration of GHG emissions and associated climate impacts.

At the same time, the coast holds great importance for our communities and way of life in NunatuKavut.[8] NCC urges great care with respect to all energy project development in and near the coast of Labrador. The benefits of GHG reduction associated with offshore renewables must be weighed against any negative impacts to our coast, as well as the costs and benefits of energy alternatives. Therefore, fulsome consultations regarding the expansion of NEB's mandate to include offshore renewables are critical.

2) Indigenous Peoples

Government recommendation:

- Creating opportunities for dialogue with Indigenous peoples on energy policy

NCC asserts that "dialogue" is not the goal toward which the reform of the NEB should be aiming. We recommend aiming higher immediately, toward Nation-to-Nation communication and, where appropriate, collaboration on changes to energy policy, regulation and legislation, and to project development. While dialogue is necessary and constructive, it is not sufficient. In a landmark duty to consult case decided in July 2017, the Supreme Court of Canada mentioned that it does not agree that the NEB fulfills its duty consult by ensuring the proponents "engage in a dialogue" with potentially affected Indigenous Groups.[9]

We have seen Government express interest in advancing Nation-to-Nation relations on energy matters, and thus we are disappointed that this language does not appear in the specific reform proposals related to NEB modernization in the Discussion Paper.[10] On the other hand, we were very encouraged, for example, to see the following, clear endorsement of the Nation-to-Nation approach at the top of slide 9 in the Government's August 9 Presentation to NCC on the NEB Act reform, and truly hopes that this represents the direction of current thinking on the Government's part:

[8] Mitchell, Gregory E. *An Inventory of Studies on Land and Sea Uses in NunatuKavut since 1979*, September 2013, unpublished, available from NCC ("Mitchell report"). This comprehensive survey, prepared for NCC, provides an excellent source of written information concerning the essential role that the Atlantic coast plays in the life of most inhabitants of NunatuKavut today.
[9] Ibid., para. 39.
[10] Discussion Paper, p. 20.

3. Indigenous Participation and Nation-to-Nation Relationship

Goal: Ensure Indigenous rights are recognized, and the modernized NEB is fully engaged in the Government of Canada's move to a nation-to-nation relationship.

The Expert Panel Report, as well, contained an important recommendation on Nation-to-Nation approaches, under the theme of "Mandate":

> 2.1.1 Indigenous peoples should have a nation-to-nation role in determining Canada's national energy strategy, and we look to the Minister of Natural Resources to define how this commitment can be met within the context of the decisions and recommendations of the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples.[11]

NCC strongly recommends that the Government of Canada revisit Expert Panel Recommendation 2.1.1 concerning a Nation-to Nation role for Indigenous Peoples and integrate it within the legislative, regulatory and/or policy reform of the NEB.

Government recommendation:

- Strengthening the approach for Indigenous peoples to build capacity for participation in processes and help coordinate Crown consultations

NCC strongly supports any efforts to ensure that it and other interested Indigenous Groups are provided the essential ongoing capacity funding, as well as project-specific participant funding required in order to effectively participate in hearings. We emphasize that participation in hearings is a highly resource-intensive activity, and that it needs to be seen as distinct from core capacity building. For example, the capacity resources required to coordinate Crown consultations triggered by NEB project hearings, should not be confounded with the project-specific participant funding resources needed to be a meaningful and effective actor in the hearing room. Similarly, participant funding for projects should not be seen as a source of resources for the kind of capacity building needed for Indigenous Groups to participate in other phases of regulatory activity. This point is described in more detail in Sections B 4) and 5) and expanded on below.

Government recommendation:

- Expanding the role of Indigenous peoples in the monitoring of pipeline and other energy infrastructure from construction to decommissioning

NCC strongly supports the establishment of policy, regulatory and legislative mechanisms to create a meaningful role for NCC and other interested Indigenous Groups in all aspects of the energy project life-cycle, from planning to monitoring to accident

[11] Expert Panel Report, p. 47.

response to decommissioning, and all steps in between. NCC underscores, however, that such roles come with costs that are currently above and beyond the capacity of NCC to cover. All such roles require capacity building at the core. **NCC urges the Government of Canada to commit to providing the resources needed to build this kind of capacity.**

NCC also wishes to comment on a recommendation that appears in the Expert Panel Report under "Relationships with Indigenous Peoples", but not in the Discussion Paper concerning the possibility of an "Indigenous Major Projects Office" (Recommendation 2.2.1).[12] As described, the responsibilities of this office would include, but not be limited to "defining clear processes, guidelines, and accountabilities for formal Consultation by the government on energy transmission infrastructure, regulatory processes and assessing compliance with those guidelines." While the intention may be helpful, this kind of initiative is potentially problematic in practice, because there is a significant diversity among Indigenous Groups in Canada with respect to geography, experience, perspectives and values, which shape approaches to natural resources and their management. There is the possibility of Indigenous Groups holding one set of values being responsible for designing processes affecting other Indigenous Groups that the latter may not find acceptable. Moreover, Indigenous Major Projects Office may not include regional representation, knowledge or experience of NunatuKavut. As such an Indigenous Major Projects Office could be inconsistent with a Nation-to-Nation approach.

In light of the above, NCC does not recommend the creation of an Indigenous Major Projects Office within the context of the NEB Modernization. It is not appropriate for the purpose of reforming Canada's energy regulation regime.

3) Modern and Effective Governance

We will respond to the following four items together, since all are oriented toward a similar objective of helping to reduce risks that the regulatory process is biased in favour of industry.[13] In fact, as the August 9 Presentation to NCC indicates, all items under this heading are oriented toward that goal. Still, we choose to single out two of them because they have specific implications for Indigenous Groups.

Government recommendations:

- Separating the roles of Chief Executive Officer and Chairperson of the Board, currently held by the same person
- Creating a corporate-style executive board to lead and provide strategic direction to the NEB organization
- Creating separate Hearing Commissioners to review projects and provide regulatory authorizations

[12] Expert Panel Report, p. 51.
[13] Presentation, August 9, slide 8.

- Maintaining the National Energy Board in Calgary, while eliminating the residency requirement for the Board and Hearing Commissioners.

NCC supports the measures proposed above to separate administrative and regulatory functions within the NEB or its successor, but emphasizes that much more must be done to repair the NEB's reputation as a captured regulator. We believe that measures like these, while necessary and helpful for the purpose of rebuilding trust and credibility, are insufficient for addressing concerns about the bias of the NEB toward industry, commonly referred to as "regulatory capture". More trust must be built with all hearing participants in order to accomplish that goal; and separating environmental reviews from regulation is a good first step. More on this point is found in the section below, "Decision-Making."

Government recommendations:

- Enhancing the diversity of the Board and Hearing Commissioners
- Increasing Indigenous representation among the Board and Hearing Commissioners and requiring expertise in Indigenous knowledge

NCC strongly supports the objective of increasing diversity on the Board, in particular by including Indigenous persons from the affected region on all hearing panels evaluating energy projects that may impact Indigenous rights and interests. We understand from discussions with Government representatives on and after the presentation to NCC in August, that the Government is considering some arrangement whereby rosters of part-time hearing commissioners from all regions could be tapped for purposes of constituting hearing panels with regional representatives. NCC supports this approach but recommends taking this a step further and ensuring that, wherever possible, an Indigenous hearing commissioner from the affected region sit on the hearing panel of any project impacting Indigenous territory or otherwise putting Indigenous rights and interests at risk.

NCC supports the idea of requiring expertise in Indigenous Knowledge (IK) on the Board, but strongly recommends that this be expanded beyond IK to include expertise in Indigenous rights and interests under Canadian law generally. Ideally, this type of expertise should be in the background of all commissioners sitting on hearing panels for projects that cross Indigenous territory or otherwise affect Indigenous rights and interests. NCC believes that this suggestion would go a long way to increasing the kind of "mutual understanding" that is critical to adequate consultation[14] and is essential to building trust around energy projects.

4) Decision-Making

Government recommendations:

[14] *Clyde River (Hamle*t) v. *Petroleum Geo-Services Inc.,* 2017 SCC 40. para. 49.

- Increasing public participation opportunities in technical hearings, including enhancing the support available to all participants to help them navigate regulatory processes

- Introducing an advocate to support landowners in regulatory processes

- Establishing alternatives to some formal adjudicative processes, such as appropriate dispute resolution

NCC recommends that the specific proposals under Decision-Making be modified wherever possible to include and yet distinguish Indigenous Groups. Minor modifications such as these can provide major improvements that will aide all phases of regulatory matters and advance reconciliation as well.

For example, Indigenous Groups should be given distinct consideration in the first item, which advocates increased public participation opportunities in technical hearings and an offer of support to navigate regulatory processes. NCC, and undoubtedly numerous other Indigenous Groups would find access to technical hearings and "navigational" support extremely helpful. It goes without saying that special considerations will be necessary to make these such options real, accessible and effective for Indigenous Groups.

Similarly, Indigenous Groups would also likely benefit from a support person similar to the advocate being proposed to support landowners in the regulatory processes. Close discussion with NCC and interested Indigenous Groups could help identify whether a specialized advocate, such as an Ombudsman, would represent a service valued by Indigenous communities, and if so, how such a role could be operationalized.

NCC asserts that modifications to the language of these items in order to signal that the special status and needs of Indigenous Groups will be addressed in the implementation of these steps should be relatively simple. Again, minor wording changes can bring great gains.

In addition to the points above, NCC wishes to address two important points relating to the issues of project reviews and environmental assessments, or impact assessments that are not specifically addressed in the "Modern Energy Regulation" section of the Discussion Paper,[15] but which were examined by the Expert Panel.[16]

First, in NCC's submission to the Expert Panel on the Modernization of the National Energy Board, we emphasized that we do not support the practice of having agencies whose primary function is regulatory, such as the NEB, conducting environmental assessments. As we have stated previously, these agencies are prone to industry capture and environmental evaluations are not their primary area of expertise. With some reservations,[17] we prefer the approach

[15] Discussion Paper, p. 20.
[16] Expert Panel Report, pp. 19 – 32.
[17] Discussed in the section containing NCC's submissions regarding the Environment Assessment Review.

proposed by the Expert Panel for the Review of Environmental Assessment Processes[18] in which a new, independent and dedicated agency, such as the proposed "Impact Assessment Commission," would lead and conduct the environmental reviews for all types of projects under federal jurisdiction, including energy projects. With this in mind, we must restate the following recommendation:

NCC strongly recommends that responsibility for conducting environmental assessments be removed from the NEB's mandate and transferred to CEAA or a new environmental assessment body.

Second, we wish to comment on a proposal put forward by the Expert Panel, regarding a two-step decision-making process for major energy projects, which we note no longer appears as a feature of the Government's proposals for NEB reform in the Discussion Paper (Recommendations 1.4.1,[19] 1.4.2,[20] 1.5.1,[21] and 1.5.2).[22] The Expert Panel report describes a two-step process wherein the Governor-in-Council (GIC) would make a national interest determination (NID) first, and then – on a finding that the project was in the national interest – the regulator would undertake a review of the project.

NCC strongly opposes the two-step, NID-followed by regulatory review proposal on a number of grounds: (a) neither step alone, nor the combination of the two steps together, will result in a fair and comprehensive evaluation of environmental impacts; (b) this process would undercut any other changes being made to restore credibility and public confidence; and (c) most significantly for the NCC, the process is antithetical to building good relationships with Indigenous Groups as it has the appearance of bias towards pre-determined outcomes. We are encouraged by signs that the Government of Canada is moving away from this particular Expert Panel recommendation, but our opposition to the two-step review is so strong that for the sake of prudence, we are stating it for the record.

5) Operations

Government recommendations:

- Encouraging the development of cooperation agreements with interested jurisdictions
- Making information available to the public online, including incident reports and follow-up data, in a way that is easily understood

[18] *Building Common Ground: A New Vision for Impact Assessment in Canada*, Expert Panel for the Review of Environmental Assessment Processes, undated, pp. 52 -55.
[19] Expert Panel Report, p. 37.
[20] Expert Panel Report, p. 38.
[21] Expert Panel Report, p. 41.
[22] Ibid.

- Enhancing safety and security measures to protect energy infrastructure and prevent tampering

NCC supports these measures but reiterates the need to create roles and mechanisms that ensure proper implementation of such measures for Indigenous Groups. To this end, we are encouraged by the item included in the Discussion Paper and discussed above, namely: "Expanding the role of Indigenous peoples in the monitoring of pipeline and other energy infrastructure from construction to decommissioning."

The Expert Panel also included the following recommendation in its Report:

> 5.2.2 That the government enter into formal agreements with Indigenous nations who wish to participate, in order to deliver local Indigenous energy infrastructure monitoring programs which are considered as a vital input to existing monitoring tools and systems.[23]

NCC strongly recommends that the Government of Canada revisit this recommendation and integrate into it the legislative, regulatory and/or policy reform of the NEB**.** Doing so will help concretize the Government's expressed interest in pursuing a Nation-to-Nation approach, and help implement one of its key objectives of the NEB Modernization Panel.

NCC also wishes to point out that the Expert Panel Report made several recommendations around the idea of creating "Multi-Stakeholder Committees" that would play central roles in core activities of the NEB or the agency that will replace it. As such, we feel it important to comment on this issue now, in case the Government is still considering the use of Multi-Stakeholder Committees.

NCC asserts that if the Government of Canada wishes to employ Multi-Stakeholder Committees, that the role and relationship of Indigenous Groups in relation to such Committees must be developed in a way that avoids lumping together Indigenous Groups and "stakeholders".

The Expert Committee envisioned that the new Act would enable the creation of Regional Multi-Stakeholder Committees (Recommendation 5.4.1)[24] and that such Committees would be "formally integrated into the CETC's management and continuous improvement systems, allowing all participating parties to assess aspects of the CETC's practices and outcomes, and make recommendations for improvements." As well, one of the functions of the Regional Multi-Stakeholder Committees would be to review emergency preparedness plans with citizens, first responders, and other groups to ensure their completeness. (Recommendation 5.2.3).[25] In sum, if the Government of Canada plans to pursue specific recommendations involving Multi-Stakeholder Committees, NCC strongly recommends that it proceed with care and involve Indigenous Groups early in the committee design process.

[23] Expert Panel Report, p. 80.
[24] Expert Panel Report, p. 83.
[25] Expert Panel Report, p. 80.

D. CONCLUSION, LEGISLATIVE AND IMPLEMENTATION RECOMMENDATIONS

NCC appreciates the opportunity to provide input and recommendations for the current environmental and energy reviews, and looks forward to deeper discussions on details in the context of Consultation on draft legislation. In the meantime, NCC recommends the following for the Government of Canada's legislative amendments to the *National Energy Board Act* and effective implementation of the energy regulation regime as it relates to NCC and Indigenous groups generally:

Mandate

- NCC opposes any wholesale or strict removal of policy issues from regulatory hearings. It would be premature to attempt full exclusion of policy issues from regulatory hearings because the necessary trust for doing this does not yet exist.

- NCC does not support the use of "existing venues for policy dialogue" with limited details on how such a venue would work in practice.

- NCC favours the idea of separating energy information gathering and dissemination activities from regulation, as well as the establishment of a separate energy information agency.

- NCC is opposed to the subsuming of Indigenous rights and interests within the general concept of "public interest", and we ask that this item and all similar items be reworded to reflect the important distinction between Indigenous rights and public interest.

- NCC strongly recommends that any expansion of NEB's (or its successor's) mandate to include offshore renewables and their associated power lines under federal jurisdiction must be accompanied by careful, early and fulsome consultations.

- A "Purpose of the Act" section should be added to the Act that mentions recognition and respect for Indigenous rights and interests.

Indigenous Peoples

- NCC strongly recommends that the Government of Canada revisit Expert Panel Recommendation 2.1.1[26] concerning a Nation-to Nation role for Indigenous Peoples and integrate it within the legislative, regulatory and/or policy reform of the NEB.

[26] The text of Recommendation 2.1.1 is as follows:
"Indigenous peoples should have a nation-to-nation role in determining Canada's national energy strategy, and we look to the Minister of Natural Resources to define how this commitment can be met within the context of the decisions and recommendations of the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples."

- NCC asserts that "dialogue" is not the goal toward which the reform of the NEB should be aiming. We recommend aiming higher immediately, toward Nation-to-Nation communication and, where appropriate, collaboration on changes to energy policy, regulation and legislation, and to project development.

- NCC strongly supports any efforts to ensure that it and other interested Indigenous Groups are provided the essential ongoing capacity funding, as well as project-specific participant funding required in order to effectively participate in hearings.

- NCC strongly supports the establishment of policy, regulatory and legislative mechanisms to create a meaningful role for NCC and other interested Indigenous Groups in all aspects of the energy project life-cycle, from planning to monitoring to accident response to decommissioning, and all steps in between. NCC urges the Government of Canada to commit to providing the resources needed to build this kind of capacity.

- NCC also strongly supports increasing the resources available directly to NCC for the gathering and inclusion of Indigenous Knowledge. The Government of Canada and NCC would need to enter into appropriate agreements governing the sharing and use of that knowledge.

- NCC does not recommend the creation of an Indigenous Major Projects Office within the context of the NEB Modernization.

Modern and Effective Governance

- NCC supports the measures proposed to separate administrative and regulatory functions within the NEB or its successor, but emphasizes that much more must be done to repair the NEB's reputation as a captured regulator.

- NCC strongly supports the objective of increasing diversity on the Board, in particular by including Indigenous persons from the affected region on all hearing panels evaluating energy projects that may impact Indigenous rights and interests.

- NCC supports the idea of requiring expertise in Indigenous Knowledge (IK) on the Board, but strongly recommends that this be expanded beyond IK to include expertise in Indigenous rights and interests under Canadian law generally.

Decision-Making

- NCC recommends that the specific proposals under "Decision-Making"[27] be modified wherever possible to include and yet distinguish Indigenous Groups.

[27] "Increasing public participation opportunities in technical hearings, including enhancing the support available to all participants to help them navigate regulatory processes";
"Introducing an advocate to support landowners in regulatory processes"; and
"Establishing alternatives to some formal adjudicative processes, such as appropriate dispute resolution".

- NCC recommends that responsibility for conducting environmental assessments be removed from the NEB's mandate and transferred to CEAA or a new environmental assessment body.

- NCC strongly opposes the two-step, NID-followed by regulatory review proposal, on a number of grounds: (a) neither step alone, nor the combination of the two steps together, will result in a fair and comprehensive evaluation of environmental impacts; (b) this process would undercut any other changes being made to restore credibility and public confidence; and (c) most significantly for the NCC, the process is antithetical to building good relationships with Indigenous Groups as it has the appearance of bias towards pre-determined outcomes.

Operations

- NCC supports the specific items proposed in the Discussion Paper under "Operations,"[28] but reiterates the need to create roles and mechanisms that ensure proper implementation of such measures for Indigenous Groups.

- NCC asserts that if the Government of Canada wishes to employ Multi-Stakeholder Committees, that the role and relationship of Indigenous Groups in relation to such Committees must be developed in a way that avoids lumping together Indigenous Groups and "stakeholders".

We look forward to a fulsome consultation on the specific legislative, regulatory and policy proposals being developed by the Government of Canada in relation to the amendment of the *National Energy Board Act*.

[28] "Encouraging the development of cooperation agreements with interested jurisdictions";
"Making information available to the public online, including incident reports and follow-up data, in a way that is easily understood"; and
"Enhancing safety and security measures to protect energy infrastructure and prevent tampering".

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Appendix A

January 31, 2017

The Honorable Dominic LeBlanc
Minister of Fisheries, Oceans and the Canadian Coast Guard
Minister's Office
200 Kent Street
Station 15N100
Ottawa, Ontario
K1A 0E6

Dear Hon. Dominic LeBlanc:

RE: NunatuKavut Community Council submission on changes to Fisheries Act

Introduction

The NunatuKavut Community Council ("NCC") is pleased to present its initial comments on the recent changes to the *Fisheries Act* (the "Act"). We are encouraged by the federal government's promise to review the recent changes to the *Act* and "restore lost protections and incorporate modern safeguards". The NCC has concerns about how far the *Act* has strayed from the protection of our aquatic environment, and by extension, our Aboriginal RIghts, and thus we are eager to share our views and believe our comments will constitute a valuable contribution to the review.

The Review Process to Date

NCC was invited to participate in this process of reviewing the legislative changes to the *Act*, and to submit a request for participant funding. NCC only received confirmation of their participant funding on November 17, 2016, and the deadline for submissions to the Standing Committee on Fisheries and Oceans was November 30, 2016. The level of funding received was significantly less than requested, and work could only commence on the date of confirmation of funding.

This did not allow the time or resources for fulsome consultation with our communities on these issues, nor did it allow us adequate time for a full technical review of the legislation and its impacts on our Aboriginal Rights and Title. It did not allow time for us to appear before the committee in support of our submission.

Additionally, in the same letter received on November 17, 2016, NCC was advised we had until the end of January, 2017 to provide you with any submissions, and that our submission would be considered along with the Standing Committee's report. However, as pointed out, because of the narrow timeline and lack of funding, NCC's concerns will not form part of the Standing Committee's report.

As such, this submission can be taken only as a preliminary analysis and we reserve the right to modify it and/or present additional issues in our analysis and recommendations as the *Fisheries Act* review process continues. We look forward to a thorough and thoughtfully held consultation going forward which fully addresses the impacts on NCC's Rights and Title.

Background on the People of Nunatukavut and the NCC

NunatuKavut means "Our Ancient Land." It is the territory of the Inuit of NunatuKavut, the Southern Inuit, who reside primarily in southern and central Labrador. Our people lived in Labrador long before Europeans set foot on North American soil. As it was in times of old, and still today, we are deeply connected to the land, sea, and ice that make up NunatuKavut, our home.

For hundreds of years, we controlled the coast of Labrador. The rugged coastlines and the interior waterways were home to our families who lived off the land and sea. Our people travelled throughout our territory, by kayak and umiak, to harvest the plants and animals that sustained us. We had our own way of making decisions, we respected all things around us and we thrived. It was our way.

Over time, there were temporary visits by fishermen and explorers, people who wanted our resources: the fish, seal, whale and fur-bearing animals. Strife and warfare marked our early encounters and many of our people lost their lives, as did the Europeans. In 1765, hundreds of our ancestors travelled by boat to Chateau Bay to meet with Governor Palliser, and a treaty called the British-Inuit Treaty of 1765 was reached to end the hostilities. Some European men from the Old World chose to remain on our lands and survived in our territory because of the knowledge and skills of the Inuit of NunatuKavut.

As time went on, there was intermarriage and our way of life began to change dramatically. Like all Indigenous peoples in Canada, we too, suffered the effects of colonialism. Outsiders pillaged our resources, brought their own form of government, denied our language and many of our people experienced resettlement and residential schools.

Despite these challenges and changes, however, we survived. Today we thrive. We built our communities, and still hold fast to our traditional territory, which in very general terms includes the central and southern Atlantic coast of Labrador, the inland area in and around Lake Melville, including Happy Valley-Goose Bay, as well as areas in Labrador west and the Labrador straits region. The fisheries in and around these communities are important to our cultural practices and survival.

Today, the communities making up NunatuKavut are centered primarily along the Atlantic coast, from Cartwright in the north, to Henley Harbour in the south (near Chateau Bay, a historically significant location for the people of NunatuKavut). In addition to Cartwright and Henley Harbour, the other communities key to NunatuKavut today include Lodge Bay, Mary's Harbour, St. Lewis, Port Hope Simpson, Charlottetown, Williams Harbour, Norman's Bay, Pinsent's Arm, Black Tickle and Happy Valley-Goose Bay, although it must be mentioned that there are also some NunatuKavut members who reside in Labrador west and the Labrador straits region.

For centuries, our way of life sustained us and today, many of the traditions of our ancestors and Elders are still followed or are experiencing a revival. To name but a few examples, we have brought back the Kullik (a traditional seal oil lamp), our drum, and proudly celebrate our dog sledding tradition.

Additionally – and of particular relevance to the issue of federal fisheries protection legislation -- most of NunatuKavut's people follow at least some of the most important traditions of our ancestors, including the harvesting of seals, fish, and waterfowl. Nearly everyone in NunatuKavut eats food from our local fisheries on a regular basis, which means the protection and nurturing of habitat in harvesting areas is essential. Protection of the habitat is of great importance for more than just fisheries, as the game we hunt also feeds upon nutrient in the habitat.

Further below in these comments, we provide additional details demonstrating how fisheries and the habitat that sustains the fisheries are vital to NunatuKavut and our people, and thus why the protections in the *Act* must be strengthened.

We are 6,000 strong. We know who we are and are proud of what we have accomplished. Our rights are protected and enshrined in the Constitution of Canada, and they must be respected and honoured, including in the context of federal fisheries legislation.

Today, the NunatuKavut Community Council (NCC), serves as the representative governing body for approximately 6,000 Inuit of south and central Labrador, collectively known as the Southern Inuit of NunatuKavut. A council elected by our membership and comprised of members representing each of the six regions of our territory and led by a President and Vice-President governs the NCC.

NCC's primary function is to ensure the land, ice and water rights and titles of its people are recognized and respected. We are also fully present at the grassroots level in our communities. Operated as a not-for-profit organization, NCC is responsible for a variety of programs and services. Members are provided help and support with employment, education, skills and training and many other needs.

Our Natural Resources and Environment Department oversees a Habitat Stewardship Program (HSP) for Species-at-Risk, and employs fisheries and wildlife guardians to monitor annual hunts and fisheries. The Natural Resources and Environment Department issues seasonal harvest and conservation guidelines and advises and supports NunatuKavut members on exercising their Aboriginal right to hunt and fish and encourages the following of a traditional lifestyle in a sustainable and responsible manner. The Department also oversees NunatuKavut's Harvest Registry, and recently implemented an environmentally friendly online system for harvest reporting.

The *Fisheries Act*

The *Fisheries Act* (the "Act") is one of Canada's oldest pieces of legislation, enacted in 1868, right after the time of confederation, indicating the importance of providing protection to Canada's fisheries, which the people of NunatuKavut have utilized as a vital part of our culture since time immemorial.

In the 1970's, habitat protection provisions were added to the *Act,* including a prohibition against the "harmful alteration, disruption or destruction of fish habitat" (the "HADD" provision). The HADD provision became known as one of the strongest environmental protection mechanisms. The habitat protecting provisions remained virtually unchanged in the *Act* from 1977-2012.

The 2012 changes to the *Act* included the following:

- Removing the HADD provision (s. 35);
- Introduced definitions of "Aboriginal" ,"commercial", and "recreational" fisheries;
- Enabling the Minister to enter into agreements with Provinces to facilitate cooperation in fisheries management (s. 4.1);
- Ministerial discretion to:
    - Exclude fisheries from the definitions "Aboriginal", "commercial", and "recreational" (s. 43(1)(i.01));
    - Issue authorizations to proponents for works, activities, or undertakings that cause serious harm to fish;
    - Make regulations that exempt specific fisheries waters from the requirement to avoid or mitigate the obstruction of waterways (s. 20 and 21), and the duty to notify DFO of a risk of serious harm to fish (s. 38(4)).

The impacts of these changes are detailed below.

Impacts of the Changes to the *Fisheries Act*

Removing the HADD Provision

The most significant and detrimental change to the *Act* was the replacement of the phrase "harmful alteration, disruption or destruction of fish habitat" with the phrase "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery". This change shifted the governing scheme of the *Act* from a proactive model to a reactive model. Instead of preventing harmful activities, the changes brought in a 'wait and see' approach which places the entire ecosystem in danger of irreparable harm.

DFO itself has agreed that the sustainability and productivity of fisheries in Canada is threatened by "habitat degradation or loss, which may occur as a result of the fragmentation of habitat" (Review of the Changes *to Fisheries Act*, October 2016).

The NunatuKavut people do not rely solely on fisheries to practice their constitutionally protected Aboriginal right to fish, rather, we rely on the habitat that houses the fish. Once lost or damaged, habitat is not easily replaced. It has been acknowledged that "it is simply not possible to compensate for some habitat" (*Effectiveness of fish habitat compensation in Canada in achieving no net loss"*, Quigley and Harper (2006)).

Without adequate protection, the aquatic habitat throughout our territory faces direct threat from a number of sources. As a result of this, NCC's members face the potential loss in ability to practice certain Aboriginal rights due to the degradation of habitat which provides the life support for fish harvested.

The new "serious harm" provision applies only to either (a) the death of fish, or (b) the permanent alteration or destruction of habitat. This means that transitory damage to fish habitat which would have been prohibited under the old *Act* is now allowed as long as it does not kill fish. Other forms of harm to fish, such as malnourishment, disease, and non-fatal mutation, are also not specifically prohibited.

Introduced definitions of “Aboriginal”, ”commercial”, and “recreational fisheries

The addition of definitions of “Aboriginal”, “commercial”, and “recreational” fisheries , when examined closely is also the cause for some concerns:

> "Aboriginal", in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization

As you can see, the focus in the definition is on fish that is “harvested”. This is problematic from NCC’s perspective because it suggests a lack of protection for fish that the Inuit do not harvest, but which may nonetheless have significant cultural or ecological value. If the NunatuKavut people choose not to harvest a particular species of fish, either due to conservation or other reasons, then those fish may not be protected under the *Act*.

A fish that is not provided protection is at risk of harmful alternation, disruption, or even extinction. This is a great concern to NCC because our Aboriginal rights are not tied to specific species. Aboriginal rights are dependent on a healthy ecosystem as a whole, and when the protections for certain species are removed we are then faced with the potential eradication of that unprotected species.

Another issue with the current definition of ‘Aboriginal fishery’ is that it does not expressly include Aboriginal fisheries with an economic aspect such as our commercial communal fisheries.

Enabling the Minister to enter into agreements with Provinces to facilitate cooperation in fisheries management (s. 4.1);

The changes to the *Act* brought about the addition of section 4.1 which provides the Minister with authority to enter into agreements with Provinces regarding the management of fisheries, the gathering of scientific information, and consultation with stakeholders. The rationale behind this, according to DFO, is to “ensure agencies and organizations that are best placed to provide fisheries protection services to Canadians are enabled to do so”.

The problem with this addition to the *Act* is that it is silent on the Minister entering similar agreements with Aboriginal groups. NCC exists to ensure the land, ice and water rights and titles of its people are recognized and respected. As such, NCC is best suited to enter into agreements regarding the management of fisheries, the gathering of scientific information, and consultation with stakeholders.

Omitting Aboriginal groups from section 4.1 was a way for the Conservative government to discount the capacity of our people and the organized political structures we have in place to advance our Aboriginal and Treaty rights through dialogue and agreements with our Treaty partners. Aboriginal People such as NunatuKavut must be expressly recognized in such a provision.

Ministerial Discretion

Prior to 2012, Ministerial authorizations triggered the requirement for environmental assessments pursuant to the *Canadian Environmental Assessment Act*. This is

important for Aboriginal peoples because environmental assessments are triggers for consultation with Aboriginal groups (*Haida Nation v British Columbia,* 2004 SCC 73). The requirement for an environmental assessment that flowed if there was Ministerial discretion was unfortunately eliminated.

Section 43 of the *Act*, which gives the Minister power to make regulations about various matters, was expanded significantly; in particular, the Minister may now make regulations:

- Excluding fisheries from the definitions "Aboriginal", "commercial", and "recreational", meaning fish important to those fisheries will no longer be protected (s. 43(1)(i.01))
- Exempting certain classes of activity from the requirement to be authorized by the Minister, even if they might otherwise pose a risk of serious harm to fish (s. 43(1)(i.1))
- Exempting specific fisheries waters from the requirement to avoid or mitigate the obstruction of waterways (s. 20 and 21), and the duty to notify DFO of a risk of serious harm to fish (s. 38(4))

Although these provisions in the *Act* have no force or effect unless regulations are actually made under them, the regulation-making power they grant is immense. With little public oversight and no say from Parliament, DFO is authorized to essentially exempt certain industries and certain waters from the most crucial portions of the *Act*. This would leave those industries or those waters more or less free from oversight by DFO. Further, these exemptions are permitted to be carried out with no consultation with any potential Aboriginal groups who may be affected.

Section 6, newly re-added to the *Act* after a previous version was repealed in 1991, details several factors that the Minister must take into account before taking certain regulatory actions. One of the factors is:

> whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery

Section 6 may appear to be a provision that is an attempt to protect Aboriginal rights, however, as pointed out above, the Minister has the ability to exclude fisheries from the definitions "Aboriginal", "commercial", and "recreational", which makes the factors to consider in s. 6 seem pointless. There needs to be more accountability and restraint surrounding the provision on regulations.

Conclusion and Recommendations

The pace of the changes and the unilateral approach by the Conservative government made it difficult for Aboriginal groups to assess the impacts on our Aboriginal rights. Aboriginal groups were not consulted about the 2012 changes to the *Act*, and the results speak for themselves.

Moving forward it is important we keep in mind the mandate letter sent to you by Prime Minister Trudeau, where he stated your overarching goal as Minister "will be to protect our three oceans, coasts, waterways and fisheries and ensure that they remain healthy for future generations". As part of this plan moving forward, the Prime Minister emphasized the need to review the *Fisheries Act* and "restore lost protections, and incorporate modern safeguards".

The most significant change to the *Fisheries Act*, and one that has a direct impact on our rights, is removal of the HADD provision. This significantly reduced the legal protection our habitats need. Our recommendation would be to restore the HADD provision.

In addition to restoring HADD, the broad powers behind the Ministerial discretion need to be reined in. We recommend an environmental assessment or Indigenous Knowledge study to be performed on all projects that require Ministerial approval and on all projects that have the potential to adversely impact Aboriginal and Treaty rights.

Also in addition to restoring the HADD provision, we need to see this backed by additional DFO capacity in habitat protection. Around 3 years ago, the DFO Habitat Office in our territory in Happy Valley-Goose Bay, Labrador was closed, and relocated to St. John's Newfoundland. This has resulted in a serious diminishment in the habitat protection work in our territory, which is of particular concern given the vast extent of our territory, and the large number of projects with significant fisheries impacts going on in our territory. Along with the restoration of the HADD provisions, we need to see the restoration of a habitat office in Labrador.

Our primary recommendation moving forward is to improve the scope of consultation between government and NCC (and all other Aboriginal groups affected) regarding legislative changes that affect our Aboriginal Rights and Title.

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Appendix B

Submission to the Parliament of Canada Standing Committee on Transport, Infrastructure and Communities

Review of the *Navigation Protection Act*

7 December 2016
By the NunatuKavut Community Council

INTRODUCTION

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the *Navigation Protection Act* ("*NPA*"), and we thank the Standing Committee on Transport, Infrastructure, and Communities for the opportunity to do so.

We are encouraged by the federal government's promise "to review the recent changes to the *Navigable Waters Protection Act*, restore lost protections and incorporate modern safeguards".[1] The NCC has concerns about how far the NPA has strayed from its predecessor, the *Navigable Waters Protection Act* ("*NWPA*"), and thus we are eager to share our views and believe our comments will constitute a valuable contribution to the review.

We wish the Committee well in its task of undertaking a comprehensive review of the current legislation and hope that the ultimate result will be legislation that will better protect Canada's waterways and the people who depend on them in fundamental ways, such as the people of NunatuKavut.

A. PRELIMINARY COMMENTS: THE REVIEW PROCESS TO DATE

NCC was invited to participate in the *NPA* Review process, and to submit a request for participant funding. We received confirmation of participant funding only on November 4, 2016, and we were asked to make a submission to this committee by November 30, 2016. The level of funding received was significantly less than requested.

This situation did not allow for fulsome consultation with our communities on these issues, nor did it allow us adequate time for a full technical review of the legislation and its impacts on our Aboriginal and Treaty Rights. Nor did the engagement process to date allow time for us to appear before the committee in support of our submission.

As such, this submission can be taken only as a preliminary analysis and we reserve the right to modify it and/or present additional issues in our analysis and recommendations as the *NPA* review process continues. We look forward to a thorough and thoughtfully held consultation going forward which fully addresses the impacts on NCC's Rights and Title.

[1] Government of Canada, Navigation Protection review website, https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/navigation-protection.html.

B. BACKROUND ON THE PEOPLE OF NUNATUKAVUT AND THE NUNATUKAVUT COMMUNITY COUNCIL

1. NunatuKavut and its people

NunatuKavut means "Our Ancient Land." It is the territory of the Inuit of NunatuKavut, the Southern Inuit, who reside primarily in southern and central Labrador. Our people lived in Labrador long before Europeans set foot on North American soil. As it was in times of old, and still today, we are deeply connected to the land, sea and ice that make up NunatuKavut, our home.

For hundreds of years, we controlled the coast of Labrador. The rugged coastlines and the interior waterways were home to our families who lived off the land and sea. Our people travelled throughout our territory, by kayak and umiak, to harvest the plants and animals that sustained us. We had our own way of making decisions, we respected all things around us and we thrived. It was our way.

Over time, there were temporary visits by fishermen and explorers, people who wanted our resources: the fish, seal, whale and fur-bearing animals. Strife and warfare marked our early encounters and many of our people lost their lives, as did the Europeans. In 1765, hundreds of our ancestors travelled by boat to Chateau Bay to meet with Governor Palliser, and a treaty called the British-Inuit Treaty of 1765 was reached to end the hostilities. Some European men from the Old World chose to remain on our lands and survived in our territory because of the knowledge and skills of the Inuit of NunatuKavut.

As time went on, there was intermarriage and our way of life began to change dramatically. Like all Indigenous peoples in Canada, we too, suffered the effects of colonialism. Outsiders pillaged our resources, brought their own form of government, denied our language and many of our people experienced resettlement and residential schools.

Despite these challenges and changes, however, we survived. Today we thrive. We built our communities, and still hold fast to our traditional territory, which in very general terms includes the central and southern Atlantic coast of Labrador, the inland area in and around Lake Melville, including Happy Valley-Goose Bay, as well as areas in Labrador west and the Labrador straits region.

Coastal waters and rivers provide essential links between our communities. In many ways, the waterways are more important to our mobility between communities, as well as to and from harvesting areas, than roadways.

Today, the communities making up NunatuKavut are centered primarily along the Atlantic coast, from Cartwright in the north, to Henley Harbour in the south (near Chateau Bay, a historically significant location for the people of NunatuKavut). In addition to Cartwright and Henley Harbour, the other communities key to NunatuKavut today include Lodge Bay, Mary’s Harbour,

St. Lewis, Port Hope Simpson, Charlottetown, Williams Harbour, Norman's Bay, Pinsent's Arm, Black Tickle and Happy Valley-Goose Bay, although it must be mentioned that there are also some NunatuKavut members who reside in Labrador west and the Labrador straits region.

For centuries, our way of life sustained us and today, many of the traditions of our ancestors and Elders are still followed or are experiencing a revival. To name but a few examples, we have brought back the Kullik (a traditional seal oil lamp), our drum, and proudly celebrate our dog sledding tradition.

Additionally – and of particular relevance to the issue of federal navigation protection legislation -- most of NunatuKavut's people follow at least some of the most important traditions of our ancestors, including the seasonal harvesting of small and large game, seals, fish, birds and waterfowl, berries and plants. Harvesting to obtain "country foods" such as these requires extensive travel, and much of that occurs on waterways. Nearly everyone in NunatuKavut eats country foods on a regular basis, which means safe navigation to harvesting areas is essential. As well, coastal waters, rivers, streams and all the waterways that our people depend upon must be kept safe and clean in order to preserve the habitat of the animals and plants we harvest, as well as the habitats of the species that the fish and game we hunt feed upon.

Further below in these comments, we provide additional details demonstrating how central rivers, lakes and coastal waters are to NunatuKavut and our people, and thus why the *NPA* must be strengthened.

We are 6,000 strong. We know who we are and are proud of what we have accomplished. Our rights are protected and enshrined in the Constitution of Canada, and they must be respected and honoured, including in the context of federal Navigation Protection legislation.

2. NunatuKavut Community Council

Today, the NunatuKavut Community Council (NCC), serves as the representative governing body for approximately 6,000 Inuit of south and central Labrador, collectively known as the Southern Inuit of NunatuKavut. A council elected by our membership and comprised of members representing each of the six regions of our territory and led by a President and Vice-President governs the NCC.

NCC's primary function is to ensure the land, ice and water rights and titles of its people are recognized and respected. We are also fully present at the grassroots level in our communities. Operated as a not-for-profit organization, NCC is responsible for a variety of programs and services. Members are provided help and support with employment, education, skills and training and many other needs.

NunatuKavut currently has over 25 full-time and seasonal staff members working in five offices. Led by a Chief Executive Officer, there are five departments within the organization: Natural

Resources and Environment; Human Resources Development; Finance and Administration; Social Sector; and the Aboriginal Service Centre.

Our Natural Resources and Environment Department oversees a Habitat Stewardship Program (HSP) for Species-at-Risk, and employs fisheries and wildlife guardians to monitor annual hunts and fisheries. The Natural Resources and Environment Department issues seasonal harvest and conservation guidelines and advises and supports NunatuKavut members on exercising their Aboriginal right to hunt and fish and encourages the following of a traditional lifestyle in a sustainable and responsible manner. The Department also oversees NunatuKavut's Harvest Registry, and recently implemented an environmentally friendly online system for harvest reporting.

C. GENERAL COMMENTS ON CHANGES TO FEDERAL NAVIGATION LEGISLATION AND ITS IMPACT ON NUNATUKAVUT

The *Navigable Waters Protection Act* (*NWPA*) was one of Canada's oldest pieces of regulatory legislation, providing protection to navigable waters throughout Canada. The definition of "navigable waters" was open-ended, stating only that it includes "a canal and any other body of water created or altered as a result of the construction of any work." In *Attorney-General of Quebec* v. *Fraser* / *Attorney-General of Quebec* v. *Adams*, 37 SCR 577, the Supreme Court of Canada decided that navigable waters included waters that were navigable by all types of vessels, including canoes.

The *NWPA* required approval of certain works in navigable waters, and prohibited depositing certain substances in navigable waters. Although the original intent was to ensure that waters remained safe for navigation, the end result was that the *NWPA* provided some limited protection for water quality and quantity in all navigable waterways, making it an early form of environmental legislation.

While the *NWPA* provided no mention of and no direct protection for Aboriginal Rights, it protected the waterways on which Aboriginal Peoples rely not only for navigation, but for physical, cultural and spiritual survival. It cannot be overstated that waterways in Labrador generally and in NunatuKavut more specifically, are of fundamental significance to life in NunatuKavut and thus to NCC and the people it governs. As mentioned briefly above, the use of waterways in NunatuKavut is central to harvesting activities such as hunting, fishing, "egging" (gathering gull and other eggs), and berry gathering. As will be explained further below, these harvesting activities are important not only because they represent a valued part of our culture, but also because they provide access to an important source of food consumed frequently by all of the people of NunatuKavut today – even those currently living in the more urban setting of Happy Valley-Goose Bay, and (thanks to our community freezer program) those who can no longer hunt or fish due to age, illness or other situation.

These facts alone motivate the NCC to advocate for the strongest protections possible in any future federal navigation protection legislation, should the *NPA* be amended.

Unfortunately, changes to the *NWPA* in recent years have generally weakened some of the protections for waterways central to life in NunatuKavut and indeed to Aboriginal Peoples across Canada. These changes began with the 2009 amendments to the *NWPA*, which had the stated intention of simplifying procedures and promoting economic growth, but in fact which reduced the level of protection for Canadian waterways. When the *NWPA* was amended again, by virtue of the *Jobs and Growth Act, 2012*, and protections to waterways were further compromised (with a few exceptions, mentioned below).

The amended Act in 2012, re-named the *Navigation Protection Act* (*NPA)* included provisions that:

- added a Schedule to the Act that lists navigable waters where people must apply for federal authorization for works that interfere with navigation;
- narrowed the Minister's powers to address obstructions in navigable waterways to those on a Scheduled waterway;
- prohibited dewatering any navigable water, not only those listed on the Schedule; and
- introduced authority to issue administrative monetary penalties to address non-compliance and expanded enforcement provisions.

NCC offers its preliminary comments on the impacts of these provisions of the *NPA*, which represented a substantial deviation from the *NWPA*, in the subsections below.

D. IMPACTS OF THE CHANGES TO THE *NWPA* ON NUNATUKAVUT

1. Scheduled Waters and Approval Requirements

The 2012 amendments added a Schedule to the *NPA* listing specific navigable waters. While some protections in the *NPA* continue to apply to all navigable waters, some apply only to those waters that are listed in the Schedule.

For example, whereas under the *NWPA*, approval of the Minister was required for all works constructed in navigable waters, under the *NPA*, approval of the Minister is only required if that work will substantially interfere with navigation, and the party intending to construct a dam, bridge, dock, or other works need only give notice that they intend to construct a work in the Scheduled waters.

Given the small number of Scheduled waters, it is estimated that this removes 99.7% of the navigable waters in Canada from the requirement to apply for approval, even where the works in question impede navigation. Where a proposed work in the Scheduled waters would not interfere with navigation, approval is simply not required. There are no clear criteria for which waters were included in the Schedule, and NCC was certainly not consulted regarding the inclusion or exclusion of waters in our territory.

Additionally, the boundaries for the waters that are included in the Schedule are not amenable to a practical understanding of what part of the water body is considered covered by the Schedule and what part is not. For example, in Part 1 of the Schedule ("Oceans and Lakes"),

the description of the protected area for the Atlantic Ocean is: “All waters from the outer limit of the territorial sea up to the higher high water mean tide water level and includes all connecting waters up to an elevation intersecting with that level.” As we understand from communications with federal Navigation Protection Program staff, the exact point at which a tributary of the Atlantic Ocean falls under the Schedule is not easily known to the public. This is because the exact boundaries for this determination are made on a case by case basis that requires knowledge of the last charted feature (e.g., a bridge or other landmark) on the river. All of this confusion and lack of clarity, however, would not exist if the Schedule were simply eliminated, and all rivers and waterways were protected, as under the *NWPA*.

In Labrador, only Lake Melville is included in the Schedule. This means that, under the current law, proponents can undertake projects in navigable waterways anywhere else in Labrador without having to seek approval under the *NPA*. This includes dams, bridges, and other works that interfere with our ability to travel in and around our territory, and to exercise our rights on the waterways that are the lifeblood of our culture.

The current lack of protection for rivers not included on the Schedule poses a number of potentially serious risks to NunatuKavut and its people because the rivers flowing to the Atlantic coast, on which many of us travel and/or live in the winter months, are simply not listed on the Schedule. As explained above, the mouths of these rivers may be protected because they are covered under the Schedule, but the inland stretches of the river are not. Major rivers such as the Alexis River near Port Hope Simpson, the St. Lewis River near Mary’s Harbour, the Hawke River, the North River, the Sandhill River, and the rivers flowing into Sandwich Bay such as the Eagle, White Bear and Paradise Rivers, are just some of the many highly important rivers in NunatuKavut which do not appear on the *NPA* Schedule.

An inventory of studies on land and sea uses in NunatuKavut since 1979 describes our people as “constantly ‘on the move’”,[2] and this is no surprise given our strong tradition of resource harvesting that requires significant travel. While some amount of travel for harvesting and other purposes happens by vehicle or snowmobile, much of it occurs on waterways via family-owned boats, particularly during warmer weather.

Some travel between communities or for harvesting involves short distances, but for the most part, our traditional hunting, fishing and gathering practices require longer, seasonally-based travel. For example, while many people in NunatuKavut today reside primarily in the coastal areas, where traditionally our summer harvesting practices take place (e.g., salmon and cod fishing[3] and berry-picking), they still travel extensively for resource harvesting (e.g., going inland in winter to hunt game and birds and for winter fishing). Most families still have multiple cabins or tilts, and the 2013 inventory by Mitchell estimated that each person in NunatuKavut spends, on average, about 7 weeks away from their primary residence in an average of 4.5 locations (i.e., cabins or tilts) to procure country foods.[4]

[2] Mitchell, Gregory E. *An Inventory of Studies on Land and Sea Uses in NunatuKavut since 1979*, September 2013, p.13, unpublished, available from NCC (“Mitchell report”).
[3] We speak here of salmon and cod harvesting for personal and community use, not commercial.
[4] Mitchell report, *supra*, pages 13 and 36.

It has been verified by field research that some 92% of our people in NunatuKavut eat country foods at least once a week.[5] Hunting, fishing, trapping and gathering are not recreational past-times or ways to pass the time. They are ways of life. They are ways of providing healthy food for families and connecting us with our rich history and culture at the same time.

It must also be mentioned that long trips to inland areas, often on or along major rivers, happen not only for harvesting country foods, but also for wood cutting and working traplines for the fur trade and occasionally for other activities such as gathering plants or juniper berries for traditional medicines.

In sum, it is essential to our well-being and way of life that all of our waterways be protected under the *NPA*….not only those lucky enough to fall within the Schedule.

In addition to the concerns outlined above, the requirement for federal approval under the *NWPA* often triggered the requirement for a federal environmental assessment under the *Canadian Environmental Assessment Act ("CEAA")*. As a result of the changes to *CEAA* and the *NWPA*, which were made at the same time in 2012, this is no longer the case.

Furthermore, the requirement for an *NWPA* Approval for a work that would impact Aboriginal and Treaty Rights would trigger the duty to consult with NunatuKavut. With the removal of the requirement for approval for most works, there is often no longer a trigger for consultation by the federal government, even where those works threaten to interfere with the exercise of our rights. This, to our people, is simply unacceptable.

Recent developments in our territory including the Muskrat Falls Hydro Project, and other works that interfere with our ability to carry on our way of life, further deepen our concern about the *NPA* and underscore the need for comprehensive protection of Canadian waterways from works that affect their use, water quality and safety not just in terms of navigation but also for human health.

2. Prohibition on Dewatering

The *NPA* contains a prohibition against "dewatering" any navigable water. This is one of the few respects in which the *NPA* is stronger than its predecessor, and is a welcome change from our perspective. That said, the Minister retains the power to exempt any river, stream, or waters if doing so is deemed in the public interest.

We wish to point out that any such exemption, upon the discretion of the Minister, absolutely must consider the likely impact on Aboriginal and Treaty Rights. The "public interest" cannot be allowed to override our constitutionally protected rights.

[5] Mitchell report, *supra*, page 34.

3. Enforcement Provisions

The *NPA* expanded and clarified the enforcement provisions. This is another welcome change from our perspective, and similar provisions should be included in any modification of the legislation or its regulations.

E. CONCLUSION AND RECOMMENDATIONS

While the change to the enforcement provisions likely improves the functioning of the *NPA*, and the addition of the dewatering provision is an improvement, the most significant and detrimental change to the *NPA* was the addition of the Scheduled navigable waters. This significantly reduced the total number of protected waterways. The result was that approval is no longer required for constructing, repairing, or removing any work in unscheduled waterways, even if it substantially interferes with navigation, and by extension, with the exercise of our Aboriginal and Treaty Rights.

As noted above, this fundamental change to the structure of the Act, coupled with the changes to the federal environmental assessment regime reflected in the *Canadian Environmental Assessment Act 2012 ("CEAA 2012),* means a federal environmental assessment of proposed works in waterways is also far less likely. Consequently, there may be no trigger for the government to consult with us, even where a proposed work has significant impacts on our Aboriginal and Treaty Rights.

With these observations in mind, and in light of the central importance of waterways to our way of life – today, as in the past – we offer the following preliminary recommendations at this stage of the review process:

- Make all of the protections in the *NPA* apply to <u>all</u> navigable waters, not just those listed in the Schedule. In short, restore the approach of the *NWPA*, and eliminate the Schedule so as not to limit protections to waterways not listed on the Schedule.

- Keep the prohibition against dewatering any navigable water, but require that in exercising discretion to grant exemptions from the prohibition "in the public interest", the Minister must consider the likely impact on Aboriginal and Treaty Rights and be prohibited from making exemption decisions that override our constitutionally protected rights.

- Keep the enforcement provisions and examine ways of enhancing their effectiveness.

- Add language that acknowledges the special relationship Aboriginal Peoples have with waterways and underscores the need to respect and honour Aboriginal rights in the application of the legislation.

  This could potentially be done in part through a new "Purposes of the Act" section, in a manner similar to the way in which *CEAA 2012* recognizes communication and

cooperation with Aboriginal peoples as a purpose of that Act.[6] It could also be done partly through language similar to section 5(1) in *CEAA 2012*, which includes, within effects that must be taken into account in relation to a proposed project, factors such as health and socio-economic conditions, physical and cultural heritage, current use of lands and resources for traditional purposes, and sites of special significance. These constitute our preliminary observations on the insertion of Aboriginal rights acknowledgement into any new navigation protection legislation, and we reserve the right to advance other considerations and specific wording recommendations later in the review process and/or during consultation.

To reiterate a critical point, when we have had sufficient time to review the impacts and implications of the *NPA* in its current form, we may wish to explore other options for potential improvements to the *NPA* that might more directly address the rights and interest of Aboriginal Peoples, and specifically the people of NunatuKavut.

We look forward to deeper examination of the issues related to a contemplated overhaul of the *NPA* during Consultation phase of this review process.

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[6] We emphasize the word "similar" in that even that provision of *CEAA 2012*, section 4 (1)(d), which speaks of promoting communication and cooperation with aboriginal peoples with respect to environmental assessments", is in need of improvement. NCC will be offering comprehensive comments on the review of *CEAA 2012* in the context of the federal government review process for that legislation. That said, it may be useful to also consider specific language in any new Navigation Protection legislation to ensure a triggering process under *CEAA 2012* or its successor legislation and we reserve the right to make such suggestions later in *NPA* review process.

Appendix C

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

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 decolonialize 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.[1] However, the start of the current EA Review process has been less than promising.

[1] 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.[2]

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.[3] 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.

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[2] 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

[3] 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.

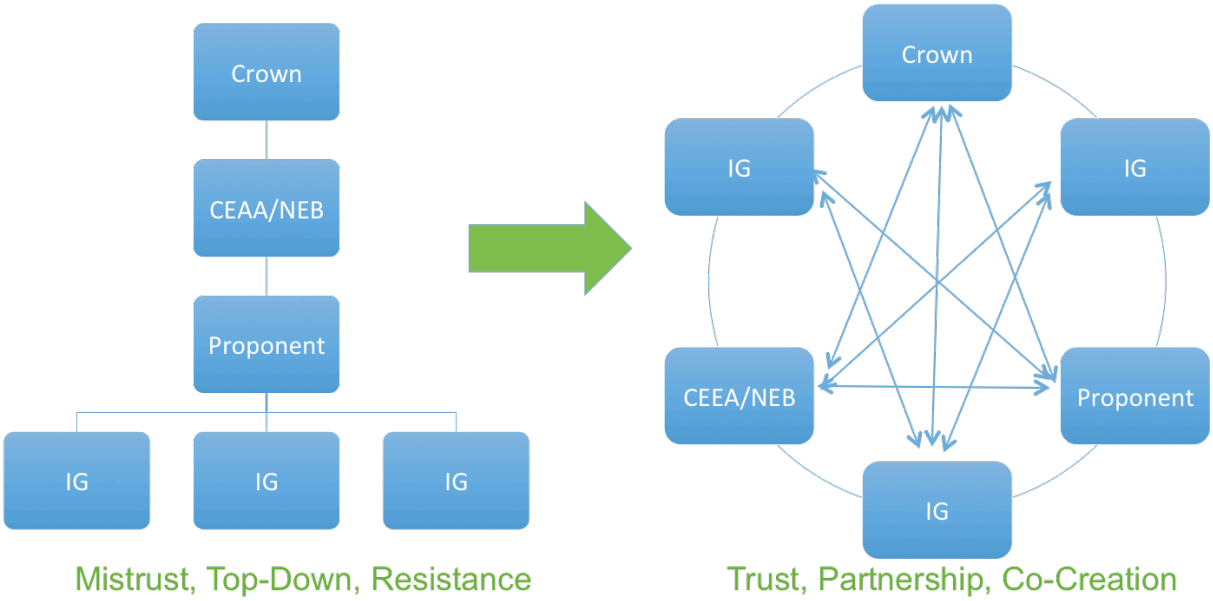
Here are the **steps to correct the Crown's bias towards project development:**

- 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.[4]

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

[4]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;
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/

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.[5]

[5] 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.[6]

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.[7] 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

[6] Findlay, p. 6.

[7] 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.[8]

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

[8] 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."[9]

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

[9] 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[10]
    - 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;

[10] 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.

Annual Budget Required by NCC for Nation-to-Nation Partnership in EA Process

NunatuKavut Community Council (NCC)
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George Russell Jr., 709-896-0592, ext 229, grussell@nunatukavut.ca, www.nunatukavut.ca

	Low End (in $000s)	Medium End (in $000s)	High End (in $000s)
Budget Total	**$944**	**$1,479**	**$1,740**
Personnel			
ITK Specialist	60	90	90
Science Specialist (Biology-Fisheries)	60	90	90
Science Specialist (GIS-Engineering-General)	60	90	90
Consultations Process Specialist	60	90	90
Social Sciences Specialist (Economics/Sociology)	60	90	90
Office Coordinator	40	60	60
Non-Salary Personnel Costs (40% - 50% of Salary)	136	255	255
Includes hiring costs, benefits, mandatory costs, etc.			
Personnel Total	**476**	**765**	**765**
External Consultants			
Legal Counsel	75	100	150
Environmental (EA) and Legislative	50	100	150
Science	50	100	150
Economics/Social Sciences	50	100	150
External Consultants Total	**225**	**400**	**600**
Office Space and Equipment			
Office Rent (based on space for 6 new employees)	50	50	50
Phone	18	18	18
Travel	115	132	150
Recording Equipment with GIS for ITK	5	7	10
Videconferencing Equipment (one-time investment	20	60	100
Personnel Desk and Computer Set-Up ($5-$7K/per person)	30	42	42
GIS Software	5	5	5
Office Space and Equipment Total	**243**	**314**	**375**

*Note the annual cost of office equipment and software listed in the last four rows (A36-39) will be lower in years 2 and 3 after the original investments are made. No attempt has been made to amortize these asset investments over a multi-year period as this is an approximate budget and the asset amounts are relatively small. The other costs listed in the budget occur on an annual basis.

Appendix D

Final Submission to the Expert Panel on the Modernization of the National Energy Board

17 April 2017 (Final Submission) 31 March 2017 (Draft Submission)
By the NunatuKavut Community Council

Introduction

The NunatuKavut Community Council ("NCC") is pleased to present its comments on the Modernization of the National Energy Board to the Expert Panel, and we thank the Panel and Natural Resources Canada for the opportunity to do so.

We wish the Committee well in its task of undertaking a comprehensive review of the National Energy Board ("NEB") and its framing legislation, the National Energy Board Act ("NEB Act" or "the Act"). We hope that the ultimate result will be legislation that will better protect Canada's lands and waterways and the people who depend on them in fundamental ways, such as the people of NunatuKavut.

NunatuKavut and its people

NunatuKavut means "Our Ancient Land." It is the territory of the Inuit of NunatuKavut, the Southern Inuit, who reside primarily in southern and central Labrador. Our people lived in Labrador long before Europeans set foot on North American soil. As it was in times of old, and still today, we are deeply connected to the land, sea and ice that make up NunatuKavut, our home.

For hundreds of years, we controlled the coast of Labrador. The rugged coastlines and the interior waterways were home to our families who lived off the land and sea. Our people travelled throughout our territory, by kayak and umiak, to harvest the plants and animals that sustained us. We had our own way of making decisions, we respected all things around us and we thrived. It was our way.

Over time, there were temporary visits by fishermen and explorers, people who wanted our resources: the fish, seal, whale and fur-bearing animals. Strife and warfare marked our early encounters and many of our people lost their lives, as did the Europeans. In 1765, hundreds of our ancestors travelled by boat to Chateau Bay to meet with Governor Palliser, and a treaty called the British-Inuit Treaty of 1765 was reached to end the hostilities. Some European men from the Old World chose to remain on our lands and survived in our territory because of the knowledge and skills of the Inuit of NunatuKavut.

As time went on, there was intermarriage and our way of life began to change dramatically. Like all Indigenous peoples in Canada, we too, suffered the effects of colonialism. Outsiders pillaged our resources, brought their own form of government, denied our language and many of our people experienced resettlement and residential schools.

Despite these challenges and changes, however, we survived. Today we thrive. We built our communities, and still hold fast to our traditional territory, which in very general terms includes the central and southern Atlantic coast of Labrador, the inland area in and around Lake Melville, in Happy Valley-Goose Bay, and in parts of Labrador west and the Labrador straits region.

We are 6,000 strong. We know who we are and are proud of what we have accomplished. Our rights are protected and enshrined in the Constitution of Canada, and they must be respected and honoured in the context of both the NEB Act and the manner in which the NEB carries out its mandate and legislated duties.

NunatuKavut Community Council

Today, the NunatuKavut Community Council (NCC), serves as the representative governing body for approximately 6,000 Inuit of south and central Labrador, collectively known as the Southern Inuit of NunatuKavut. A council elected by our membership and comprised of members representing each of the six regions of our territory and led by a President and Vice-President governs the NCC.

NCC's primary function is to ensure the land, ice and water rights and titles of its people are recognized and respected. We are also fully present at the grassroots level in our communities. Operated as a not-for-profit organization, NCC is responsible for a variety of programs and services. Members are provided help and support with employment, education, skills and training and many other needs.

NunatuKavut currently has over 25 full-time and seasonal staff members working in five offices. Led by a Chief Executive Officer, there are five departments within the organization: Natural Resources and Environment; Human Resources Development; Finance and Administration; Social Sector; and the Aboriginal Service Centre.

Our Natural Resources and Environment Department oversees a Habitat Stewardship Program (HSP) for Species-at-Risk, and employs fisheries and wildlife guardians to monitor annual hunts and fisheries. The Natural Resources and Environment Department issues seasonal harvest and conservation guidelines and advises and supports NunatuKavut members on exercising their Aboriginal right to hunt and fish and encourages the following of a traditional lifestyle in a sustainable and responsible manner. The Department also oversees NunatuKavut's Harvest Registry, and has implemented an environmentally friendly online system for harvest reporting.

Preliminary remarks concerning the Expert Panel's Terms of Reference (TOR) as it relates to indigenous people

We wish to make several observations on the TOR in order to underscore the power of frameworks in discussing indigenous issues in relation to the NEB.

Positive aspects of the TOR

We applaud the fact that two of five Modernization Panel members are indigenous persons: Panel Co-Chair, Mr. Gary Merasty, and Mrs. Wendy Grant-John. This is an encouraging sign of

the seriousness of this review. As well, we were pleased to see that the TOR description of the Panel Mandate did not simply lump indigenous groups (IGs) together with general stakeholders. This is an important point in light of the fact that, as we discuss below, that IGs are rights holders and not simply stakeholders – a critical distinction.

Less helpful aspects of the TOR

Under the description of themes in the TOR, IGs appear as one element of "public interest", and this is, in NCC's view, problematic: in a subsequent section, we present our views on why indigenous rights and interests must not be conflated with or subsumed within "public interest". Furthermore, "Indigenous Engagement" is presented as a stand-alone topic, which obviously overlooks relationships between IGs and other "big-ticket" topics like "Mandate," "Decision-making Roles," etc. These other topics are, of course, as relevant to IGs as they are to others.

The "Indigenous Engagement" topic in TOR speaks only of pipeline issues. We presume this to be an error, since power lines are obviously another key responsibility under the NEB Act. It goes without saying that the NEB needs to ensure greater indigenous engagement in transmission line approval.

Clarification on Consultation

We welcome this opportunity to submit input to the Panel, but also look forward to a fulsome consultation on the Panel final report and proposed changes to the legislation.

Organization of our submission

In this submission, we address five topics from among the six suggested themes: Indigenous Engagement, Mandate, Decision-making Roles, Governance and Public Participation.

Indigenous Engagement and the NEB - General Issues

Best path forward: increase agency expertise and knowledge of indigenous rights and interests, and build trust

A clear understanding of Indigenous rights and interests is a prerequisite for trust. Trust-building is essential and must be developed at two levels. At the general level, trust-building can happen through awareness-raising and training on indigenous rights and interests within NEB for non-indigenous Board members, and this is of course in addition to greater representation of indigenous persons on the Board (a subject we address in a subsequent section). At the specific level of project proposals, trust-building happens through measures such as the proper incorporation of Indigenous Traditional Knowledge (ITK), Oral History Evidence, and opportunities for Indigenous Groups to introduce the NEB to their territory and culture.

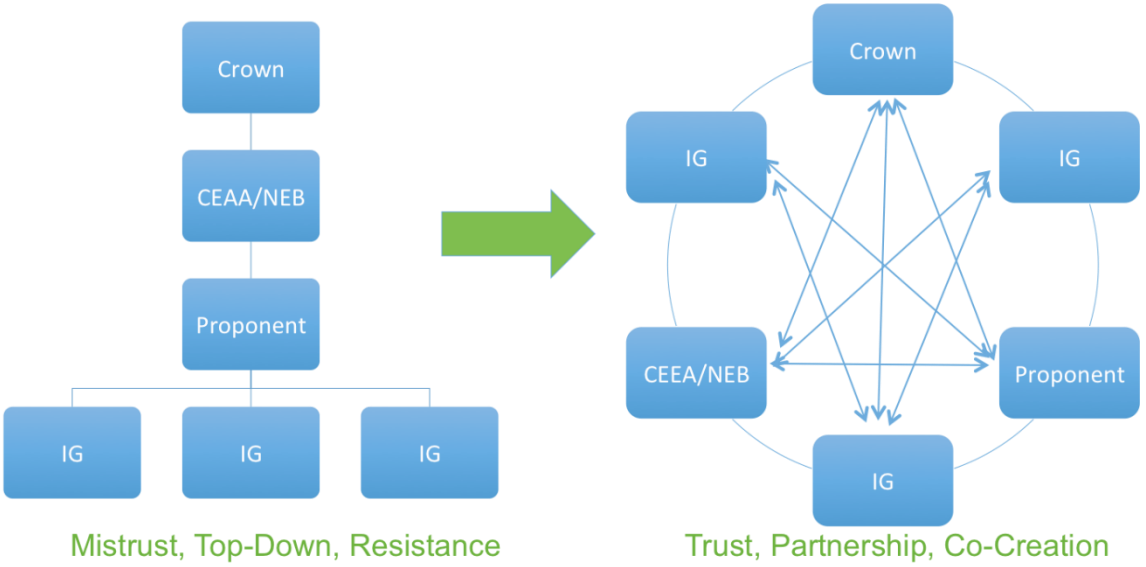
A Nation-to-Nation approach: the key to an effective way forward

NCC believes that the blueprint for successful conversations between indigenous groups and federal government agencies dealing with project decision-making is a Nation-to-Nation approach highlighting recognition and full respect of indigenous rights and interests as well as cooperation. We believe that a Nation-to-Nation approach is, in fact, key to achieving positive outcomes in most of the areas identified in the Panel's discussion paper "Indigenous Engagement and Consultation," and also referenced in the Panel's TOR, including:

- Early conversations and relationship building.
- Ongoing dialogue between the federal government and Indigenous groups on key matters of interest.
- Fuller integration of ITK into application and hearing processes.
- Enhancing the role of IGs in monitoring the construction and operation of projects, and developing emergency response plans.

On this last point, we emphasize the need for improved and more direct involvement of IGs at *all* stages in a project's lifecycle, including ongoing monitoring, compliance, enforcement and abandonment and restoration. Accordingly, NCC takes the position that IGs should be given the training, resources and authority to carry out activities such as monitoring and enforcement.

The diagram below illustrates NCC's view of the Nation-to-Nation approach compared with the current state of relationships during project approval processes. The left side of the diagram shows the current, top-down hierarchical process, while the right side illustrates what a collaborative Nation-to-Nation, relationship of equals could look like. ("IG" in the chart refers to Indigenous Groups). The flattening of the hierarchy facilitates and creates trust, partnership and eventually a co-creative approach.



Respect for indigenous rights and interests – fundamental changes are needed in the Act and in relation to energy project consultations

The NEB Act does not currently reflect support for indigenous peoples' s.35 rights and status or the Crown's obligation to consult and accommodate. In particular, serious lacunae exist in those provisions of the NEB Act dealing with the needs assessment (or "needs test") phase of decision-making on pipelines and power lines. With respect to pipelines, s. 52(2) instructs the Board to consider various factors to determine whether a project is needed for purposes of public convenience and necessity and nowhere among these factors is there any mention of indigenous rights and interests. While "public interest" is mentioned as a factor (s.52(2)(e)) that "may" be considered, indigenous rights and interests are not mentioned. As discussed in more detail below, NCC does not believe that the term "public interest" should include within it indigenous rights and interests. Not only should "indigenous rights and interests" be considered in this provision, this should be mandatory. Consequently, the legislative language should indicate "shall be considered" rather than "may be considered", to ensure that decision-makers remain mindful of such considerations.

With respect to power lines, the problem is somewhat different: s. 58.16(2) of the Act contains no "factors for consideration" but rather a simple requirement that the Board "shall have regard to all considerations that appear to it to be directly related to the line and relevant." It should be noted that a similar phrase appears in the first paragraph of s.52(2) for pipelines, but unlike for pipelines, there are no named factors to consider.

Regardless of the formulation of the provision (list of factors or not), the way in which the needs tests for pipelines and power lines are currently crafted does not appear to adequately protect s.35 constitutional rights, and clearly does not further the goal of trust-building in relation to project reviews. NCC strongly recommends that this be rectified by adding language to the needs test provisions for pipelines, power lines or any energy project, to ensure that decisions relating to need for the project consider potential impacts on indigenous rights and interests.

The NEB Act also lacks a "purpose of the Act" clause, and NCC recommends adding one that recognizes the duty to consult and accommodate indigenous peoples in the regulation of energy matters under the Act. While far from perfect, the *Canadian Environmental Assessment Act 2012* (CEAA 2012)[1] includes a "Purposes" clause that includes some recognition of indigenous interests. Specifically, s. 4(1)(d) of CEAA 2012 lists one of its purposes as follows: "to promote communication and cooperation with aboriginal peoples with respect to environmental assessments." A clause such as this, but which also recognizes the duty to consult in regulation of energy matters, is recommended as a modification to the NEB Act.

[1] *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52, available online at: http://laws-lois.justice.gc.ca/PDF/C-15.21.pdf.

The Crown's duty to consult and accommodate must be carried out in good faith and any delegation of this duty to agencies such as the NEB must be carried out with greatest of care to avoid confusion, misunderstandings and inefficiencies around roles during consultations. Clarity about who is responsible for what as between the Crown, agency, and proponents is essential. Ideally, the duty to consult should not be delegated to project proponents, but if it is, delegation must be clear, in writing, and NEB must exercise close supervision of proponents by the NEB during this process. Anything else leads to inevitable confusion as to who is supposed to be carrying out which aspects of a consultation.

Additionally, the duty to consult must not fall between the cracks during NEB Act modifications and/or shifting of responsibilities on environmental assessments. If EAs are removed from the NEB's mandate, as we suggest below (and in NCC's submission to the EA Review Process Expert Panel), then the duty to consult on EAs must "follow" the EA process to the new agency, be it the Canadian Environmental Assessment Agency (CEAA), or some other body chosen or created if Canada's environmental assessment regime is modified. Equally important, the government must ensure that the Crown's duty to consult is respected in relation to that part of the project decision process that *remains* with the NEB, such as the needs test and final project decision or recommendation. To clarify, under the current Act, the environmental assessment (EA) is carried out separately from the needs test. Thus, if EAs are removed from the NEB and conducted by another agency, the duty to consult on the EA must occur in conjunction with the EA, wherever it is carried out, and the duty to consult on the NEB Act needs test and final decision or recommendation must occur in conjunction with those NEB decisions.

The lacunae identified above must be rectified in order to respect the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and in particular, the UNDRIP principle of "free, prior and informed consent".[2] Additionally, NCC believes that respect for indigenous rights and interests requires full respect for inter-generational rights, which in turn necessitates consideration of upstream as well as downstream impacts of projects in project reviews and proper consideration of GHG emissions and associated climate impacts.

The NEB's Mandate

"Public interest" and "Indigenous rights and interests": a fundamental distinction

Too often, indigenous rights and interests are implicitly subsumed under "public interest" in legislation such as the NEB Act. This is unwise given the history of legal battles concerned with infringement of indigenous rights in the name of public interest. NCC observes that "public

[2] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, March 2008, available online at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; see also the federal government webpage on UNDRIP at: https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958.

interest" is not defined in the NEB Act, despite its critical role in the NEB's evaluation of need for a project, and this can lead to questions and difficulties where indigenous rights and interests are concerned. NCC supports adding a definition of the term "public interest" to the Act, but at the same time observes that it in crafting a new definition, it is critical to distinguish between stakeholders and rights holders: indigenous peoples are, of course, the latter.

As such, "public interest" should not be defined in the Act in any way that sees indigenous rights and interests included as part or within the term "public interest." Rather, NCC recommends that the term "indigenous rights and interests" be given equal footing with "public interest", such that the two terms literally appear side by side, for all provisions in the Act dealing with project decisions or recommendations. Several key provisions stand out in this respect. As mentioned above, Section 52(2)(e), in the list of "factors to consider" for certificates of authority for pipelines, "public interest" appears as an optional factor in the pipeline project needs test. NCC recommends the term "and indigenous rights and interests" be added after "public interest", and that the entire content of sub-paragraph (e) be moved to the mandatory clause of s. 52(2), to indicate that the public interest and indigenous rights and interests "shall be considered" in the needs test. Similar changes should be made to the parallel provision for certificates for power line projects, s.58.16(2), although it should be noted that presently, this provision does not even mention "public interest", thus both "public interest" and "indigenous rights and interests" should be added. There are, in fact, numerous provisions in the Act that mention "public interest,"[3] and NCC recommends that these provisions be examined closely and adjustments made as necessary in order to prevent the kind of problem just described, where indigenous rights and interests are – by lack of definition or by other presumption or interpretation – subsumed under the term "public interest".

NCC also suggests that the general notion of "public interest" should be broadened to include:

- Consideration of regional, local interests – not just national interests;
- Inter-generational interests (allows for consideration of climate change impacts);
- Broader notions of environmental protection and safety; and
- Longer-term economic and social interests in moving away from fossil fuels.

Environmental Assessments should be removed from the NEB's mandate and transferred to CEAA or a new environmental assessment body

In NCC's submissions to the Environmental Assessment Process Review Expert Panel in December 2016, we raised a number of fundamental concerns about EAs and recommended deep-level changes, including a Nation-to-Nation approach. While many of our concerns are

[3] See NEB Act sections 12(1)(b), 16.2(b), 26(1.1), 46(1)(a), 48.18(2), 48.36(a), 48.43(1), 52(1)(b), 53(7), 58.35(1) and (2), 71.3, 72(1), 119.90(1), 120.3.

relevant to the NEB context, we will not duplicate those detailed discussions here, but rather touch on a few key points. (NCC notes that in relation to these issues, it provided the NEB Modernization Expert Panel with copies of NCC's written submission to the Environmental Assessment review Expert Panel on March 22, in Saint John, NB).

NCC believes that the NEB is simply not well-suited to the task of carrying out EAs, and this is due largely to the phenomenon of "regulatory capture", wherein a regulatory body advances the interests of the industry it regulates, perceived or otherwise. When a regulator is viewed by the public and by IGs as a captured regulator, it goes without saying that its environmental assessments will lack credibility. Indigenous groups, environmental organizations and others have not been alone in pointing out the ways in which the NEB has suffered from regulatory capture: even the former CEO of BC Hydro has made such observations, which in fact led him to withdraw from the NEB's hearing on Kinder Morgan's Trans Mountain Expansion Project.[4]

It appears to us that, unfortunately, the NEB's reputation as a credible evaluator of environmental impacts of energy projects has become too affected by regulatory capture to allow it to carry out EAs effectively and objectively. Furthermore, even if the problem of regulatory capture and other credibility and trust issues are resolved, NCC believes that the task of conducting EAs is best left to an agency whose primary focus is the assessment of environmental impacts – either CEAA or another body specialized in environmental assessment.

NEB's mandate should be expanded as appropriate to track and facilitate development of new and evolving energy sources

As Canada takes steps to encourage a clean energy future, in recognition of the realities of a world evolving toward decarbonization, the NEB will naturally need to evolve from an agency concerned primarily with pipelines and power lines to one concerned with a variety of earth-friendlier sources of energy. With this in mind, NCC recommends that the NEB's mandate be expanded, as appropriate, to keep pace with the expansion of emerging sources of energy. At a minimum, this should include staying abreast of developments and ensuring that the public has up-to-date information on renewable energy and energy efficiency.

Another reason why the NEB should be mandated to track and monitor new and evolving energy sources is that it will better equip the NEB to compare proposed energy infrastructure projects to renewable alternatives -- something NCC also recommends.

The evolving and new energy sources that a revamped NEB should track and report on include, but are not limited to, the following:

[4] 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

- Energy efficiency advances (technology and best practices);
- Effective and ambitious transition to a low carbon economy (via environmentally sound technologies and practices; steadily replacing carbon intensive energy sources with low-carbon sources, etc.); and
- Emerging offshore renewables such as wind and tidal power.

Special comments on emerging offshore renewables

NCC wishes to underscore the importance of early and fulsome consultation in the event that the NEB's mandate is expanded to include emerging offshore renewables. Holding conversations with NCC at the earliest stage of discussions about such projects is critical in light of the great importance that the coast holds for our communities and way of life in NunatuKavut.[5]

Today, the communities making up NunatuKavut are centered primarily along the Atlantic coast, from Cartwright in the north, to Henley Harbour in the south (near Chateau Bay, a historically significant location for the people of NunatuKavut). In addition to Cartwright and Henley Harbour, the other communities key to NunatuKavut today include Lodge Bay, Mary's Harbour, St. Lewis, Port Hope Simpson, Charlottetown, Williams Harbour, Norman's Bay, Pinsent's Arm, Black Tickle and Happy Valley-Goose Bay, although it must be mentioned that there are also some NunatuKavut members who reside in Labrador west and the Labrador straits region.

Coastal waters provide essential links between our communities and in many ways, are more important to our movements between communities, and to and from harvesting areas, than roadways. Most of NunatuKavut's people follow at least some of the most important traditions of our ancestors, including the seasonal harvesting of small and large game, seals, fish, birds and waterfowl along the coast.[6] Thus safe navigation to harvesting areas is essential, as is preservation of the coastal habitat of the animals we harvest. Coastal waters are absolutely central to our way of life today, as they always have been.

In light of the above, NCC urges great care with respect to all energy project development in and near the coast of Labrador. People in NunatuKavut have already witnessed inexplicable new phenomena occurring around the time of seismic testing during oil and gas exploration off the coast (e.g., pilot whale frenzy and large numbers of seals washing up dead ashore). Situations like this, which saw a complete lack of consultation, must not be repeated for offshore renewable projects or any other projects. Again, earliest possible consultation with NCC is essential to the effective respect of our indigenous rights and interests.

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[5] Mitchell, Gregory E. *An Inventory of Studies on Land and Sea Uses in NunatuKavut since 1979*, September 2013, unpublished, available from NCC ("Mitchell report"). This comprehensive survey, prepared for NCC, provides an excellent source of written information concerning the essential role that the Atlantic coast plays in the life of most inhabitants of NunatuKavut today.

[6] Mitchell report, *supra*, pages 13 and 36.

Decision-making roles

Indigenous Traditional Knowledge must play an essential and serious role in all NEB activities affecting IGs

This rule should apply not only to consultations and hearings on project applications, but also to construction, operation, monitoring, development of emergency response plans, enforcement, abandonment and any non-project-specific activities of the NEB that potentially affect indigenous rights and interests.

Power lines: ensure respect of indigenous rights and interests

"Construction and operation of international power lines and designated interprovincial power lines under federal jurisdiction" is a key regulatory subject matter for the NEB. As such, potential impacts on IGs of power line projects must be examined with great care, and consultations must be carried out that are in good faith, comprehensive and meaningful. Furthermore, electric power lines may play a larger role as Canada decarbonizes and this provides added impetus to the need for full consideration of impacts to IGs.

NCC's experience with an intra-provincial transmission line illustrates the kinds of problems that can arise when evaluations of transmission projects do not sufficiently include IGs as partners in evaluation of impacts. The evaluation of Labrador-Island Transmission Link Project (LITL) electricity transmission project, was carried out not under NEB authority but rather under the authority of the CEAA,[7] which prepared a Comprehensive Study Report[8] that included a technical review of Nalcor's Environmental Impact Statement, as well as input from the public. While the CEAA Comprehensive Study Report was fairly thorough, the handling of the study report findings by the federal Minister of Environment[9] and subsequent decision by the "Responsible Authorities" (with the approval of Governor-in-Council),[10] provide an example of how *not* to handle the review and approval of power line projects. (The "Responsible Authorities" for this project review were Fisheries and Oceans Canada, Transport Canada, Natural Resources Canada, and Public Works and Government Services Canada"). We

[7] In addition to federal review by CEAA, the project was also the subject of a provincial environmental review by the government of Newfoundland and Labrador: See e.g., Nalcor, [press release] "Nalcor Energy receives provincial release from Environmental Assessment for Labrador-Island Transmission Link," June 21, 2013, available online at: https://nalcorenergy.com/wp-content/uploads/2016/12/NR_Lab-Island-Link-Provincial-EA-Release_21Jun2013.pdf.
[8] CEAA, *Labrador-Island Transmission Link, Comprehensive Study Report*, June 2013, available online at: http://www.ceaa-acee.gc.ca/050/documents/p51746/90383E.pdf.
[9] CEAA, "Environmental Assessment Decision Statement, Labrador-Island Transmission Link Project, Newfoundland and Labrador" Government of Canada, September 8, 2013, available online at: http://www.ceaa.gc.ca/050/document-eng.cfm?document=96154.
[10] CEAA, "Decision of Responsible Authorities, Labrador-Island Transmission Link Project," Government of Canada (undated but last modified on November 26, 2013), available online at: http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=96186.

encourage the NEB Modernization Expert Panel to look at what happened with that review and decision, and draw lessons from it. For sake of convenience, we summarize the project in briefest terms below, and comment on NCC's experience with that process.

The LITL project, proposed by Nalcor Energy, involves the construction and operation of a transmission line approximately 1,100 km long, as well as associated infrastructure within and between Labrador and the Island of Newfoundland. The overhead transmission line will ultimately stretch from a converter station at Muskrat Falls in central Labrador to the Strait of Belle Isle, then cross the strait by way of submarine cables, proceed across Newfoundland, and end at a converter station at Soldiers Pond on the Island's Avalon Peninsula.[11] The path of the transmission line in Labrador runs about 400 kilometers from Muskrat falls southeast to the Strait,[12] all of it within NunatuKavut. In March 2017, Nalcor reported that the right-of-way (ROW) clearing and access road construction for LITL had been completed, along with erection of transmission towers and 65% of the lines strung.[13]

The LITL project evaluation was handled so poorly that NCC ultimately withdrew from the review, on the belief that it was no longer productive to remain involved in an ill-conceived, and poorly executed evaluation.[14] Some of the specific problems experienced by NCC in relation to this project review include:

- Project was approved[15] despite CEAA's EA study findings of adverse impacts on indigenous harvesting rights, adverse impacts on the Red Wine Mountains herd of woodland caribou;[16]
- Poor communication with NCC despite the fact that it was the IG most seriously and directly affected by the project;[17]
- ITK was neither recognized nor incorporated in LITL process;
- Lack of resources to allow fulsome participation by NCC; and

[11] CEAA, "Notice of Commencement of an Environmental Assessment, Labrador-Island Transmission Link Project" November 26, 2009 (updated July 24, 2013), Government of Canada, available online at: http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80048.
[12] Nalcor, *Labrador-Island Transmission Link, Environmental Impact Statement, Plain Language Summary*, April 13, 2012, p. 6 available online at: http://ceaa-acee.gc.ca/050/documents/55165/55165E.pdf.
[13] Nalcor, [Press release] "Clearing the way for Labrador – Island Transmission Link Construction" March 20, 2017, available online at: https://muskratfalls.nalcorenergy.com/newsroom/. The Labrador segment ROW was completed in January 2016, and the segment on the Island was completed in March 2017.
[14] NCC, [Press Release] "Transmission Link Environmental Assessment Prejudicial: NunatuKavut Withdraws", May 22, 2013. Available online at: http://www.nunatukavut.ca/home/273.
[15] *Supra*, note 9.
[16] CEAA, *Labrador-Island Transmission Link, Comprehensive Study Report*, June 2013, p. 17, available online at: http://www.ceaa-acee.gc.ca/050/documents/p51746/90383E.pdf.
[17] NCC, (Press release) "NCC Says Decision to Release Transmission Link from Environmental Assessment a Slap in the Face," November 28, 2013, available online at: http://www.nunatukavut.ca/home/261.

- Unrealistic and workable timeframes for meaningful participation by NCC.

Additionally, NCC wishes to raise the issue of cumulative effects and the problem of project splitting in relation to the LITL project.[18] It is common sense that the Muskrat Falls Hydro Project, the Labrador-Island Transmission Link and the Maritime Link projects are inextricably linked, and therefore their effects should have been evaluated together.

The LITL, for example, is useless without the generating and converter stations at Muskrat Falls, yet the federal government allowed splitting of the project into two completely separate and distinct environmental assessments. Project splitting in this manner results in decision makers losing sight of potential impacts that may arise from cumulative impacts of two or more parts or segments of a project. As such, NCC strongly recommends that the NEB evaluate interrelated projects in the contest of the same process, even at the needs test stage of evaluation.[19]

Pipelines: ensure respect of indigenous rights and interests

Although NCC has not had direct experience to date with pipeline issues, we support the call of IGs across Canada calling for proper and meaningful consultation and improved measures for participation.

Pipeline projects like Energy East, Enbridge Lines 9 and 3, and the Trans Mountain Expansion, to name a few, have posed numerous and varied potential impacts, yet consultation and evaluation have been deficient. While other IGs more directly involved with pipeline issues have likely spoken to the Expert Panel about some or all of these projects, NCC wishes to state that issues such as the following must be addressed fully in relation to any pipeline projects that may potential affect IGs:

- Duty to consult not respected nor fulfilled, problems arose with delegation of duty to consult to proponents;
- Lack of recognition, respect for treaty rights;
- Insufficient funding for hire of experts and legal counsel;
- Short timeframes don't respect indigenous consultation protocols; and
- Insufficient integration of ITK.

[18] For greater detail on this issue, we refer the Expert Panel to our written submission to the EA Review Process Expert Panel. We discuss this specific issue in section 5.5 of that submission.
[19] Obviously, we suggest this approach also for the EA phase, but given that we are recommending that EA be moved outside the NEB, the focus of our comments here is on that part of project approval which the NEB would retain – namely, the needs test.

NEB Governance

In addition to the issue of shifting responsibility for EAs from the NEB to CEAA or some other body specialized in conducting environmental evaluations, as discussed above, NCC offers two other suggestions for improving the NEB's functioning in relation to IGs and the public in general.

Improve diversity in the Board's composition and indigenous expertise

We are pleased that the Minister's mandate letter directs the Minister to ensure that the NEB includes those with expertise in fields such as ITK, environmental science and community development, and we hope all efforts will be made to improve the Board's composition. We applaud the appointment of Wilma Jacknife, of Cold Lake First Nations (Alberta) as Temporary Member of NEB as a helpful first step.[20]

In addition to expanding indigenous representation, we recommend favouring the appointment of members and staff with backgrounds in indigenous rights and interests, not just ITK. NCC also believes it would be preferable to eliminate the residency requirement for NEB members, in that Calgary area appointments seem to feed the regulatory capture problem.

Make conflict-of-interest rules air-tight, end "revolving door" appointments

The well-known and serious problems that arose with the Energy East project make clear that a host of new measures must be implemented to ensure that conflict-of-interest problems do not happen again. Otherwise, NEB credibility risks being harmed beyond repair.

Additionally, in light of what happened in Energy East, we recommend that recusal measures be tightened to prevent situations such as when Board members choose panels, sit on panels or otherwise influence panel work even though they had recently worked for a firm connected with a project under review or for a company whose project is under review.

Public Participation

Tight and inflexible timelines for participation in hearings happen to the detriment of IGs compared to proponents, who have larger capacity. For NCC, this situation arose during the environmental assessments for Muskrat Falls and Labrador-Island Transmission Link, in which NCC was given inadequate time, while the proponents were afforded ample time.

[20] Jesse Cole, "CLFN woman appointed to National Energy Board," Cold Lake Sun, November 2, 2016, available online at http://www.coldlakesun.com/2016/11/02/clfn-woman-appointed-to-national-energy-board.

Full indigenous participation requires meaningful, public consultation, ITK input, and in the context of hearings, access to adequate levels of intervenor funding. Adequate funding is essential for IGs to meaningfully participate and to hire high-quality expert and legal assistance.

NCC wishes to point out that the current participation funding model used for indigenous engagement in the context of project approval processes is not working for IGs. Participation funding is both inadequate to allow meaningful participation in the process, and is too limited in the scope of what it allows IGs to do. IGs are often forced to rely on proponent funding to enable participation in the process, and the NEB has done little to ensure that funding provides adequate capacity.

Conclusion and Recommendations

NCC offers the following preliminary recommendations at this stage, prior to consultation:

- Adopt a Nation-to-Nation approach to review of projects affecting Indigenous Groups.
- Ensure respect of indigenous rights and interests on all power line and pipeline projects.
- Add a "Purposes" clause to the NEB Act, similar to that in CEAA 2012, but ensure recognition of the duty to consult and accommodate indigenous peoples.
- Make consideration of potential impacts of projects on indigenous rights and interests mandatory by amending the needs test provisions in the NEB Act accordingly.
- Ensure that "indigenous rights and interests" are not subsumed in any new definition of "public interest" in the NEB Act: ensure that "indigenous rights and interests" are mentioned separately wherever necessary to protect such rights and interests.
- Remove EAs from the NEB's mandate and transfer to the CEAA or a new environmental assessment body specialized in environmental assessments.
- If EAs are removed from the NEB, ensure that the duty to consult does not fall between the cracks with respect to the parts of process remaining with the NEB, such as the needs test or final decision or recommendation.
- Expand the NEB's mandate to allow it to track and monitor new and evolving energy sources, and require it to compare proposed projects to renewable alternatives.
- Improve communication with NCC on any and all offshore energy projects under the NEB's purview and ensure early and fulsome consultation.
- Avoid project splitting: evaluate closely related projects together, in the same hearing.

- Improve the extent to which Indigenous Traditional Knowledge is utilized in NEB decision making on projects and activities affecting IGs.
- Expand indigenous representation on the Board, and also make knowledge of indigenous rights and interests, as well as ITK, a priority for all NEB appointments.
- Make conflict-of-interest rules air-tight, and end “revolving door” appointments.
- Expand funding to indigenous groups for hearings and consultations.

In closing, the NunatuKavut Community Council wishes to express its sincere thanks for the opportunity to provide input to the NEB Modernization Expert Panel.