Alliance Autochtone du Québec /Native Alliance of Quebec
Commuauté Madonhalodenik Community

Written Submissions by the Native Alliance of Québec

Submitted to the Expert Panel regarding the Review of Federal Environmental Assessment Processes

December 23, 2016

Introduction

The Native Alliance of Québec ("NAQ") is an association of off-reserve Aboriginal peoples residing in the province of Québec. We represent the interests of Indians, Inuit and Métis living off reserve in Québec. We provide these submissions on behalf of the community of Maldonhalodenik.

Our community engages in consultation activities with the Crown on issues and activities affecting our members and their rights. While we are not against economic development, we do object to potentially dangerous development that does not take the necessary steps to prevent potential adverse environmental effects and to ensure that our rights and the land and resources are protected.

Our experience with environmental assessment processes to date has caused us to become disillusioned with their ability to protect our members' rights and the land and resources. To properly meet these objectives, our members must play a direct role in the environmental assessment of activities that have the potential to affect our rights and the lands upon which we exercise these rights. In these submissions, we summarize the more significant deficiencies we have experienced with existing environmental assessment processes and offer recommendations to improve upon these processes.

Background

Founded in 1972, NAQ's mission is to promote and represent the interests of Aboriginal peoples living off reserve in Québec.

NAQ's members are Aboriginal, Inuit and Métis, a collectivity made up of all 11 Aboriginal nations of Quebec. We live off reserve, in Quebec's cities, and participate in a strong and united Canada. We proudly see Canada as our land and other Canadians as our brothers and sisters.

Part of NAQ's mission is to make Quebequers and other Canadians aware of the realities of off-reserve Aboriginal people, including our history, accomplishments, contributions to Canadian society, and to improve the political, economic, social and cultural conditions of our members.

Our members have never surrendered their rights to the land. Instead, we have peacefully shared our knowledge and the land, and have contributed to the formation of Canada.

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Reform of the Federal Environmental Assessment Process

When we consider issues affecting the environment, we must consider the future of our children. Environmental protection of the land and resources is of utmost importance to us, and our members see it as their responsibility to protect the land for our future generations. To ensure protection of the land, NAQ communities must have an active role in environmental assessment processes.

Involving Aboriginal people in environmental assessment processes is the only way to reconcile our different views respecting environmental issues. We wish to be directly involved in development activities that have the potential to affect the rights of our member communities. This principle underlies each of the recommendations that we have put forward in these submissions for the reform of existing environmental assessment processes.

Appendix "A"

CONCERNS REGARDING FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES AND RECOMMENDATIONS FOR REFORM

The following is a summary of the deficiencies with existing environmental assessment processes, and recommendations for addressing these shortcomings.

Concern No. 1: *Existing environmental assessment processes do not meaningfully fulfil the Crown's constitutional obligations to Aboriginal Peoples.*

The Crown has a constitutional duty to consult and accommodate Aboriginal peoples about the potential effects of proposed projects on their Aboriginal rights,[1] and to attempt to justify the potential infringement of these rights.[2] These obligations flow from the rights guaranteed to Aboriginal peoples pursuant to section 35(1) of the *Constitution Act, 1982* and the Crowns' duty to act honourably in its dealings with Aboriginal peoples. To meet its constitutional obligations, the Crown must engage in meaningful consultation with Aboriginal peoples, seek to accommodate their concerns and attempt to justify potential infringements.[3]

The Crown's obligations to Aboriginal peoples are distinct from the Crown's legislative obligations in the environmental assessment process. These obligations lie upstream of legislative requirements and the statutory mandate of decision makers, and statutory decision makers must respect the legal and constitutional limits they impose.[4]

For the reasons set out below, environmental assessment processes are inadequate for the Crown to fulfill its constitutional obligations.

(i) The Crown's duty to consult may arise prior to the environmental assessment process

Consultation with Aboriginal peoples must take place early, when the project is being defined, and should continue until the project's completion.[5] This ensures that concerns about a proposed project are addressed and integrated at the earliest stage of government

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[1] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[2] *R. v. Sparrow*, 1 S.C.R. 1075 ("*Sparrow*"), at 1110-1112; *Tsilhqot'in Nation v. British Columbia*, 2 S.C.R. 257 ("*Tsilhqot'in*"), at para. 80.
[3] *Haida*, at paras. 41-42; *Tsilhqot'in*, at paras. 78 and 80; *Sparrow*, at 1110-1112.
[4] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), at para. 106. Also, *Beckman v. Little Salmon / Carmacks First Nation*, 2010 SCC 53 (CanLII), at para. 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), at para. 177.
[5] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 209 BCCA 68 (CanLII) ("*Kwikwetlem*"),, at para. 70.

decision-making, before irrevocable decisions about the proposed project are made. Relying solely on environmental assessment processes for consultation means that, by the time the assessment is triggered, important decisions about the project may have already been made without any consultation having taken place with Aboriginal peoples.

(ii) The duty to consult is triggered at a low threshold

The Crown must consult about any decision or activity with the potential to impact Aboriginal peoples' rights. By contrast, the threshold for initiating an environmental assessment for a proposed project is set out in legislation and subject to change. The starting point for consultation should not be conflated with a government decision about when an environmental assessment is required.

(iii) Environmental assessment does not allow for iterative consultation

Consultation requires an interactive process, which includes opportunities for Aboriginal peoples to identify concerns about a proposed activity and provide information about the potential impacts of the proposed activity on their rights, and for the Crown to take steps to accommodate these concerns and attempt to justify infringements of rights.[6] The legislated timelines for environmental assessment processes and restricted scope of issues considered in the process precludes meaningful consultation.

(iv) Adverse environmental effects are not equivalent to impacts on rights

The scope of an environmental assessment is very different from the objective of reconciliation which underlies the Crowns' constitutional obligations to Aboriginal peoples. In the context of environmental assessment, the Crown can justify a project's serious environmental effects based on its potential socio-economic benefits. By contrast, the Crown can only justify an infringement of Aboriginal rights by demonstrating that the project contributes a compelling and substantial objective consistent with its fiduciary duty to Aboriginal peoples. The infringement must be more than simply in the public interest. The project must be necessary, it must be designed to minimally affect Aboriginal rights, and the adverse effects on Aboriginal peoples cannot outweigh the benefits for the general public.[7]

(v) Government representatives in environmental assessments cannot fully accommodate impacts or justify infringements

Consultation must involve Crown representatives who have the capacity and mandate to address Aboriginal peoples' concerns and give effect to meaningful accommodation. However, government representatives in the environmental assessment process often

[6] *Kwikwetlem*, at para. 68.
[7] *Sparrow,* at 1113-1119*; Tsilhqot'in*, at paras. 77 and 88.

lack the required mandates to fully address concerns and provide necessary accommodation measures and to attempt to justify infringements on rights.

(vi) The Crown must consult regardless of whether an environmental assessment is required

CEAA 2012's streamlined approach to environmental assessments means that a number of projects will not be required to undergo a full assessment. When a project does not trigger an environmental assessment, the Crown will often rely on the proponent of the project to engage in consultation activities with Aboriginal peoples. In many cases this means the Crown is absent from the consultation process. While the Crown may delegate certain procedural aspects of consultation to third parties,[8] it cannot completely disengage from the consultation and accommodation process.[9] The Crown alone can fulfill its constitutional obligations,[10] and must do so regardless of whether a particular project has triggered an environmental assessment.

Recommendations:

1. Consultation over and above environmental assessment processes

The recommendations that follow would, if implemented, improve current environmental assessment processes by ensuring that Aboriginal peoples are meaningfully involved in the review of projects that could affect the land and their rights. However, environmental assessments by their nature remain insufficient on their own to meet the Crown's constitutional obligations to Aboriginal peoples. The Crown must consult and accommodate Aboriginal peoples and attempt to justify infringements consistent with the honour of the Crown regardless of the parameters of environmental assessment processes.

2. Aboriginal-driven environmental assessment processes

The main deficiencies with current environmental assessment processes are rooted in their inability to fully and appropriately engage Aboriginal peoples and address their concerns about development activities that have the potential to affect their territory and rights. Aboriginal-driven environmental assessment processes are essential to addressing these gaps and ensuring that Aboriginal laws, knowledge, perspectives, culture and traditions are incorporated into the review processes.

Aboriginal-driven processes enable environmental reviews to assess both a project's tangible impacts, including its impacts on the physical environment, and its intangible

[8] *Haida,* at para. 53.
[9] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.*, 2006 CanLII 26171 (ON SC), at paras. 92-95.
[10] *Haida,* at para. 53.

impacts on Aboriginal rights. This is key if an assessment of the effects of a proposed project on rights is to be accurate. This is also important for determining how to address Aboriginal peoples' concerns or accommodate potential impacts on their rights.

While Aboriginal-driven environmental assessment processes may differ from one community to the next, the underlying principle is to ensure that Aboriginal perspectives and concerns, including those of NAQ's member communities, are properly understood and used to inform the review process. This will go a long way to adding credibility to environmental assessment processes.

3. Participation in decision-making

The federal government's decision to adopt the principles of *UNDRIP* and the Supreme Court of Canada's decision in *Tsilhqot'in* have important implications for environmental assessment processes. Both *UNDRIP* and *Tsilhqot'in* confirm the importance of Indigenous peoples' participation in decision-making about matters that have the potential to affect their rights.

Article 18 of *UNDRIP* confirms the rights of Indigenous peoples to participate in decision-making respecting matters that would affect their rights and to maintain and develop their own decision-making institutions. Article 32 requires government to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent about any project affecting their lands and other resources.

In *Tsilhqot'in*, the Supreme Court of Canada confirmed the importance of obtaining the consent of Aboriginal peoples potentially affected by resource development activities as a way of providing greater predictability for the activities. One obvious way for government to secure the consent of Aboriginal peoples is through collaborative decision-making processes.

One way for NAQ members to participate in these decision-making processes is to allow NAQ to appoint its own representative to sit on federal decision-making bodies established to undertake environmental assessments. This representative would act on behalf of an in consultation with NAQ's member communities and have full input into the environmental assessment. This model of decision-making would allow NAQ's member communities to directly be involved in determining whether and how a project that has the potential to affect their rights should proceed to development.

4. Traditional knowledge

A key component of Aboriginal-driven environmental assessment processes is their emphasis on Aboriginal laws, knowledge, perspectives, culture and traditions. While western scientific information is important and should inform environmental

assessments, equal weight should be given to the traditional knowledge of Aboriginal peoples.

It is important that environmental assessments incorporate the traditional ecological knowledge of the local Aboriginal communities, as these individuals are intimately connected to and familiar with the land and its resources and will offer valuable insight into the potential development of a project.

To assist with this goal, we propose the development of a professional school to teach our youth about Aboriginal ways of life and to share the traditional and ancestral knowledge of our member communities. Individuals graduating from these programs would have the knowledge necessary to inform the environmental assessment of projects of their potential impacts on our rights and the lands within which we exercise our rights. These programs would also provide the training necessary to allow our members to participate in the ongoing monitoring and management of these projects.

To date, reliance on traditional knowledge within the context of environmental assessments has usually been limited to the traditional use studies commissioned by proponents. These studies are driven by the proponent's particular project agenda, which often seek to identify specific areas that might be of particular concern to Aboriginal peoples.

Aboriginal-driven environmental assessment processes support the inclusion of available traditional knowledge to fully assess a project's tangible and intangible impacts. For an environmental assessment to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.

Concern No. 2: ***The accommodation of Aboriginal concerns offered by existing environmental assessment processes is limited.***

The Crown's constitutional obligations require it to both consult and, when necessary, accommodate Aboriginal rights potentially affected by proposed development. In the context of environmental assessments, government will often equate the mitigation of Aboriginal concerns with their accommodation. Mitigation is not synonymous with accommodation. Mitigation is only one form of accommodation.

The implications associated with a project's potential effects do not disappear with the termination of its environmental assessment and a determination that the project's environmental effects are outweighed by the public interest in having the project proceed. Proper accommodation measures must be put in place. If not, once a project has been approved Aboriginal peoples are often left wondering what they can do to ensure their rights are protected and preserved in light of government's decision.

As part of the consultation and accommodation process, the Crown must demonstrate a

willingness to consider and address Aboriginal interests.[11] This may require the Crown to change its plans, proposed actions and policies.[12] The Crown and Aboriginal peoples may also work together to negotiate alternative solutions to ensure that both of their interests are addressed. Whatever the approach, to be effective accommodation measures will need to be determined on a project-by-project basis and in collaboration with Aboriginal peoples.

Recommendations:

1. Aboriginal-driven environmental assessment processes

As described above, Aboriginal-driven environmental assessment processes will enable us to have a central role in determining how to address or accommodate a project's potential affects on our communities, our lands and our constitutionally-protected rights.

2. Participation in decision-making

The consent of Aboriginal peoples is required for any activity that has the potential to affect our rights. As described above, Aboriginal peoples must have the ability to make decisions about whether and how such development activities will proceed, and, if the activities are to proceed, what mitigation, accommodation and other justification measures are required.

3. Ongoing environmental monitoring and management

One way to address Aboriginal concerns about the potential effects of a project is to ensure the ongoing environmental monitoring and management of the project. Given the importance of the land and its resources to NAQ's members, it is imperative that we be involved in the environmental monitoring and management of any projects that have the potential to affect our rights.

4. Alternative forms of development

The significant environmental risks often associated with proposed resource development activities sometimes means that the only way to accommodate Aboriginal concerns is to not proceed with the project. The potential danger and safety issues associated with the development of nuclear power and other non-renewable forms of energy provide one example. We recommend that a fund be dedicated to researching alternative methods to meet energy demands in a more sustainable and environmentally conscious manner. This research would provide a framework for alternatives assessments in the context of environmental assessments.

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[11] *Haida*, at para. 42.
[12] *Kwikwetlem*, at para. 68.

Concern No. 3: ***The timelines set out in current environmental assessment legislation are extremely short, and the environmental assessment processes are often rushed.***

The tight timelines provided for in CEAA 2012 mean that the consultation undertaken in connection with environmental assessments is often hurried, and Aboriginal peoples are not given the time necessary to fully consider the potential effects of a proposed project on their rights. In *Gitxaala*, the Federal Court of Appeal criticized this aspect of Canada's consultation activities in the context of the environmental assessment for the Enbridge Northern Gateway Pipeline project. [13]

Aboriginal perspectives must inform environmental assessments about the potential effects of the proposed project on Aboriginal rights. One way to accomplish this is through the preparation of project-specific traditional land use information. The current timelines contained within CEAA 2012, however, are often so short that they do not provide Aboriginal peoples with adequate time to pull together and present this information. Addressing Aboriginal peoples' concerns about the potential effects of proposed development on their rights should not be arbitrarily limited by legislative timelines.

Recommendation:

1. Aboriginal-driven environmental assessment processes

Aboriginal-driven environmental assessment processes remove the guesswork around when and how Aboriginal peoples should be engaged as part of the process. Instead of forcing Aboriginal perspectives into existing regulatory processes, we would have a central role in deciding what the process will look like.

Concern No. 4: ***Aboriginal peoples are often not provided with adequate capacity funding to fully participate in environmental assessment processes.***

It is extremely important that NAQ have the opportunity to engage with the Crown as much as possible on issues affecting the rights of our members, including through environmental assessment processes. However, NAQ is a non-profit organization and our ability to participate in these processes is severely restricted by our limited internal capacity.

The funding provided is often insufficient to allow us to meaningfully participate in the environmental assessment process. As a result, we are often forced to bear the burden of studying the potential effects of a project on our land and resource use. To undertake this work, financial and human resources must be diverted away from other important

[13] *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII).

programs and services.

Recommendation:

1. Adequate capacity funding

Aboriginal peoples cannot meaningfully participate in consultation and environmental assessment processes or determine whether it can consent to a proposed project without the funding required to assess the potential impacts of the project on the land and resources and their rights.

Canadian courts have expressly endorsed the provision of funding by the Crown for First Nations to participate in consultation.[14] Appropriate funding is essential to a fair and balanced consultation process and to ensure a level playing field between First Nations and the Crown.[15] While these cases dealt specifically with First Nation consultation, the principle is equally applicable to other Aboriginal communities.

It is also important to ensure that funding is provided to support our participation in consultation processes on a timely basis. There must be adequate time for us to review any information that has been provided about the proposed activity and to provide our input.

We have limited resources to participate in environmental assessments and related consultation processes that are meant to support resource development initiatives. We should not be forced to fund industry's initiatives. Without access to appropriate and timely capacity funding, we will be without the means to properly engage with the Crown on issues that could have long-lasting impacts on our constitutionally-protected rights.

[14] *Wabauskang First Nation v. Minister of Northern Development and Mines et al.,* 2014 ONSC 44214 (CanLII), at para. 232.
[15] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC), at para. 27; *Enge v. Mandeville et al.,* 2013 NWTSC 33, at para. 269.