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Chair of the Expert Panel for the Review of the Environmental Assessment Process
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Mme. Gélinas,

Thank you for the opportunity to make this submission to the Expert Panel for the Review of the federal Environmental Assessment Process. We very much appreciated the discussion with the Panel in Goose Bay in early October. This letter and the attached report form our submission to the Expert Panel, in addition to the materials filed earlier with our presentations of October 7, 2016.

Innu Nation, is a provincially incorporated not-for-profit corporation with its head office in Sheshatshiu, 25 kilometres northeast of Happy Valley – Goose Bay and adjacent to the mouth of the Naskapi River. Innu Nation represents the Sheshatshiu Innu First Nation and the Mushuau Innu First Nation in matters related to resource developments subject to federal environmental assessment under the *Canadian Environmental Assessment Act, 2012* and predecessor environmental assessment legislation (*CEAA*), including energy, electricity transmission and mining projects.

Sheshatshiu Innu First Nation and Mushuau Innu First Nation were recognized as bands under the Indian Act in 2002. The SIFN has approximately 1700 members, with approximately 1500 living on reserve in Sheshatshiu. MIFN has approximately 1100 members of which over 900 live on the reserve located in Natuashish on the north coast of Labrador. The First Nations are responsible for primary and secondary education, health and social services, housing and infrastructure, government finance, economic development, public services and recreation.

Innu Nation asserts and holds Aboriginal rights, including title, in and to the lands and resources in much of what is now Labrador, as well as in parts of Québec. Innu Nation, Canada and the Province signed a Land Claims and Self-Government Agreement in Principle in November 2011 in relation to Innu rights in Labrador. These parties are currently negotiating the terms of a final comprehensive Land Claims and Self-Government Agreement. This Final Agreement, if ratified, will include environmental assessment provisions that will:

(a) recognize the right of the Innu Government to require environmental assessments of projects on or partly on Innu lands (called Labrador Innu Lands) under Innu Law;

(b) provide treaty rights for the Innu Government regarding participation in federally and provincially required environmental assessments for projects in Labrador Innu Lands;

(c) provide other treaty rights for the Innu Government regarding participation in federal and provincial environmental assessments for projects in the Labrador Innu Settlement Area (a larger area than Labrador Innu Lands) outside of Labrador Innu Lands or for projects outside of that Settlement Area which could affect treaty rights in that Settlement Area; and

(d) allow for harmonization between Innu Law and provincial and federal legislation regarding environmental assessments for projects on or partly on Labrador Innu Lands.

Innu Nation and the First Nations have considerable experience with the federal environmental assessment process. The Mushuau and Sheshatshiu Innu First Nations participated actively in the joint panel review environmental assessment process for the Voisey's Bay Mine and Mill Project in the late 1990s. More recently, the First Nations participated in the joint panel review process for the Lower Churchill Hydroelectric Generation Project, as well as the comprehensive study environmental assessment of the Labrador Island Transmission Link Project. Innu Nation represented and coordinated participation by the First Nations in these environmental assessments. In addition, Innu Nation on behalf of the First Nations has recently participated (or is participating) in several environmental assessments of proposed mining developments in western Labrador, including the Kami Iron Ore Project, the Howse Property Iron Mine Project, and the Joyce Lake Direct Shipping Iron Ore Project.

Our written submission to the Expert Panel, attached below, focuses on our experiences with the federal environmental assessment process, and is organized based on the suggested themes contained on the Expert Panel website.

Innu Nation awaits the report of the Expert Panel and to participating in future dialogue with the federal government concerning the matters discussed in our report.

Sincerely,

[Signature redacted]

Paula Reid
Environmental Analyst

cc: Grand Chief Anastasia Qupee
Sheshatshiu and Mushuau Innu First Nation Chiefs

1 ENVIRONMENTAL ASSESSMENT IN CONTEXT

1.1 A narrow focus on significance

In its Choicebook, the Expert Panel notes that environmental assessment can be designed to achieve different goals:

- **Public interest:** the focus is on balancing society's changing economic, environmental and social interests and values, even when an activity could result in negative effects on the environment. This means being aware of the trade-offs that exist in any decision.
- **Sustainability:** the focus is on ensuring the activity delivers lasting gains and shared benefits today, and does not prevent future generations from meeting their own needs. This means building economies, societies and relations with the environment that are mutually enhancing and reinforcing.
- **Significant negative environmental effects:** the focus is on identifying and mitigating significant negative environmental effects likely to result from an activity. This means that the goal is to reduce an activity's negative effects on the environment.

Federal environmental assessment currently focuses on identifying and mitigating significant adverse environmental effects likely to result from a project or activity. This approach has numerous limitations:

- It does not adequately reflect Indigenous perspectives on significance, particularly in relation to current use of lands and resources for traditional purposes, impacts on Aboriginal and treaty rights, and socio-economic effects on Indigenous people;
- Significance determinations are made initially by the proponent and, not surprisingly, almost no proponent concludes that its project has significant adverse environmental effects,[1] an outcome that might be referred to as "insignificance by design"; and
- Where a determination of significant adverse environmental effects is made (almost always by a review panel), the federal Minister or Cabinet makes a final determination as to whether in its view a project has significant adverse environmental effects[2] in a process that lacks transparency or any meaningful role for First Nations.

Notwithstanding the emphasis on avoiding significant adverse environmental effects, the *Canadian Environment Assessment Act* also contains what can best be described as a public interest test respecting the justification of those effects.[3] However, unlike the determination of significant adverse environmental effects (notwithstanding its inadequacies), which is informed by policy and environmental impact statement guidelines, the process for justification occurs in what can best be described as an information, consultation and reconciliation vacuum. This results, in part, from the narrow focus of the current *Act*, which excludes requirements for the

[1] A comprehensive review of the CEA Registry indicates only a single instance, the Site C Clean Energy Project, where a proponent determined its project would likely have significant adverse environmental effects. (http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=85328)
[2] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52(1)
[3] Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52(1)

assessment of socioeconomic effects, economic effects, need and alternatives, and impacts to Aboriginal and treaty rights among other information critical to a justification decision. It also results from an insular government decision-making process that has yet to incorporate a meaningful role (or any role at all, in most instances) for Indigenous Nations in decision-making.

Too often, and in the absence of adequate information pertaining to Indigenous interests and an adequate role for Indigenous peoples, the result of the federal Crown's public interest justification process is that trade-offs are consistently made in favour of broader societal interests at the expense of Indigenous rights and interests.

This imbalance results from the starting position that all economic development – regardless of the risks entailed, the certainty of benefits, or the merits of purported need – is assumed to be inherently desirable, and so the onus falls to those concerned about potentially adverse environmental effects, negative socio-economic outcomes or impacts to Aboriginal and treaty rights to present countervailing arguments. In reality, economic development often serves to provide substantial benefits to a few stakeholders – including shareholders, established businesses and qualified workers with specialized training – with marginal to modest benefits to others who bear the entirety of the adverse effects, negative outcomes and impacts.

In short, the federal Crown's justification and decision-making process is designed neither for environmental, social or economic sustainability nor for reconciliation with Indigenous peoples. And so, the question arises as to how an environmental assessment, decision-making and approvals process might be designed differently for sustainability and reconciliation.

1.2 Designing for sustainability

The Expert Panel has received several submissions respecting sustainability assessment,[4] and such approaches to environmental assessment have been undertaken for some proposed developments. The framework used for the Lower Churchill Hydroelectric Generation Project is summarized below.

- Lower Churchill Hydroelectric Generation Project – Sustainability Framework[5]
    - **Ecological Effects, Benefit, Risks and Uncertainties**. Are biophysical systems adequately protected throughout all phases of development, construction, operation, and decommissioning of the Project?
    - **Economic Effects, Benefit, Risks and Uncertainties**. Does the Project provide net economic benefits to the people in the area surrounding the Project, in the province, and in Canada?

[4] Gibson, Robert B. and Doelle, Meinhard and Sinclair, A. John, Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment (July 20, 2015). *Journal of Environmental Law & Practice*, Forthcoming; Winfield, M. 2016. Better Decisions Regarding Infrastructure and Resource Development Projects.

[5] Lower Churchill Hydroelectric Generation Project Joint Review Panel. 2011. Lower Churchill Hydroelectric Generation Project Joint Review Panel Report, at pp.352-355, available at: http://www.ceaa-acee.gc.ca/052/details-eng.cfm?pid=26178.

- **Social and Cultural Effects, Benefit, Risks and Uncertainties**. Does the Project contribute to community and social well being of all potentially affected people? Is it compatible with their cultural interests and aspirations?
- **Fair Distribution of Effects, Risks and Uncertainties**. Are the effects, risks, and uncertainties fairly distributed among potentially affected individuals, communities, regions and other interests?
- **Present versus Future Generations**. Does the Project succeed in providing economic and social benefits now without compromising the ability of future generations to benefit from the environment and natural resources in areas potentially affected by the Project?
- **Integration**. Are all principles of sustainability applied together, seeking mutually supportive benefits and multiple gains?

The approach advocated by the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project also included a number of principles to guide decision-makers, including: maximizing net gains, avoiding significant adverse environmental effects, intergenerational and interregional fairness, and explicit and transparent justification.[6]

While the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project utilized the above framework, such an approach was not a requirement in the legislation at the time of the assessment, and the extent to which the framework was used by decision-makers when justifying the significant adverse environmental effects of the project is unknown. In general, a sustainability framework for environmental assessment would rebalance the consideration of development in Canada by according to the environment and to human societies similar priority consideration to that currently accorded to the economy. The objectives of using this framework would be to deliver lasting improvements in wellbeing, and fairer distribution of benefits, while avoiding adverse environmental effects.

However, what remains to be developed is a framework for federal EA processes that clearly demonstrates that the EA process and the projects it approves are contributing to reconciliation with Indigenous people.

1.3 Designing for sustainability *and* reconciliation

Incorporating reconciliation into sustainability assessment

The Truth and Reconciliation Commission (TRC) defines reconciliation as:

> "**an ongoing process of establishing and maintain respectful relationships**. A critical part of this process involves repairing damaged trust …. and following through with concrete actions that demonstrate real societal change. **Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions**…."(emphasis added) [7]

[6] The complete framework is available in the Lower Churchill Hydroelectric Generation Project Joint Review Panel Report, at pp.352-355.

[7] The Truth and Reconciliation Commission of Canada. 2015. *Honouring the Truth, Reconciling for the Future*: *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, at pp. 16-17.

The federal government's guidance to federal officials defines reconciliation as follows:

> The Crown's efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation.
>
> Reconciliation has two main objectives: 1) the reconciliation between the Crown and Aboriginal peoples and; 2) the reconciliation by the Crown of Aboriginal and other societal interests. Consultation and accommodation play a key role in the fulfillment of these two objectives.[8]

To be most effective and acceptable for Indigenous groups in Canada, sustainability assessment must embrace reconciliation with Indigenous peoples as a central principle. As detailed below, in order to give effect to the United Nations Declaration on the Rights of Indigenous People (the *Declaration*), and consistent with the TRC's calls to action, we suggest that**, federal environmental assessment legislation must, for projects that will or could seriously impact Indigenous Nations' Aboriginal or treaty rights or interests, require consent before environmental assessment approval is provided pursuant to a required assessment of whether and how the project could help further the object of reconciliation with those Indigenous Nations.**

We use the term "interests" here and throughout these submissions to refer to the matters set out in section 5(1)(c)(i)-(iv) of the current *Act*, namely **(i)** health and socio-economic conditions, **(ii)** physical and cultural heritage, **(iii)** the current use of lands and resources for traditional purposes, and **(iv)** any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. We propose additional amendments to these clauses below to address a broader set of socio-economic and cultural considerations.

This would require proponents and Canada to turn their minds to ways in which a project could proceed in a way that actually *builds* respectful relationships that seek to right historic wrongs with Indigenous Nations.

Evaluating impacts to Aboriginal and treaty rights and interests

Such an approach raises several new challenges and opportunities, of which only a few can be explored in this submission. Foremost, criteria must be developed within CEA Agency policy for evaluating the level or seriousness of an adverse impact caused directly or indirectly by a project or activity on the Aboriginal and treaty rights and interests of an Indigenous Nation or its members, resulting from – but not solely from – adverse environmental effects.

Initial criteria for consideration by the Expert Panel and by the Agency in the development of appropriate policy guidance are as follows:

(a) **Historical and contemporary context**. The historical context is essential to understanding the seriousness of the impacts to Aboriginal and treaty rights and interests from a current decision. The traditional territories of Indigenous peoples are inherently limited by access and proximity, making all territory valuable. Any

[8] Government of Canada. 2011. Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, at p.6.

new impact must be viewed in the context of lands historically or currently taken up for other projects or activities.

(b) **Importance of land and resource use.** The importance of a particular land or resource use must be evaluated in order to determine the seriousness of any potential adverse impact on that use. The importance of a particular use is related to the assessment of the seriousness of any impact on that use. A potentially severe impact on a relatively unimportant, passing use, for example, may not result in a serious adverse impact on final analysis. Conversely, what might appear to be a minor impact may be quite serious if the affected use is of high importance to the First Nation users.

(c) **Importance of the landscape or area.** The importance of the particular landscape or area within which an adverse impact may occur must be assessed in relation to the Indigenous land users who make use of the landscape or area, or who rely on that landscape or area to support specific species of importance. Generally, the more important the area or landscape is to the users, the higher the degree of seriousness of the impact.

(d) **Multiplicity of practical uses.** The level of impact needs to be evaluated in terms of the number of different practical uses to which a particular area or resource is put by the Indigenous users. An impact that affects multiple uses will generally be more severe than one that affects a single practical use.

(e) **Multiplicity of cultural uses.** The level of impact needs to be based upon the number of different cultural uses assigned to the land or resources by the Indigenous users themselves. An impact that affects multiple cultural uses will generally be viewed as more severe than one that affects a single cultural use.

Protection of tangible and intangible cultural heritage

The current *CEAA 2012* requires assessment of effects on physical and cultural heritage as part of the EA process. While that goes some way towards reflecting the *Declaration's* principles, it does not go far enough.

The culture and *innu aimun* language of the Innu Nation is intertwined with our environment. The *Declaration* includes several rights important to the protection of culture and language and the importance of spiritual connection to the land. This "intangible cultural heritage" includes:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.[9]

[9] UNESCO. 2003. Convention for the Safeguarding of the Intangible Heritage Resource, Article 2.

Intangible culture heritage is distinct from tangible cultural heritage resources, or the "stones and bones" typically protected under provincial heritage or historic resources legislation. Innu Nation has already completed a process of speaking with our elders to prepare a draft report identifying places of Innu cultural significance throughout Labrador. Whether or not all such places that we have identified would meet a legislative test of being significant cultural heritage areas requiring protection would of course take time and resources, but such work should be done, not just for our people but to educate Canadians and others about the cultural heritage of the Indigenous Nations in what is now Canada.

In order to ensure that proposed development does not permanently damage or destroy a location or practice of significant cultural heritage importance to an Indigenous Nation, **revised federal environmental assessment legislation needs to incorporate provisions to ensure that significant intangible cultural heritage of importance to Indigenous Nations be protected from development, as well as tangible heritage resources.** Appropriate policy will also need to be developed to support such a change.

The legislation must also build in protections to prevent such heritage resources from being misused in a way that could lead to damage or disrespect by those other than developers. No one would think of allowing development that would destroy significant tangible cultural heritage resources such as ancient ruins or historic forts. Our cultural heritage sites are not the Eiffel Tower or the Taj Mahal, but they are nonetheless significant cultural resources that require preservation.

Adopting a framework for justification of impacts to Aboriginal and treaty rights

Having determined the seriousness of the adverse impact on Indigenous rights, any proposed Crown decision that contemplates a serious impact, including but not limited to a potential infringement, on Aboriginal or treaty rights must provide adequate justification. Some of the elements of justification were initially established in *Sparrow* and subsequently expanded upon in other decisions by the Supreme Court of Canada and especially the *Tsilhqot'in* case.

Currently, there is no structure in federal environmental assessment that allows for either appropriate data collection or meaningful consultation between the Crown and Indigenous Nations to address the elements of justification outlined in *Sparrow* and other Supreme Court decisions.

Revised legislation must include a requirement that prior to an authorization for a project being made under the *CEAA* or under a related Act, where there is the potential for infringement, the Crown must provide written evidence documenting how the potential infringement is to be justified, with reference to the common law and the requirements under the *Declaration*. This should include, among other matters, a consideration of the priority given to the Aboriginal and treaty rights potentially affected and whether the potential infringement will deprive future generations of the benefit of the right.

Consistent with the TRC's definition of reconciliation, in keeping with the *Declaration*, and as part of the important Canadian project of reconciliation, Canada's new environmental assessment legislation must develop processes that facilitate Indigenous Nations' capacity to

self-govern through indigenous decision-making institutions as addressed in Article 18 of the *Declaration*.

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. [10]

With this in mind, revised federal legislation must include a process between the governing bodies of Indigenous Nations and the decision-makers within Canada's government, when it comes to assessing the "public good" of a project that has the potential to cause serious adverse impacts to Aboriginal and treaty rights and interests. In order to have the respectful relationships necessary for the ongoing project of reconciliation, and to reflect the principle of free, prior and informed consent[11] found in the *Declaration,* Indigenous Nations need to be partners with Canada in the environmental assessment, decision-making and approvals process for such projects. Indigenous Nations can and should participate with Canada in a consensus-building process as to whether such a project's adverse environmental and socio-economic effects are significant, whether its impacts to Aboriginal and treaty rights and interests are serious, and whether its benefits are accessible and meaningful to affected Indigenous groups. A properly-designed framework for sustainability assessment would support the gathering and assessment of this broader scope of information. It would also speak to Article 3 of the *Declaration*:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[12]

Assessment of benefits to the Indigenous Nations

As noted, one of the considerations for whether reconciliation has occurred under a sustainability model will be whether there is a fair sharing of the economic benefits of a proposed project, or appropriate compensation for risks (both direct and indirect) to Indigenous Nations. Even where there may be a lower probability of an event occurring that would have a low to medium impact on the Indigenous Nation, this is still significant in that it represents a cost that is being externalized from the Crown or proponent onto the Indigenous Nation. Sustainability means that proponents should be required to pay the full costs of their projects.

Environmental assessment co-management agreements

The development and implementation of co-management agreements with Indigenous Nations, where such agreements do not already exist, must be central to the implementation of any new environmental assessment regime that aims to renew its relationship with Indigenous people and to move toward reconciliation. Such agreements would be similar in kind to the environmental assessment harmonization agreements in place between Canada and some

[10] United Nations Declaration on the Rights of Indigenous Peoples, Article 18.
[11] The understanding of consent implies the potential for granting as well as withholding consent.
[12] United Nations Declaration on the Rights of Indigenous Peoples, Article 3.

Provinces. The Innu Nation has already concluded in its Agreement in Principle provisions allowing for harmonization of its EA processes under its own environmental assessment law (which under the treaty, if concluded, would be recognized by Canada and the Province of Newfoundland and Labrador). If this harmonization is not done through a modern land claims or self-government agreement, it could also be done through agreements reached with regional groups at the level of either tribal councils or other regional Indigenous organizations.

The approach to co-management should begin on a priority basis in regions where there is already considerable development, and the Mishta-shipu (Churchill River) watershed is a good example of such a region.

1.4 Recommendations

In summary, we recommend the following:

1. **Adopt a sustainability assessment approach.**
2. **Include "contribution to reconciliation" as a central criterion in the sustainability assessment framework.**
3. **Develop CEA Agency policy for evaluating the seriousness of impacts to Aboriginal and treaty rights and interests.**
4. **Revise the protection of cultural heritage under the *CEAA* to clarify that it includes both tangible and intangible cultural heritage, and develop appropriate policy to support such a change.**
5. **Adopt a transparent justification framework for assessment of acceptability of impacts on Aboriginal and treaty rights.**
6. **Assess the benefits of projects to Indigenous Nations as part of the sustainability assessment.**
7. **Develop and implement environmental assessment co-management agreements between Canada and Indigenous Nations.**

2 OVERARCHING INDIGENOUS CONSIDERATIONS

2.1 United Nations Declaration on the Rights of Indigenous Peoples

Free, Prior and Informed Consent

The *Declaration* states in the Preamble that the United Nations were: "[c]oncerned that [I]ndigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

The Innu people that Innu Nation represents have used and occupied what is now Labrador and parts of Quebec since time immemorial. Our connection to the land and our Indigenous laws that govern the land and resources require recognition by Canada. We see an opportunity under a revised *CEAA* to recognize Indigenous laws and decision-making as the instruments and forums where free, prior and informed consent and accommodations are best achieved.

Innu Nation's own unwritten laws about how proponents, Canada and the Province need to respect our land and consult with us and conclude agreements with us for a project they are interested in proceeding with in our territory is the way in which free, prior, and informed consent (FPIC) can be implemented.

Innu Nation has participated in numerous environmental assessments in Nitassinan. Alongside of participating in those assessments, we have also negotiated numerous impact and benefit agreements (IBAs) with proponents of the Voisey's Bay Mine, the Lower Churchill Project, the Kami Iron Ore Project (though it has not yet been constructed), and the DSO project. Those IBAs were concluded and approved consistent with our own laws. We did consult with Canada (as well as the Province) through the environmental assessment processes under their legislation. However, that federal and provincial legislation did not assist us in meeting the standard of free, prior and informed consent, because Canada and the Province were unprepared under their laws to require the proponent to obtain our consent through the detailed provisions of consent that can be laid out in IBAs. Nor were these Crown representatives prepared to obtain our consent as laid out in the terms and conditions of environmental assessment approvals or through environmental accommodation agreements dealing with the post-approval permitting process. To this day, we still have not been able to conclude an environmental accommodation agreement with Canada and the Province in connection with permitting for the Lower Churchill Project, despite the fact that construction of the Muskrat Falls hydroelectric project is well under way.

The Nation to Nation relationship that Canada recognizes it must have with Indigenous peoples, including the Innu First Nations, if properly developed and implemented, is one of the critical foundations through which the *Declaration* can best be implemented. The CEA Agency and other federal departments working with the Innu First Nations now and in the future need to understand how our First Nations engage in decision-making respecting resource developments affecting Nitassinan.

Environmental Assessment harmonization involves the entire process, not only under federal and provincial legislation, but also under the collective decision-making process requirements of the Innu Nation in the exercise of our jurisdiction. We may, in future, exercise that jurisdiction under Innu environmental assessment laws recognized by Canada and the Province, if we conclude a Final Agreement under the comprehensive claims policy and self-government policy. At this time, however, we already exercise our jurisdiction under our own unwritten laws about consultation and consent in the face of major projects that could affect our land, as noted above.

The Special Rapporteur on Indigenous Peoples for the United Nations has written several reports that bear consideration in the development of new federal environmental assessment

legislation in Canada.[13] We believe these reports need to be considered by the Expert Panel because they build on the duty to consult, a duty now well recognized under Canadian law, in support of FPIC. In particular, this duty is referenced throughout the *Declaration* in relation to particular concerns (articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38), and it is affirmed as an overarching principle in Article 19, which provides as follows:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. [14]

FPIC is simply an extension of what the Canadian courts have already said about the duty to consult and accommodate, and provides a more specific framework for implementing those goals of reconciliation centred around six key principles: [15]

1. Freedom from force, intimidation, manipulation, coercion or pressure by a proponent [Freedom];
2. Mutual agreement on a process for consultation [Procedural Consensus];[16]
3. Robust and satisfactory engagement with the Indigenous group prior to approval [Robust Engagement];[17]
4. Sufficient and timely information exchange [Information and Understanding];[18]
5. Proper resourcing, both technical and financial, to allow the Indigenous group to meaningfully participate [Meaningful Participation];[19]
6. Shared objective of obtaining the reasonable consent of the Indigenous group [Objective of Consent].[20] This is an overarching objective that serves as a guide for the process as a whole.

In order to respect the principle of free, prior and informed consent contained in the *Declaration,* federal EA legislation must, for projects that could seriously impact Indigenous Nations' Aboriginal and treaty rights or interests, require consent before EA approval is provided. Such consent would be enabled through agreements between Indigenous Nations and the Crown, or proponents or both that provide for a significant and funded role for Indigenous Nations in consensus-building activities during the environmental assessment, decision-making and approvals process. **It would also be required that the Crown be able to**

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[13] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, General Assembly 64th Sess., UN Doc. A/64/338 (2009). Report of the Special Rapporteur on the rights of indigenous people, HRC, 27th Sess., UN Doc. A/HRC/27/52/Add.2 (2014)
[14] United Nations Declaration on the Rights of Indigenous Peoples, Article 19.
[15] Factum of the Intervenor, Inuvialuit Regional Corporation, Appeal of the *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, Supreme Court of Canada Docket 36692.
[16] UN Special Rapporteur on Indigenous Peoples 2009 report at para 51.
[17] UN Special Rapporteur on Indigenous Peoples 2013 report at para 67.
[18] *Ibid* at 65-66.
[19] UN Special Rapporteur on Indigenous Peoples 2009 report at para 47.
[20] *Ibid* at para 48.

demonstrate the explicit consent of the Indigenous Nation, which could be achieved through such agreements. Where the Indigenous Nation consents, reconciliation by the Crown of Indigenous and other societal interests would still be required to be considered.

These activities would aim to support the six principles noted above, including the objective of obtaining the Indigenous group's reasonable consent**:**

(a) designing and developing plans for consultation between the Crown and Indigenous Nations, including the delegation of consultation to proponents;

(b) determining the scope of the environmental assessment required, including any terms of reference for review panels;

(c) determining how indigenous traditional knowledge and scientific knowledge will be obtained, evaluated and used in the environmental assessment;

(d) developing environmental impact statement guidelines including: valued components, methods for the determination of significant adverse environmental effects, and methods for the determination of the seriousness of impacts to Aboriginal and treaty rights;

(e) determining the adequacy of the environmental impact statement;

(f) determining the terms and conditions for environmental assessment approvals;

(g) achieving consensus on the environmental assessment decision statement;

(h) designing the consultation and implementation process in relation to follow-up and monitoring programs; and

(i) designing the consultation process for permitting for projects that have an environmental assessment approval.

These agreements would be developed on a project-specific basis, under the broader framework of the environmental assessment co-management agreements recommended above. The relationship between these project-specific agreements and the co-management agreements would be similar to the relationship between project-specific federal-provincial joint review panel agreements and process-related environmental assessment harmonization agreements.

How Indigenous Nations and the Crown address and deal with proponents in the context of obtaining reasonable consent may vary across individual Indigenous Nations and projects, as is currently the case. Negotiated impact benefit agreements, equity participation agreements between proponents and institutions that represent the Indigenous Nations, or other contractual arrangements may be necessary or desirable depending on the particular situation, in order for the Indigenous Nation to be fully informed to freely provide its reasonable consent. The proposed process is designed to flexibly meet the needs of different Indigenous Nations, recognizing that patterns of negotiations and consultation are already established. What is central is the shared objective of obtaining the reasonable consent of the Indigenous group.

This approach necessarily means that revised federal environmental assessment legislation will be required to re-orient some of the decision-making authority to Indigenous Nations. The Nation to Nation arrangement is supported by the *Declaration*, and it is the Indigenous Nations

that should also hold jurisdiction to consent to projects within their territories that will or could seriously affect their Aboriginal and treaty rights or interests.

Innu Nation believes this approach reflects a practical and workable implementation of the FPIC principles in the context of the environmental assessment, decision-making and approvals process.

Addressing concerns respecting an Indigenous "veto"

By amending federal environmental assessment legislation to allow for the approach set out above, rather than leading to an exercise of a veto power, this approach will instead assist in reforming the environmental assessment process to build credibility and legitimacy with Indigenous Nations. **The goal of obtaining reasonable consent does not create a veto**. What it does is create a situation in which all the parties – Crown, industry, and Indigenous Nations – are working toward the same goal – that of securing the reasonable consent (or withholding of consent) of an Indigenous community. Indigenous Nations will not have a veto, but they must have the ability to say "no" during the EA process, and we suggest below a process to test the reasonableness of that consent.

Assessing the reasonableness of the consent of the Indigenous Nation in the context of a specific project would be informed by the sustainability and reconciliation approach to environmental assessment outlined above. The analysis of the reasonableness of consent must consider the reasonableness of the net benefits and impacts to the Indigenous Nations. Is it reasonable to ask a First Nation to take on highly likely and/or highly consequential risks for a project whose benefits are speculative and/or unequally distributed to a small segment of society? No longer can the starting assumption be that any Crown or industry project is worthwhile and necessary simply because it holds some speculative probability of future economic benefits to a small group of people. This does not mean that those types of projects can never go ahead or that there is a veto, only that where the need for a project is uncertain or its benefits modest or accruing to a limited few, this will create a higher threshold on the proponent and/or the Crown to secure the reasonable consent of the First Nations. It may also mean that there will be a lower threshold for First Nations to reasonably refuse consent to a project if, for example, the demonstrated need for the project is low.

Again, the Special Rapporteur's reports are helpful in understanding how the *Declaration*'s consent provision is workable:

> [a]s stated, this requirement does not provide indigenous peoples with a 'veto power', but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussions over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation

and consent as they have developed in international human rights law and have been incorporated into the Declaration.[21]

In order for our proposal to reflect the above comments relating to concerns about a veto power not being built into the legislation, the new legislation should also provide for directed mediation, guided by principles to be laid out in the legislation, if the parties are unable to come to agreement within a reasonable period of time about the consent of an Indigenous Nation pursuant to an agreement with the Crown, or proponents or both.

We draw the attention of the Expert Panel to the principles for arbitration of IBAs, which Innu Nation negotiated with Canada and the Province in our Economic Development Chapter, which addresses IBAs within the part of our Labrador Innu Settlement Area comprised of 14,000 square miles in Labrador and within various Major Development IBA Areas.[22] Our Agreement in Principle is available on INAC's website[23], and we encourage the Panel to review it to consider how those IBA principles operate, and what they address. The directed mediation process we propose below for the federal EA legislation would of course not supplant this treaty right.

The mediation principles in the legislation would have to allow for the possibility that agreements would not be required to be concluded if the principles could not be met by those agreements. That directed mediation approach may in some instances mean that a project cannot proceed if the principles are not observed, but this does not amount to a veto power.

This directed mediation process would be time-limited, and would facilitate reconciliation by further driving the parties to reasonable agreement without the need to resort to the courts. Mediation would be conducted in accordance with the six FPIC principles noted above and the consideration of the balance between the demonstrated potential benefit of the project, against the risks and impacts to Indigenous peoples. At the end of the mediation process, if the parties were unable to reach agreement, the mediator would provide a written report, which would form part of the record for the Crown and Indigenous decision-makers.

What constitutes "reasonable" granting or withholding of consent would, of course, vary in the circumstances. Adjudication of reasonableness is familiar to mediators, arbitrators and

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[21] UN Special Rapporteur on Indigenous Peoples 2009 report, at para. 48.

[22] Note that our Labrador Innu Settlement Area also includes the Akami-uapishkᵘ - KakKasuk - Mealy Mountains National Park Reserve, which contains special provisions for Park IBAs in that chapter.

[23] The link to the Labrador Innu AIP is http://www.aadnc-aandc.gc.ca/eng/1331657507074/1331657630719. The considerations in negotiating IBAs are set out 21.5.7 and are reproduced here:

a) the benefits shall be consistent with and promote the cultural goals of Participants;
b) the nature and extent of the benefits shall be related to the nature, scale, cost, and profitability of the Development or Major Development and the nature and extent of its impacts on Participants;
c) the benefits shall not place an excessive burden on the Developer or undermine the viability of the Development or Major Development;
d) any negative impacts on the Environment, Participants or the rights of Participants under the Agreement shall be avoided, mitigated or compensated in a manner consistent with the nature, scale, cost, and profitability of the Development or Major Development; and
e) an Impacts and Benefits Agreement shall give priorities to Participants but shall not preclude other residents of Newfoundland and Labrador from obtaining benefits from the Development or Major Development.

adjudicators in Canada. Questions of reasonableness could centre on any of the six FPIC principles:

- **Freedom** – was the Indigenous Nation unduly influenced by a proponent or the Crown in its determination to grant or withhold its consent?
- **Procedural Consensus** – Did the Indigenous Nation have a reasonable opportunity to design the process in a manner consistent with its needs?
- **Robust Engagement** – Was the engagement process appropriate and reasonable in the circumstances?
- **Information and Understanding** – Did the process provide the Indigenous Nation with reasonable information for decision-making? Was the Indigenous Nation provided reasonable opportunity and capacity to review, understand and respond to that information?
- **Meaningful Participation** – Did the process provide appropriate financial and technical resources to allow the Indigenous group to be fully informed and to meaningfully participate?
- **Objective of Consent** – Was the decision by the Indigenous Group or by the Crown to grant or withhold consent reasonable in the context and in light of the findings of reasonableness with respect to the other principles?

This approach differs from the current approach, which is solely process-based rather than both process- and outcome-based. The desired outcome of this approach is the reasonable granting or withholding of consent by the Indigenous group. The approach is not a hard "no" under all circumstances to all proposed projects, plans or activities, and to the extent that an Indigenous Nation or the Crown might be unreasonable, those decisions can be challenged. In addition, where there are potential infringements, the Crown will have the opportunity to justify any infringement in the face of withheld consent under the justification analysis.

Innu Nation also wishes to draw to the Panel's attention, in concluding our comments about FPIC, that our environmental laws were not at all respected when, without any consultation with us, let alone our consent, the Province and Canada permitted the environmentally devastating Churchill Falls Hydroelectric Project to be developed in the late 1960s, within the lifetime of many Innu elders still alive today.

The lack of consultation and consent of the Innu people in that instance has led to vast and irreversible impacts on our land and resources and our rights, to an extent we will never be able to know in the absence of any environmental assessment of that project. But there is no doubt that those impacts have been enormous. It is fair to speculate that had the Province and Canada respected our laws, and respected the principles in the *Declaration*, that that project would never have been built, because the Innu Nation and the proponent could not have concluded an IBA, and the Province and Canada could not have concluded accommodation agreements that would have met the requirements to protect land and resources. It is conceivable, however, that a process of co-management of environmental assessment may have lead to the development of smaller-scale hydroelectric resources or other energy resources that better reconciled societal and Innu rights and interests. Reconciliation **requires**

that the approach of assessing major projects as to whether they should proceed or not must involve the free, prior and informed consent of Indigenous Nations. The terrible mistakes made with the approach taken to allowing the Upper Churchill project to proceed without a process that provided for free, prior and informed consent must never happen again.

2.2 Capacity of Indigenous Nations to implement the *Declaration*

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. [24]

Organizational capacity

The Innu First Nations, and we suspect other Indigenous Nations, will require time and resources to develop a framework for implementing the *Declaration* in consultation with Innu Nation members, and in dialogue with neighbouring Indigenous Nations. Such a framework could come into existence in the form of environmental assessment co-management agreements recommended above.

Within each Indigenous Nation, the nature of development, the scope of acceptable adverse environmental effects, the priority values for preservation, the process for consensus-building and decision-making, and the acceptable level of cumulative effects are just a few of the issues that require further discussion. The federal Crown will need to provide adequate financial resources to Indigenous Nations for the meaningful implementation of the *Declaration*. This could be achieved through the development, in consultation with Indigenous groups, of a funding program specifically designed to support Indigenous implementation of the *Declaration*.

Funding capacity

The current inherent power imbalance between proponents and Indigenous Nations in the conduct of environmental assessments makes the process seem illegitimate and does not meet the standard for Meaningful Participation. An important part of Meaningful Participation includes providing adequate capacity funding that will facilitate meaningful consultation and consensus development of appropriate accommodations with Indigenous Nations. Capacity to participate in a consensus-building and higher-level decision-making process must also address the ongoing underfunding of Indigenous Nations in environmental assessment processes, and regulatory processes more generally.

In its National Program Guidelines for its Participant Funding Program, the Agency clearly acknowledges that: “The Agency is not able to cover all expenses incurred and participants are encouraged to investigate other sources of funding or in-kind support.”[25] The result is that in

[24] United Nations Declaration on the Rights of Indigenous Peoples, Article 32(2).
[25] Canadian Environmental Assessment Agency. 2015. Participant Funding Program: National Program Guidelines, at p.1.

addition to providing in-kind support, Indigenous groups must negotiate additional funding from project proponents or engage in fundraising activities. While some proponents are reasonable in such negotiations, most are not, and it is taking too much time and money for Indigenous Nations to negotiate funding with proponents to supplement the inadequate funding from the Agency. Some measures that can be taken by the federal Crown to address this situation include the following:

- acknowledge that the current funding provided to indigenous groups, particularly those groups most affected by major projects, has been grossly inadequate for a process designed to move towards reconciliation with Indigenous people
- develop and implement environmental assessment co-management agreements between Canada and Indigenous Nations as a framework that does not have to be reinvented with each environmental assessment;
- develop and implement agreements that provide for a significant and funded role for Indigenous Nations in consensus processes during the environmental assessment and approvals process that aim to support the six principles noted above, including the objective of obtaining the Indigenous group's reasonable consent; and
- revise the Participant Funding Program so that it provides complete funding for the participation of Indigenous groups, rather than the current partial funding, with amounts to be paid entirely on a "user-pay" basis by proponents.

An approach designed to move towards reconciliation must provide Indigenous Nations with adequate capacity to participate meaningfully. Indigenous Nations need to do our own assessment of each project, in order to become informed from our own perspective as to whether consent should be granted or withheld.

2.3 Implications of the *Declaration* for developing environmental assessment legislation

The *Declaration* has implications not only for the *content* of revised federal environmental assessment legislation, but also for the *process* of developing that legislation. Gathering information and ideas from Indigenous peoples through the work of this Expert Panel is only the beginning of that process. Indigenous Nations must be involved throughout the process to ensure that future amendments to legislation will protect our land, resource and harvesting rights.

In support of our view that Indigenous Nations must be involved in future development of the legislation, we point again to the comments made by the United Nations' Special Rapporteur, James Anaya. He was concerned with the lack of consultation prior to the Government of Canada passing the 2012 legislation that impacted Indigenous Nations:

> [m]ost notable were concerns expressed about a lack of effective participation of [I]ndigenous peoples in the design of legislation that affected them. In 2012, the federal Government enacted or amended a number of statutes affecting Canada's [I]ndigenous peoples, including the Canadian Environmental Assessment Act, the National Energy Board Act, the Fisheries Act, the Navigable Waters Protection Act and the Indian Act, through two "omnibus" budget implementation acts, the Jobs and Growth Act 2012 (Bill C- 45) and the Jobs, Growth and

> Long-term Prosperity Act (Bill C-38). Despite the vast scope and impact on indigenous nations of the omnibus acts, there was no specific consultation with indigenous peoples concerning them.[26]

A decision-making role for Indigenous Nations will require that environmental assessment respond better to Indigenous Nation concerns. This may be challenged by the fact that trust in the environmental assessment process is currently very low among many Indigenous Nations. The process is largely viewed as "rubber stamping" development.

Being "fully informed" requires considerable time to acquire sufficient understanding about a proposed project, plan or activity, including its adverse and beneficial environmental, social and economic effects and risks. Over time, experience with the environmental assessment process would likely shorten the time required to achieve that understanding, and early engagement with Indigenous Nations will also be critical to timely decision-making. However, Indigenous Nations arrive at the current situation having substantially different levels of experience with environmental assessment in general, and different levels of capacity to adapt to a new assessment regime, particularly one that addresses the *Declaration*. This suggests the need for the Expert Panel to be cognizant that additional consultation with Indigenous Nations will be essential following the release of its final report, particularly if the environmental assessment process is going to include a decision-making role for First Nations.

2.4 Implications of the Declaration for consultation with Indigenous peoples

The Special Rapporteur has stated that:

> [i]n order to achieve a climate of confidence and mutual respect for the consultations, **the consultation procedure itself should be the product of consensus.** The Special Rapporteur has observed that, in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures. Additionally, States must duly address the imbalance of power by ensuring arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous positions in the consultations." [27]

The Special Rapporteur states:

> [c]onsulting with [I]ndigenous peoples on the very elements of the consultation procedure to be employed not only helps to ensure that the procedure is effective, it is also an important, necessary confidence-building measure**.** [28]

We draw this to the attention of the Expert Panel because ensuring that consultation processes are co-defined will create more legitimacy for Indigenous Nations of decisions made under federal environmental assessments. The CEA Agency currently engages in a process of developing consultation plans with Indigenous Nations, and achieving consensus on a go-forward basis will be essential to the legitimacy of the consultation process.

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[26] *UN Special Rapporteur on Indigenous Peoples 2014 report*, at para. 47.
[27] UN Special Rapporteur on Indigenous Peoples 2009 report, at para. 51.
[28] UN Special Rapporteur on Indigenous Peoples 2009 report, at para. 68.

Innu Nation prefers direct consultation with the Crown on the environmental assessment. Specifically, direct, face-to-face meetings between the Innu Nation and our technical staff and the Crown and its technical staff have been an essential part of the environmental assessments in which the Innu Nation has participated. While engagement with the proponent is particularly important when preparing and reviewing the environmental impact statement, **the core of the consultation during environmental assessment, particularly at the early and latter stages, must be between the Crown and Indigenous Nations**. This does not take away from the practical reality that an IBA or similar agreement can be and often indeed is the best way to meet the requirement of explicit Indigenous Nation consent, as discussed below.

The incorporation of the *Declaration* into the consultation and accommodation process also raises questions respecting the adequacy of the Crown's determination of who needs to be consulted in relation to particular development activities. As an example, the Crown is currently requiring proponents to consult with Indigenous groups who have provided little or no evidence of Indigenous rights in the areas potentially affected by proposed projects, without any distinction as to how that consultation should proceed with those claiming such rights as compared to how it should proceed with the Innu Nation which has a signed Agreement in Principle with the federal and provincial Crowns in relation to our Aboriginal rights. The Crown needs to work with affected Indigenous Nations to determine where and how rights are exercised, and also must undertake to provide evidence supporting any conclusions that Indigenous Nations have or may have Métis rights in accordance with the *Powley* test, in the areas affected by proposed projects. Applying the *Declaration* in the absence of sufficient evidence of rights undermines confidence in the environmental assessment, decision-making and approvals process.

2.5 Indigenous Traditional Knowledge

The *Canadian Environmental Assessment Act* provides, in section 19(3) that: "the environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge." [emphasis added] In general, almost all designated projects occur in regions where local and traditional knowledge exists and needs to be considered in environmental assessment. Replacing this discretionary language with prescriptive language would better ensure that proponents, governments, local communities and Indigenous groups make appropriate efforts to apply this knowledge for use in environmental assessment.

Making the use of Indigenous Traditional Knowledge (ITK) mandatory for environmental assessment would also signal stronger support and respect for the importance of ITK. If this recommendation is accepted, we additionally recommend mandatory training in the use of ITK for all Agency staff and management, and that this training be made available to non-Agency and non-government staff, including relevant persons working for Indigenous organizations, proponents and environmental assessment consultants.

In support of the inclusion of ITK in environmental assessment, the Agency should continue to maintain and update its reference guide[29] and continue to scope requirements for ITK into EIS Guidelines. The Agency has deliberately not defined ITK in its policy guidance, and the *CEAA* also provides no definition. While this allows flexibility of interpretation to account for differences between Indigenous groups, it also tends to result in a narrow understanding of ITK. Proponents mostly view ITK as land use that they are (or in some instances are not) attempting to accommodate in developing their projects, and this tends to limit the use of ITK in environmental assessment to information concerning how the environment is used. Usher[30] outlines the following categories of ITK:

- Category 1: Factual/rational knowledge about the environment
- Category 2: Factual knowledge about past and current use of the environment
- Category 3: Culturally based value statements about how things should be, and what is fitting and proper to do, including moral or ethical statements about how to behave with respect to animals and the environment, and about human health and well-being in a holistic sense
- Category 4: Underlying the first three categories is a culturally based cosmology--the foundation of the knowledge system--by which information derived from observation, experience, and instruction is organized to provide explanations and guidance

This observation is not intended to advocate for a strict definition of ITK in the *CEAA* or otherwise for use in environmental assessment, but to make the observation that prescribing the use of ITK in the *Act* would likely contribute to a more a consistently serious and exhaustive consideration of ITK in federal environmental assessment, including how ITK:

- can be used more effectively to inform and evaluate valued component selection, baseline conditions, effects assessment, mitigation measures, determination of significance, and the design of follow-up programs;
- increases the number of sensory values and indicators (tastes, smells, visual landscape, soundscape) that merit data collection and assessment;
- varies in quality and breadth between Indigenous persons and groups, much as other forms of knowing (e.g. scientific or religious);
- can and must be subject to rigorous validation and verification;
- establishes as legitimate observations that under a scientific knowledge framework might be considered “anecdotal”;
- supports the development of pre-contact or pre-industrial baselines from which to assess total cumulative effects over time; and
- can provide environmental assessment with more profoundly different understandings of reality, of what is valuable in life, of what must be preserved for future generations,

[29] Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*. (http://www.ceaa-acee.gc.ca/default.asp?lang=en&n=C3C7E0D3-1)
[30] Usher, P.J. 2000. Traditional Ecological Knowledge in Environmental Assessment and Management. *Arctic* 53:2 (June 2000): 183-193.

and of what matters in making decisions about whether a proposed action is in the interest of a community or a society.

In order for environmental assessment to benefit much more from ITK, there must be sufficient investment in gathering, understanding, incorporating and validating ITK for use in environmental assessment. Currently, not all proponents spend sufficient (or any) funds to gather ITK, even where its use is a requirement of the EIS Guidelines. It would never be tolerated if a proponent decided to spend very little (or nothing) on the study of water quality, technical feasibility, or fish habitat. Yet, we continue to treat ITK as a "nice to have", but not an essential to evaluating the merits of our development proposals. So long as this continues to be the case, environmental assessment will continue to languish in its attempts to meet the needs of Indigenous people.

2.6 Recommendations

In summary, we recommend the following:

8. **Adopt the framework for reconciliation based on the six principles outlined by the Special Rapporteur and restated in this submission.**
9. **That federal environmental assessment legislation must, for projects that will or could seriously impact Indigenous Nations' Aboriginal and treaty rights or interests, require reasonable consent before environmental assessment approval is provided pursuant to a required assessment of whether and how the project could help further the object of reconciliation with those Indigenous Nations.**
10. **Indigenous consent must be enabled through agreements with the Crown, or proponents or both that provide for a significant and funded role for Indigenous Nations in consensus-building activities during the environmental assessment, decision-making and approvals process.**
11. **New environmental assessment legislation should provide for directed mediation, guided by principles to be laid out in the legislation, if the Crown and Indigenous parties are unable to come to agreement within a reasonable period of time about the consent of an Indigenous Nation.**
12. **Establish a funding program to provide adequate financial resources to Indigenous Nations for the meaningful implementation of the *Declaration*.**
13. **Revise the Participant Funding Program so that it provides complete funding for the participation of Indigenous groups, rather than the current partial funding, with amounts to be paid entirely on a "user-pay" basis by proponents.**
14. **The core of the consultation during environmental assessment, particularly at the early and latter stages, must be between the Crown and Indigenous Nations.**
15. **The Crown needs to work with affected Indigenous Nations to determine where and how rights and interests may be affected, and also must undertake to provide**

evidence supporting any conclusions that Indigenous Nations have or may have Métis rights in accordance with the *Powley* test, in the areas affected by proposed projects.

16. **The use of Indigenous Traditional Knowledge (ITK) needs to be made mandatory for environmental assessment under the *CEAA*.**
17. **Training in the use of ITK in environmental assessment should be developed and required for all Agency staff and management, and made available to non-Agency and non-government staff, including relevant persons working for Indigenous organizations, proponents and environmental assessment consultants.**

3 PLANNING AND CONDUCTING ENVIRONMENTAL ASSESSMENT

3.1 Socio-economic well-being of Indigenous people

Case Study: Lower Churchill Hydroelectric Generation Project

The Lower Churchill Hydroelectric Generation Project, of which the Muskrat Falls Project forms one component, and the Labrador-Island Transmission Link Project represent Innu Nation's most recent experience with the federal environmental assessment process. The Innu Nation, Canada and the Province also negotiated into the Land Claims and Self-Government Agreement-in-Principle that Environmental Management Agreements would be in place to address consultation with the Innu Nation/Innu Government on federal and provincial permits required to construct, operate and, if decommissioning were to occur, to decommission this Project.

The environmental assessment of the Lower Churchill Hydroelectric Generation Project was undertaken between 2008 and 2011 by a federal-provincial joint review panel (JRP), pursuant to an agreement[31] between the responsible Ministers establishing terms of reference for the JRP, and Environmental Impact Statement (EIS) Guidelines.[32]

The EIS Guidelines required the consideration of a relatively broad scope of socio-economic matters, which included:

- Communities – demographics, community services and infrastructure, human health, community health, family life, safety, culture, education and training, housing and accommodation, property values
- Methylmercury – fishing patterns and consumption, baseline human methylmercury exposure, toxicology, perceptions of methylmercury health risk, findings of existing research, health effects of long-term exposure
- Economy – education, training, labour supply, employment, expenditures, employment equity and diversity, economic conditions, business capacity, agriculture, outfitting, eco-tourism, trapping, forestry, mining and mineral exploration

[31] Government of Canada, Government of Newfoundland and Labrador. 2008. Agreement concerning the establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project.
[32] Government of Canada, Government of Newfoundland and Labrador. July 2008. Environmental Impact Statement Guidelines Lower Churchill Hydroelectric Generation Project, Newfoundland and Labrador Hydro.

Throughout the environmental assessment, including during the Community Hearings held in Sheshatshiu, Innu Nation tracked the issues raised by community members. Three-quarters of the issues raised concerned socio-economic matters, including individual, family and community well-being, social and health services, economic development, training, employment and business opportunities. Socio-economic impacts and benefits are a real concern for the Innu, and we suspect for other Indigenous Nations.

Innu Nation and Innu community members raised the concern with the JRP that there appeared to be an overall lack of readiness for the likely socio-economic effects of the Lower Churchill Project both within Innu communities and within the Upper Lake Melville region more generally. Specifically, the following issues were raised:

- **Limited information on Innu conditions**. Despite the broadly-scoped EIS Guidelines, there was very limited high-quality information of sufficient duration respecting the Innu communities. No primary research was conducted respecting historic and current conditions related to the Innu population, labour force, income, education, health, and social wellbeing. As a result, it was not possible to accurately predict how or to what extent Innu would benefit from the employment and business opportunities provided by the Project, how ready the Innu communities were for the Project, how the Project could negatively or positively affect Innu families, or how the Project could affect Innu women and men differently.
- **Limited information on Innu capacity**. There was a lack of current and credible information concerning the capacity of Innu to address on-going cultural, social, health, educational and economic needs. Thus it was extremely difficult, if not impossible, to assess the potential impacts of Project-related change on Innu, Innu governments, and Innu social service agencies.
- **Innu resilience unknown**. What was also lacking and critical to understanding the potential effects (both negative and positive) of the Project was concrete data concerning how ready and capable Innu were to adapt to or absorb further cultural, social and economic change. The state of individual, family and community resilience and how close the Innu were to critical thresholds that allow for the preservation, protection, promotion and enhancement of cultural, social, and economic wellbeing were unknown.
- **Social services stressed**. Innu Nation and Nalcor both reported that social and health services delivery capacities within Innu communities were already exceeded at the time of the environmental assessment. This suggested that governments had not been able to respond to existing needs and any additional adverse socio-economic effects associated with the Project were unlikely to be addressed adequately by government.
- **Limited monitoring of past projects**. Government and industry had not implemented substantial follow-up programs to analyze the accuracy of the socioeconomic impact predictions identified in previous environmental assessments (e.g. Voisey's Bay, Trans Labrador Highway Phase 3). Information generated from these types of studies could have significantly increased the base of knowledge for both current conditions and predictions of Project impacts.

- **Insufficient commitment to socio-economic monitoring and effects management**. Development of a socioeconomic monitoring and effects management program could have resulted in information collection to support Innu organizations in managing the adverse socio-economic effects of the Project as well as enhancing project benefits. In other words, such a program, properly designed and implemented, could have contributed to the overall sustainability of the Project.

In its final report, the Joint Review Panel made recommendations, including: a pilot study for methylmercury mitigation; measures to enhance training and employment; negotiation of an MOU to address Sheshatshiu social effects mitigation; a social effects needs assessment; investment in low-income housing; and a request of the Province to commit to provide the human resource required to address effects on health and social services. While these recommendations were well-considered by the Panel, the limitations outlined above and the lack of a regulatory framework to apply them meant that they were largely not implemented or could not be effectively implemented.

Designing for socio-economic impact assessment

The current *CEAA* considers socio-economic matters only to a very limited extent, assessing only those impacts following from a change to the biophysical environment. This scope can be seen in the language of section 5(1)(c) of the *CEAA*:

> 5(1)(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on:
>
> i) health and socio-economic conditions,
>
> ii) physical and cultural heritage,
>
> iii) the current use of lands and resources for traditional purposes, or
>
> iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

A broader consideration of socio-economic effects could be achieved by defining the socio-economic effects on Indigenous people to be assessed:

> **Socio-economic effect** means, with respect to indigenous peoples, an effect occurring in Canada of any change that may be caused to:
>
> i) health and socio-economic conditions,
>
> ii) physical, tangible and intangible cultural heritage,
>
> iii) the current use of lands and resources for traditional purposes, or
>
> iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

While this offers a simplistic solution, it must be supplemented with appropriate policy respecting socio-economic impact assessment, at a minimum. The socio-economic assessment must also be conducted in a manner that disaggregates between different Indigenous groups, recognizing that there can be substantially different socio-economic conditions even between groups that are directly adjacent to each other.

However, a more holistic and effective approach would entail the adoption of a sustainability framework for environmental assessment. This would facilitate the consideration of a broader sub-set of socio-economic considerations, including in relation to Indigenous people. In particular, an assessment process inclusive of social and economic considerations could better address the following types of questions that are not currently addressed in an environmental assessment under the *CEAA*:

- Does the Project provide net economic benefits to the Indigenous people in the area surrounding the Project?
- Does the Project contribute to community and social well being of the affected Indigenous people? Is it compatible with their cultural interests, social and economic aspirations?
- How does the Project compare with the reasonable alternatives for meeting the purported need in terms of providing net social and economic benefits to the affected Indigenous people?
- How might the social and economic benefits of the project be enhanced?

We recommend that the Expert Panel recommend expanding the mandate of the *CEAA* to address direct socio-economic effects on Indigenous peoples resulting from designated Projects, and not only those that follow from "any change that may be caused to the environment" as per section 5(1)(c).

3.2 Consultation

Assessments by the Agency

The terms of reference for the Expert Panel ask:

> *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?*

The question implies that it is Indigenous groups who alone require "capacity building" when it comes to consultation. The experience of Innu Nation in federal environmental assessment is that the Agency is often understaffed and under-resourced to conduct adequate consultation, so much so that it is now delegating to project proponents its core responsibility to Indigenous groups – environmental assessment and consultation on the impacts of designated projects on Aboriginal and treaty rights. Ultimately, it is the Crown's responsibility to assess these impacts, and imposing this responsibility on proponents is neither appropriate nor effective.

This is not to suggest that proponents have no role in assisting the Crown in its assessment or assisting Aboriginal groups in participating in consultation with the Crown. On the contrary, proponents can play a valuable role in relation to gathering and assessing information respecting valued environmental components, alternatives, avoidance measures, mitigation measures, and monitoring of environmental effects. The proponent also plays a role in

reporting what it may have gathered during its engagement with Aboriginal groups or from public documents respecting Aboriginal and treaty rights.

While early consultation is often emphasized, and remains important, greater emphasis must be placed on the latter stages of the environmental assessment. Over the past few years, the Agency has added an Indigenous consultation phase in the environmental assessment concerning the environmental assessment report (or panel report) and potential environmental assessment conditions – this is a positive step. However, this phase of the environmental assessment is also when the Crown is conducting its final assessment of the impacts of the Project on Aboriginal and treaty rights, yet the consultation with potentially affected First Nations on these matters can best be described as vague and indirect.

There is a need for the Minister to develop guidance for the Agency (and review Panels) to conduct the assessment of impacts on Aboriginal and treaty rights. Above, in section 1.3 Evaluating impacts to Aboriginal and treaty rights and interests, we have provided initial criteria for this evaluation, but the policy guidance also needs to provide consistent approaches to consultation with Indigenous groups respecting the assessment of the impacts of designated projects on Aboriginal and treaty rights, including the Crown's consideration of the potential for infringement of those rights. The development of this policy, similar to other CEA Agency policy, should be the product a review of the literature, technical workshops, and considerable consultation with Indigenous groups and Canadians more generally.

Assessments by review panels

The issue of whether the assessment of impacts on Aboriginal and treaty rights can be delegated to a review panel depends on the mandate and qualifications of the review panel. Typically,[33,34] the federal Ministers (and provincial counterparts) have taken the approach of:

- mandating the Panel to:
  - receive information regarding the manner in which the Project may adversely affect asserted or established Aboriginal and treaty rights;
  - receive information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title;
  - record any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title;
  - receive information regarding any measures to avoid or mitigate potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights;
  - use the information received and concerns raised to inform the assessment of environmental effects; and

[33] Agreement Concerning the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project, at pp.9-10.
[34] Agreement to Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project, at p.15.

        - make recommendations which, if implemented, would avoid or minimize potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights.
    - precluding the Panel from making any determinations or interpretations of:
        - the nature and scope of asserted Aboriginal rights;
        - the scope, nature or meaning of any land claims agreements, agreements in principle, or treaties;
        - the validity or the strength of any Aboriginal group's claim to Aboriginal rights, treaty rights or title;
        - the scope or nature of the Crown's duty to consult Aboriginal groups;
        - whether the Crown has met its respective duty to consult Aboriginal groups and, where appropriate, accommodate Aboriginal groups in respect of potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights; and
        - whether the Project is an infringement of a treaty.

The above approach is what might be described as an "implied delegation". In permitting review panels to "*receive information regarding the manner in which the Project may adversely affect asserted or established Aboriginal and treaty rights*" and to "*make recommendations which, if implemented, would avoid or minimize potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights*" implies an expectation that the review panels will assess the impacts to Aboriginal and treaty rights, which inevitably means coming to an understanding of the nature and scope of those rights.

The qualifications of review panels to undertake an assessment of the effects of a project on Aboriginal and treaty rights vary considerably. Should the assessment of the impacts of a designated project on Aboriginal or treaty rights continue to be delegated to review panels, directly or by implication, there is a need for the Minister to develop guidance to conduct the assessment of impacts on Aboriginal and treaty rights, similar to that developed for the Agency, as recommended above.

However, should the Expert Panel recommend that a standing review panel be established that includes members who serve for multi-year terms or longer, then it could be appropriate for such a panel to review matters related to impacts on Aboriginal and treaty rights. Such a panel would have the benefit of additional training and knowledge development on these matters that is not available to review panels assembled for a single environmental assessment. Consistent with the role played by quasi-judicial panels (e.g. utility boards), a standing review panel could also make determinations as to whether consultation has been adequate.

3.3 Towards reconciliation through meaningful cumulative effects assessment

Historical context

Innu Nation's experience with environmental assessment is that it has consistently failed to adequately assess cumulative effects. Recent illustrations of this can be seen in the comments of the JRP for the Lower Churchill Hydroelectric Generation Project:

> The Panel considered the cumulative effects assessment information submitted by Nalcor and participant concerns regarding its adequacy. Through information requests and the public hearing, the Panel sought further information regarding the effects of the Churchill Falls development, downstream effects, and justification for assessment boundaries and cumulative effects assessment methodology. At the end of this process, it is the view of the Panel that Nalcor's approach to cumulative effects was less than comprehensive and that participants raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project.
>
> Participant input regarding the residual effects of the Churchill Falls development highlighted the limitations of Nalcor's approach of including the effects of past projects in baseline conditions, without clearly acknowledging these effects. Generally, Nalcor's approach illustrates the limitation of project-specific cumulative effects assessment, namely that the end result is the potential for incremental decline in the biophysical and socio-economic environments with each successive development. *[emphasis added]*

To be very clear – failing to adequately assess cumulative effects amounts to denying the historic and ongoing negative effects of prior Crown actions, inactions and decisions on the Innu, and on all Indigenous peoples. It is a form of pretending that the prior actions of the Crown did not occur, a denial of truth that stands in the way of reconciliation. The principles of the Truth and Reconciliation Commission speak directly to this issue:

> 3. Reconciliation is a process of healing of relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms.
>
> 4. Reconciliation requires constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' education, cultures and languages, health, child welfare, the administration of justice, and economic opportunities and prosperity.

Recent amendments to the *CEAA*[35] opened up the possibility for the conduct of so-called "regional studies" in regions entirely composed of federal lands as well as regions located partially or entirely outside of federal lands. To the best of our knowledge, despite the inclusion of this section in the *CEAA*, no regional studies have been undertaken to date. Changes to the *CEAA* may be required in order to better operationalize the potential for conducting regional studies in the future.

Among numerous other limitations, project-based approach to cumulative effects assessment has failed in at least three fundamental ways:

- to protect the environment from activities that have exceeded environmental thresholds;

[35] Sections 74 to 77.

- to ensure that the collective adverse environmental effects does not result in situations where the exercise of Aboriginal and treaty rights is precluded; and
- to establish a process of relationship healing that leads to outcomes that support public truth-sharing, redress of past harms, and ultimately reconciliation.

Proponents of current projects are strongly tempted to avoid legitimate consideration of prior impacts for fear that a conclusion of significant adverse cumulative environmental effects will preclude the development of their projects.

The assumption implicit in the approach taken by many Proponents is that the prior taking up of land (e.g. for existing mining operations and associated transportation, energy and municipal infrastructure) and the commensurate implications for Innu exercise of Aboriginal rights is no longer relevant to the determination of potential adverse effects of proposed projects on the Innu's Aboriginal rights. Recent court rulings suggest otherwise. For example, in *West Moberly* the court held that the historical context is essential to understanding the seriousness of the impacts from a current decision,[36] thereby affirming the core principles of cumulative effects assessment of the impacts of a Crown action on Aboriginal rights.

Priority species for Indigenous groups

While acknowledging the significant limitations of the project-based approach to cumulative effects assessment, there are also instances where proponents simply neglect to undertake any assessment at all:

> The Panel concludes that the effect of the Project on the George River caribou herd in isolation is not likely to be significant. The Panel is not in a position to make a cumulative significance determination because a proper cumulative effects assessment for the George River herd was not carried out and information on the recent decline came too late in the process to allow for proper consideration of its implications for this environmental assessment. (p.118) [emphasis added]

Where cumulative effects assessments are conducted in relation to species that are a priority for Innu and/or known to be rare or endangered, conclusions are often made by proponents that so long as an entire caribou herd range is compromised, then the significance of the residual effect of a project or activity cannot be "high" or "very high".

Of course, no individual project is going to compromise an entire caribou herd. This approach is quite unsatisfactory from the perspective of potentially-affected Indigenous groups, who continue to witness the "death by a thousand cuts" of the caribou herds across the Quebec-Labrador Peninsula. The issue is not, or at least is not only, the compromising of an entire herd or range, but the compromising of the accessible harvesting of animals from a herd within areas traditionally harvested.

Where a species is already listed as threatened or endangered, the minimal conclusion respecting the imposition of additional adverse environmental effects is that these effects

[36] *West Moberly, supra,* paras. 117 and 181.

will result in significant adverse cumulative environmental effects. The appropriate conclusion was reached for the Labrador-Island Transmission Link Project:

> The [Red Wine Mountains Herd] RWMH is listed as threatened under the Species at Risk Act. While the Project itself is likely to result in minor, adverse, but non- significant environmental effects on the RWMH, the Herd continues to be under significant pressure when taking into account other projects and activities. The Agency therefore concludes that the Project, when cumulative environmental effects are taken into account, is likely to cause significant adverse environmental effects on the RWMH, even if the Project itself will only minimally contribute to these effects.[37] [emphasis added]

Finally, proponents often use the "go elsewhere" argument to conclude that the project-specific and cumulative effects of a project are acceptable. The validity of this argument depends on a level of information that is almost never gathered by a proponent, as to do so would involve conducted a proper cumulative effects assessment. Guidance on this issue was recently provided by the Joint Review Panel for the Site C Clean Energy Project:

> The assumption that traditional practices of Aboriginal groups are adaptable requires a demonstration that alternative areas of equivalent value and quantity are available for traditional use. More specifically, for each aspect of this valued component (VC), the Proponent should have determined whether alternative areas in the traditional territory were comparable in terms of uses, environmental conditions, accessibility, proximity to Aboriginal communities, animal and plant species availability, and intrinsic value to Aboriginal groups. The Proponent also should have looked at the potential for competition with other users of those areas and whether those areas are really available for traditional practices.[38] [emphasis added*]*

We recommend that new policy developed respecting the assessment of impacts on Aboriginal and treaty rights provide guidance to proponents respecting the "go elsewhere" argument, including information requirements to establish the legitimacy of this argument.

Meaningful cumulative effects assessment

Regional strategic environmental assessment is one approach to more meaningful cumulative effects assessment that has been articulated in prior reviews of the *CEAA*, but has yet to be implemented in any meaningful way in federal environmental assessment.

> In particular, R-SEA [regional strategic environmental assessment] is viewed as a means to address the cumulative effects of multiple initiatives within a region, including induced development, thereby providing an alternative forum to debate broader policy issues and having the potential to streamline subsequent project-based EA and regulatory decision-making processes.[39]

The Canadian Council of Ministers of Environment articulated potential opportunities of regional strategic environmental assessment:

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[37] Canadian Environmental Assessment Agency. June 2013. Labrador-Island Transmission Link Comprehensive Study Report, p.63.

[38] Report of the Joint Review Panel – Site C Clean Energy Project. May 2014. Published under the authority of the federal Minister of the Environment, Government of Canada and the B.C. Minister of Environment, Government of British Columbia, at p.96.

[39] Noble, B. and Harriman J. 2008. Regional Strategic Environmental Assessment (R-SEA): Methodological Guidance and Good Practice, p. 7.

- analyzing, identifying and managing cumulative environmental effects at a more appropriate, regional scale;
- considering strategic alternatives early in decision making, ideally before irreversible development decisions are taken;
- informing subsequent project environmental impact assessment providing opportunities to streamline the review process; and
- establishing the context and direction for preferred regional environmental management plans and frameworks.

Potential benefits of regional strategic environmental assessment include:

- Integrating a range of sustainability considerations into regional policies, plans, and programs;
- Creating a long-term perspective for development and decision-making;
- Assessing cumulative effects at the appropriate scale and stage of environmental assessment;
- Providing a forum for discussion of alternative sustainable future scenarios;
- Improving understanding of the environment, particularly trends over time;
- Placing avoidance of environmental effects (and of undesirable actions) ahead of mitigating effects after the fact;
- Establishing regional targets, limits and thresholds against which to evaluate development and management decisions;
- Providing an early opportunity for indication of public perspectives on regional issues;
- Providing a framework for early Indigenous consultation and accommodation.

Clearly, there is a strong consensus across Canada resecting the merits of regional strategic environmental assessment, and numerous benefits that would support reconciliation with Indigenous people.

Innu Nation recommends that the Expert Panel propose changes to the *CEAA* that would allow for more frequent use of regional studies wherever there is **(i)** a particular industrial sector that has widely distributed landscape effects that would be unlikely to individually trigger an assessment, or **(ii)** where there is evidence of widespread pre-existing cumulative effects in advance of future land use decision-making, including the environmental assessment of additional projects or activities that would contribute to those cumulative effects.

3.4 Follow-up Programs

National Indigenous Guardians Program

Innu Nation employs several Innu Guardians who are responsible for monitoring site activities, environmental and engineering field studies, and related project activities being carried out for the Muskrat Falls Project and the Voisey's Bay Project. The Innu Guardians report to the Innu people on the situation and activities at these projects, among other responsibilities:

- Participating in the review of permit applications and providing advice to Innu Nation;
- Participating in training activities organized by Innu Nation or the proponents

- Monitoring activities at project construction and operation sites;
- Maintaining a log of ongoing activities;
- Collecting biological samples;
- Carrying out patrols on land and water to monitor activities at the site;
- Carrying out monitoring and enforcement functions in accordance with applicable Environmental Protection Plans;
- Interacting with Innu Nation members involved in the projects; and
- Representing the interests of the Innu Nation to the proponent, government agencies or other organizations or contractors on site.

The Innu Guardians program is an effective program for involvement of Innu Nation in the ongoing monitoring associated with these two projects. Though the responsibilities of the Innu Guardians have not been specifically directed at follow-up programs for verifying the predictions of environmental assessment and ensuring the effectiveness of mitigation measures, there is considerable overlap between the activities of the Innu Guardians and the objectives of follow-up programs.

In a recent article in the Hill Times,[40] the president of the Mining Association of Canada, Pierre Gratton, noted the efforts of the mining industry to manage their environmental impacts by availing of traditional knowledge from Indigenous communities. In particular, Mr. Gratton points to the success of the Indigenous (Innu and Inuit) Guardians at the Voisey's Bay Project, whose work "helped build community support for the project during negotiations. Now those Guardians have full access to the mine site as independent, third-party observers. They report their findings to the community, and they relay community input back to the mine."

Gratton takes a broad view of the potential future role that these Indigenous Guardians could play in terms of monitoring ecological health, protecting sensitive species, maintaining traditional sites, interpreting cultural heritage, building tomorrow's leaders, and developing land use plans that reflect Indigenous values and economic goals. The president of the Mining Association of Canada notes what Innu Nation and other Indigenous groups have noted, namely that a project-specific approach to Indigenous guardians (much like project-specific cumulative effects assessment) cannot provide the breadth of monitoring or capacity-building that is required. Having had direct experience with the value of the Innu Guardians program, we can concur with the observations of the Mr. Gratton that investment by the Government of Canada to expand the program as a nation-wide program would have numerous benefits, including:

- Linking the 30 Indigenous guardian programs already in existence;
- Allowing for the creation of an additional 200 programs;
- Providing core funding that would allow the programs to leverage additional funding from other sectors;
- Offering professional training for guardians in data collection, water quality monitoring, mapping, and other related expertise including land use planning and environmental assessment; and

[40] "Feds should fund indigenous environmental guardians network" in The Hill Times, Wednesday, December 14, 2016.

- Fostering the skills necessary to build trust between companies and Indigenous communities.

OPINION INDIGENOUS AFFAIRS

Feds should fund indigenous environmental guardians network

Researchers studying a similar Australian program suggested that for every $1 invested, $3 in social, economic, and cultural value is created.

PIERRE GRATTON

OTTAWA—When it comes to protecting the land, water, flora, and fauna around mining operations, companies use a wide range of tools, technologies, and expertise. Increasingly, that expertise comes in the form of traditional knowledge from local indigenous communities. But innovative solutions are needed to enable communities to contribute on a larger scale.

What we're talking about is generating shared benefits. Companies are seeking traditional knowledge to help manage their environmental impacts and to respect the ways of life of the communities where they operate, and indigenous communities are eager to provide it.

Our member companies have made great strides in formalizing indigenous engagement in their day-to-day operations through our Towards Sustainable Mining initiative. However, we believe private sector actions could be complemented by a powerful new opportunity at the federal level: funding for the proposed National Indigenous Guardians Network.

Just consider what a similar program has done in Australia. In 2007, the Australian government launched its Working on Country initiative as part of its national reconciliation strategy. Now, more than 100 indigenous ranger programs operate across the country, helping protect cultural sites, manage fires, control invasive species, and conserve biodiversity. Researchers studying Australia's indigenous rangers have found that for every $1 invested, the programs create $3 in social, economic, and cultural value. Those benefits include reduced social assistance payments and lower crime rates.

Indigenous guardians have had success in Canada too. Vale's Voisey's Bay mine in Labrador—the world's biggest nickel mine—works closely with the Innu Nation's Minashkuat Kanakutuatak Guardians. Indigenous monitors working on site helped build community support for the project during negotiations. Now those guardians have full access to the mine site as independent, third-party observers. They report their findings to the community, and they relay community input back to the mine.

Participants in the Innu Nation guardians program (Minashkuat Kanakutuatak) in Labrador take part in fieldwork training. *Photograph courtesy of the Mining Association of Canada*

Canadian government investments can make this commonplace across the country. Indigenous guardians would monitor ecological health and protect sensitive species, and would maintain traditional sites and interpret cultural heritage for visitors. They would connect youth with elders and train the next generation of leaders. And they would create land-use plans that reflect the cultural values and economic goals of their communities.

All of these skills help First Nations engage as active partners. With boots on the ground and in the boardroom, indigenous guardians strengthen communication between leadership, community members, and companies interested in accessing resources.

Canada's mining industry has prioritized indigenous inclusion for many decades. This has resulted in the industry becoming the largest private sector employer of indigenous Canadians. It has also translated into more than 350 active impact benefit or other agreements between indigenous communities and mining companies, many of which include indigenous environmental monitoring near our activities.

But the reality is that such project-specific arrangements—even in combination with company commitments made through the Towards Sustainable Mining program—cannot provide on their own the breadth of monitoring nor build the capacity needed to empower indigenous nations to manage their affairs. The National Indigenous Guardians Network can help fill the gap.

The network will support the roughly 30 indigenous guardian programs already operating in Canada and create more than 200 more programs. It will provide consistent funding for guardian programs, allowing them to shift beyond the grant-to-grant cycle and leverage outside funds. It will offer professional training for guardians in data collection, water quality monitoring, geographic information systems mapping, and countless other expertise used to create land-use plans and assess development proposals. And it will foster the skills necessary to build trust between communities and companies so important to enabling development to proceed—and succeed.

Strengthening these capacities through the National Indigenous Guardians Network will contribute to sustainable mineral development and will support Canada's reconciliation efforts. The ability to manage the land is at the heart of healthy communities. And strong, healthy indigenous communities make good partners.

Pierre Gratton is president and CEO of the Mining Association of Canada.

The Hill Times

Innu Nation recommends that the Expert Panel recommend to the Minister of the Environment and Climate Change the development and stable and adequate funding of a National Indigenous Guardians Program to support capacity development of Indigenous groups in the monitoring and follow-up of projects approved under the CEAA or requiring federal authorizations.

3.5 Implementing regional studies and follow-up programs

Institute of Environmental Monitoring and Research

In our meeting with the Expert Panel, the former Institute of Environmental Monitoring and Research (IEMR)[41] was discussed as a potential model for managing and implementing regional studies for follow-up programs under the *CEAA*. The IEMR was established in 1995 pursuant to a recommendation of a federal environmental assessment review panel reviewing military flight activities in Labrador and northeastern Québec. The establishment of the IEMR was

[41] Information summarized from: Department of National Defence. 2009. Evaluation of the Grant Program for the Institute of Environmental Monitoring and Research. 1258-174 (CRS). Available at: http://publications.gc.ca/collections/collection_2016/mdn-dnd/D58-214-2009-eng.pdf

viewed as necessary by the Panel prior to the approval of a memorandum of understanding between Canada and other NATO countries in relation to low-level flight training activities.

The IEMR was incorporated under Provincial laws as a not-for-profit organization that operated at arm's length from the Department of National Defence. The organization conducted scientific research and monitoring activities in relation to military flight training, as well as socio-economic effects studies of military training activities in the region. The mandate of the IEMR was to:

- Focus on the protection of the environment and, within the concept of sustainable development, support the viability of the military flight-training program;
- Provide independent verification of environmental effects as well as expertise and advice on structuring adequate monitoring and mitigation measures; and
- Foster a level of trust among all groups affected by the military training program

The objectives of the IEMR were to:

- Initiate, coordinate, support and conduct environmental research;
- Monitor the effects and propose mitigation measures associated with the military training activities over northeastern Quebec and Labrador;
- Foster inclusion or incorporation of Indigenous environmental knowledge and cooperation in research and monitoring activities amongst DND, scientific establishments, research institutes, consultants and universities interested in the mandate and objectives of the IEMR;
- Promote a solid understanding and flow of information with the public on the work of the IEMR; and
- Provide advice and information to stakeholders to ensure that the environmental impact of low-level flying and other training in and around the low-level training area is minimized to the fullest extent possible.

Results of the work of the IEMR were required to contribute to:

- Minimization, to the fullest extent practicable, of the environmental impacts of low-level flying training;
- The development of knowledge or the people, flora and fauna of northeastern Québec and Labrador; and
- The development of a level of trust amongst various Indigenous and other stakeholder groups, that DND's operations are non-detrimental to the interest of these stakeholders.

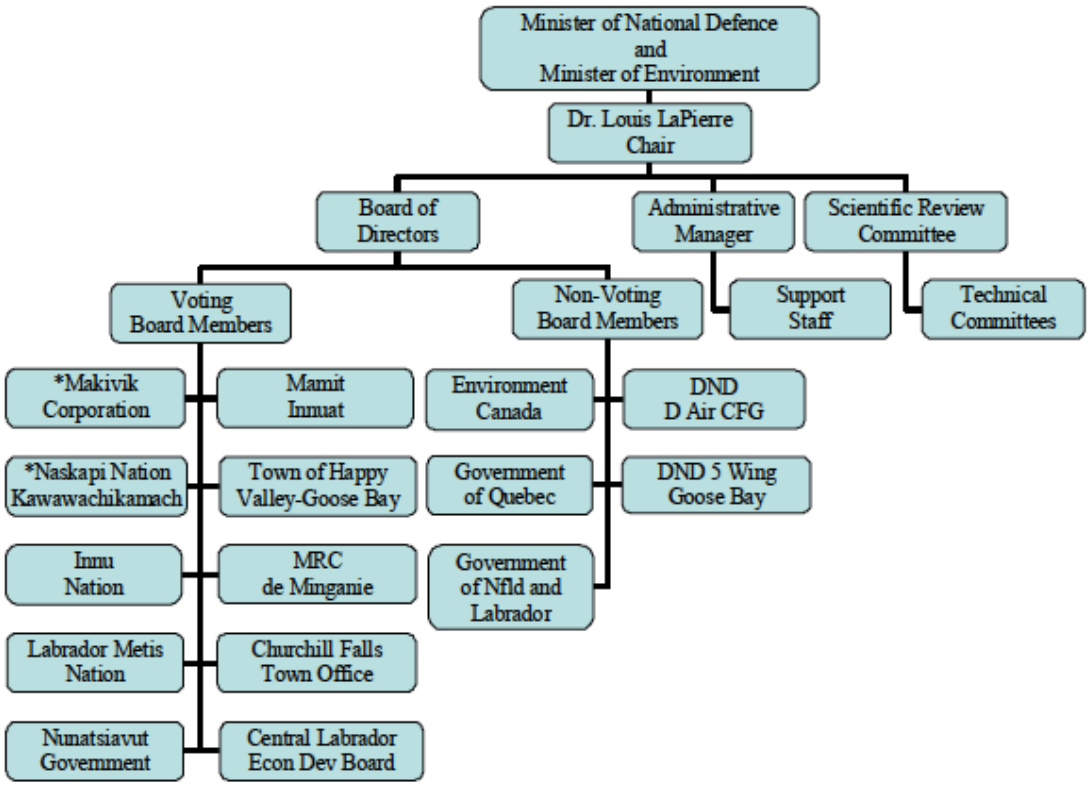
The IEMR generated a large number of research reports and other materials, most of which were digitized and are now housed at the Memorial University archives in St. John's. The organization succeeded in large part as a result of the active support of the Labrador and Québec Innu over many years, notwithstanding that its board of directors also included representation from other Indigenous groups and local municipalities, as shown below.

The IEMR contained several positive elements, including a scientific review committee with various technical committees, a board of directors run largely by representatives of local

Indigenous organizations, and involvement of the relevant provincial and federal government departments. However, it is important that the establishment of any similar organizations designed to address cumulative effects or follow-up monitoring, be developed pursuant to collaboration with Indigenous groups.

Innu Nation recommends that any new approach to regional studies or follow-up programs, occurs as an outcome of the co-management approach to environmental assessment recommended in this submission, or otherwise be developed in consultation with Indigenous groups pursuant to the Expert Panel's findings.

Figure 1. IEMR Organizational Chart



3.6 Recommendations

In summary, we recommend the following:

18. That the Expert Panel recommend expanding the mandate of the *CEAA* to address direct socio-economic effects on Indigenous peoples resulting from designated Projects, and not only those that follow from "any change that may be caused to the environment" as per section 5(1)(c).

19. **That the Agency develop policy to assist its staff and review panels in the assessment of the impacts of designated projects on Aboriginal and treaty rights, including the Crown's consideration of the potential for infringement of those rights.**

20. **That new policy developed respecting the assessment of impacts on Aboriginal and treaty rights provide guidance to proponents respecting the "go elsewhere" argument, including information requirements to establish the legitimacy of this argument.**

21. **That the Expert Panel propose changes to the CEAA that would allow for more frequent use of regional studies wherever there is** (i) **a particular industrial sector that has widely distributed landscape effects that would be unlikely to individually trigger an assessment, or** (ii) **where there is evidence of widespread pre-existing cumulative effects in advance of future land use decision-making, including the environmental assessment of additional projects or activities that would contribute to those cumulative effects.**

22. **That the Expert Panel recommend to the Minister of the Environment and Climate Change the development and stable and adequate funding of a National Indigenous Guardians Program to support capacity development of Indigenous groups in the monitoring and follow-up of projects approved under the CEAA or requiring federal authorizations.**

23. **That any new approach to regional studies or follow-up programs, occurs as an outcome of the co-management approach to environmental assessment recommended in this submission, or otherwise be developed in consultation with Indigenous groups pursuant to the Expert Panel's findings.**

4 COORDINATION

4.1 Provincial mine rehabilitation and closure plans

Mine closure is regulated provincially and not federally in Labrador, as it is in many other locations in Canada. The filing of a draft mine rehabilitation and closure plan either as part of or concurrently with an environmental impact statement would greatly facilitate the determination of significance, and the assessment of the effectiveness of long-term post-closure environmental monitoring.

Without the filing of the plan in draft form, it is often very difficult for proponents to meet the requirements of the EIS Guidelines, or for First Nations to feel satisfied that the mine will be adequately rehabilitated and the site conditions suitable for traditional activities following closure. This rehabilitation is critical to assessing the duration of many of the adverse environmental effects, and therefore drawing conclusions on their significance.

Innu Nation recommends that Canada coordinate with provincial governments to require draft mine closure and rehabilitation plans to be filed as part of or concurrently with an environmental impact statement required under the *CEAA*.

4.2 Canada-Newfoundland and Labrador Offshore Petroleum Board (CNLOPB) as a federal regulatory authority

The Innu of Labrador have significant rights and interests in the offshore regions of Newfoundland and Labrador, and wish to ensure these rights are protected well into the future. Therefore, the Innu oppose the CNLOPB taking the role of the federal regulatory authority under any updated version of *CEAA*, as CNLOPB lacks the institutional competence to perform this role in relation to s. 35 rights. In addition, there must be a clear framework and process for how the Crown will fulfill its to duty to consult and accommodate in this regulatory context. Our reasons for this position are set out below.

The Innu of Labrador are generally assumed by both Canada and the Province to be interested in or to have or to have claims to Aboriginal rights only to land-based harvesting. That is not correct. Like other indigenous peoples on the coast of Labrador, Innu traditionally make extensive use of marine resources, harvesting fish, seabirds, eggs and marine mammals in both the near shore, coastal islands and into the offshore areas. The marine areas of Labrador are also vital for transportation, with Innu utilizing the open water and the ice for travel purposes.

Beginning in the 1920s, Innu inshore fishers made a living by trading in seals, salmon and cod. Currently, the Innu Development Limited Partnership (jointly owned by the two Innu First Nations in Labrador) is a full participant in the offshore fishery. As owners of our own offshore fishing enterprise, we are actively fishing for shrimp and groundfish, and continue to pursue commercial fisheries opportunities in the entire Atlantic offshore. Innu are seeking in our land claim negotiations to have offshore commercial fishing rights recognized off the coast of Labrador, and to have recognized in the treaty our domestic fishing rights in zones that would also extend 12 miles off the North and central coasts of Labrador.

But commercial fishing licences and Aboriginal domestic fishing rights are only valuable if there are healthy fish populations to be fished, which is where federal environmental assessment processes must, of course, play an important role.

The environmental assessments done to assess the impact of Atlantic offshore oil and gas development (from seismic testing, to exploratory drilling and to development of offshore oil and gas projects like Hibernia) have addressed to some extent the impacts on fish and marine animals as well as other animals including migratory birds. However, we are concerned that the current environmental assessment regime for such projects is placing our fishing rights and interests behind the economic interests of oil and gas development.

The Innu Nation was approached in a very general way in 2008 by the CNLOPB to participate in a strategic environmental assessment of the Labrador Shelf, but the consultations were not specifically about our Aboriginal rights or the potential impacts on our land claim negotiations. The Crown also did not engage with us in consultation about these matters. The consultation was general, unfunded, without any hearings, and did not provide the Innu with any opportunity to technically address the impacts on our rights of seismic testing offshore of Labrador, despite our economic interests and our accepted claims for Aboriginal rights in the offshore, which are currently under negotiation with NL and Canada. Though there was consultation with Innu Nation in the vaguest of ways, the consultation was not directed at the

duty to consult and accommodate with any clarity whatsoever, and lacked any rigour because we were unable to access any funding for independent technical expertise.

Where was the explicit request during the strategic EA to consider the impacts on our Aboriginal rights of seismic testing or future offshore exploration and drilling? Where was the effort made to work out a process for the purpose of understanding these impacts? There was no such request and no such effort made. Collecting traditional knowledge was (according to CNLOPB's 2008 Strategic EA) done to some limited extent, but this does NOT mean that CNLOPB actually consulted us about the potential impacts on our Aboriginal rights.

An explicit, clear process for consideration of impacts on Aboriginal rights is not what CNLOPB engages in. Nor is there any indication that the Crown itself takes the product of CNLOPB's generalized consultation and assesses for itself whether the duty to consult has been met. CNLOPB's website makes no mention that its mandate includes anything to do with consultation on Aboriginal and treaty rights – it is concerned about environmental impacts, to be sure, but the duty of consultation requires much more than assessing potential environmental impacts on species harvested by Indigenous people.

Our purpose in drawing this to the Panel's attention is that we have concerns that Canada cannot and should not rely on the CNLOPB as being able to carry out the duty of consultation and accommodation on behalf of the Crown.

The CNLOPB created under the Canada-Newfoundland Atlantic Accord and charged with implementing what is referred to in short as the *Accord Acts* plays a role similar to what the National Energy Board does in the regulation of the offshore oil and petroleum industry in the Arctic. The CNLOPB has suggested to this Expert Panel that they should be accorded the role of a federal authority in any future federal EA legislation. **The Innu Nation does not support having the CNLOPB play the role of federal authority under any revamped CEAA, 2012** because there is no clarity with respect to how the CNLOPB operates in addressing the duty to consult and accommodate, and it has no expertise in this area.

Frankly, we have serious concerns that were the CNLOPB to take over the role of being a federal authority under future EA legislation that it would be subject to the critique that the Board is not independent enough of the oil and gas industry – its fundamental focus is to licence oil and offshore petroleum exploration and development. The critique of the NEB for this same reason has led to a Supreme Court of Canada challenge by the Inuit of the Hamlet of Clyde River to a decision made to allow seismic testing in an offshore area that is covered by the Nunavut Land Claim Agreement. The CNLOPB is NOT in the business of protecting fish and migratory birds, and it has no expertise in dealing with Aboriginal and treaty rights issues. The CNLOPB is subject to the same critiques as the NEB when it comes to its ability to carrying out (through delegation from the Crown) the duty to consult and accommodate in relation to our Aboriginal rights.

Furthermore, we believe that the CNLOPB's enabling statute needs to be looked at closely and amended to lay out that the Crown has an <u>explicitly</u> defined role, separate apart from the CNLOPB, in carrying out the duty to consult and accommodate Indigenous peoples potentially

affected by the various activities which the CNLOPB licences under its enabling legislation. Those activities are not assessed under the *Canadian Environmental Assessment Act, 2012.*

In summary, as an Aboriginal people who are trying to understand and have clear processes through which we can properly be consulted and accommodated when oil and gas exploration and fishery rights and interests in the offshore of the Atlantic collide, Innu Nation believes that **the Crown should *directly* (not through the CNLOPB) consult about potential effects of the Atlantic offshore oil and gas industry on our Aboriginal and potential future treaty fishing rights.**

4.3 Recommendations

24. **That Canada coordinate with provincial governments to require draft mine closure and rehabilitation plans to be filed as part of or concurrently with an environmental impact statement required under the *CEAA*.**
25. **That the CNLOPB's enabling statute needs be reviewed and amended to lay out that the Crown has an explicitly defined role, separate apart from the CNLOPB, in carrying out the duty to consult and accommodate Aboriginal peoples potentially affected by the various activities which the CNLOPB licences under its enabling legislation.**
26. **That the Crown should directly (not through the CNLOPB) consult about potential effects of the Atlantic offshore oil and gas industry on our Aboriginal and potential future treaty fishing rights.**