Kebaowek First Nation
Review of Canadian environmental assessment processes (CEAA 2012)

FINAL WRITTEN SUBMISSION

presented to
The Expert Panel as mandated by the
Minister of Environment and Climate
Change, Catherine McKenna

December 23, 2016

NOTE

This document is the final written submission of the Algonquin Nation of Kebaowek submitted by the Chief and Council on December 23, 2016.

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1. INTRODUCTION

The following submission is presented on behalf of Kebaowek First Nation (KFN) to the Expert Panel mandated to review the environmental assessment processes provided for under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

We have made separate submissions to the relevant bodies charged with reviewing the *Fisheries Act* and *Navigation Protection Act*.

Kebaowek First Nation is one of ten distinct First Nations that make up the Algonquin Nation. Nine are located in Quebec and one, in Ontario. As explained below, KFN's traditional territory lies on either side of the Ottawa River Basin and their members live, work and exercise Aboriginal rights, including Aboriginal title, in both Ontario and Quebec. Its reserve, however, is located in Quebec on Lake Kipawa, 15 km from the interprovincial border. KFN, like many Aboriginal[1] peoples in Canada, is a trans-border community.

On November 10, 2016, Ms. Rosanne Van Schie made a presentation to the Expert Panel in Toronto on behalf of Kebaowek First Nation. KFN Chief Lance Haymond was unable to attend the presentation as he was attending a regional meeting with the Algonquin Chiefs that same day in Val d'Or Quebec.

The following submission is a revised version of the draft submission presented to the Expert Panel on November 10, 2016. It also incorporates answers to questions the panel asked of Ms. Van Schie at that time and develops themes that the panel indicated were of interest.

A. CEAA review process

As a preliminary matter, we draw to your attention some procedural concerns about the conduct of this consultation, as was done by Ms. Van Schie in Toronto in November, when she was accorded a perfunctory 20 minutes to present KFN's views. Unfortunately, this process has been marred by short notice periods, insufficient funding and timing for Aboriginal communities like KFN to prepare comments. With no disrespect to your panel, this Federal procedure to date is not unlike CEAA 2012 in that

[1] The present document uses the term "Aboriginal" and "Indigenous" throughout. We recognize that "Aboriginal" is the Canadian constitutional term used to categorize the people of Kebaowek First Nation and their recognized rights and title to the land. The use of the term "Indigenous" refers to our identity in international law and our connection to other first peoples around the world. However, we remain at all times Algonquin, a distinct nation like the Mi'kmaq, Abenaki, Cree, Innu, Anishinaabe, Haudenosaunee, Assiniboine, Dakota, Ktunaxa, Secwepmec, Carrier-Sekani, Dene, Salish, Haida and others who affirm histories, knowledge and relationships to their territories independent of the formation of Canada and European occupation.

its been designed to be intentionally ineffectual for First Nation peoples participation, unduly limiting us through funding and arbitrary timing constraints that leave little sentiment for First Nation communities to prepare or participate. In order to safeguard against this situation, KFN's presentation was recorded as a consultation under protest. If the federal government ultimately introduces a bill to amend the CEAA 2012, the bill should be referred back to First Nation communities like our own to be consulted upon clause by clause with appropriate resources and review timeframes to account as meaningful consultation.

Recommendation

1. *Cabinet should provide for a special consultation and accommodation framework regarding any proposed amendments or draft legislation introduced in response the present review process that allows Aboriginal people the time and resources necessary to study the draft legislation and propose amendments as necessary.*

Figure 1: Speck 1914 map of hunting territories of the Temagami, Kipawa and Dumoine Indian Bands

B. History of Kebaowek First Nation

Traditionally, KFN's social, political and economic organization was based around watersheds in what is known today as the Ottawa River basin. The waterways served as their transportation corridors and family land management units. Anthropologist Frank Speck noted in 1915 how members of each Algonquin regional band traditionally held a territory in common, and this collectively held tenure was recognized in alliance with other bands.

For KFN, the starting point in improving federal EA processes for Aboriginal peoples must be in recognizing that Algonquins, like all First Nations in Canada, began with both rights to their territories and rights as people governed under customary laws.

Algonquin researcher Dr. Sue Roark-Calnek (2013:13) explains, that **mutuality**, **respect** and **consultation** are integral to Algonquin social and political organization on a number of levels: family-to-family, band-to-band, and nation-to-nation. From an Algonquin perspective, the current CEAA 2012 legislative process should be harmonized with that expectation.

Algonquins have never relinquished the rights to their territory or their rights as Anishinabe people. Indeed, Algonquins enjoyed many co-operative arrangements in the early beginnings of what is now Canada. As allies with the French Algonquins, they assisted in the exploration, settlement and development of Nouvelle-France. Algonquins then signed treaties of Peace and Friendship with the British between 1760-1764, as co-operative agreements to protect both their peoples and territories in advance of colonial settlement. They accepted the protection of the Royal Proclamation, 1763, in that same spirit.

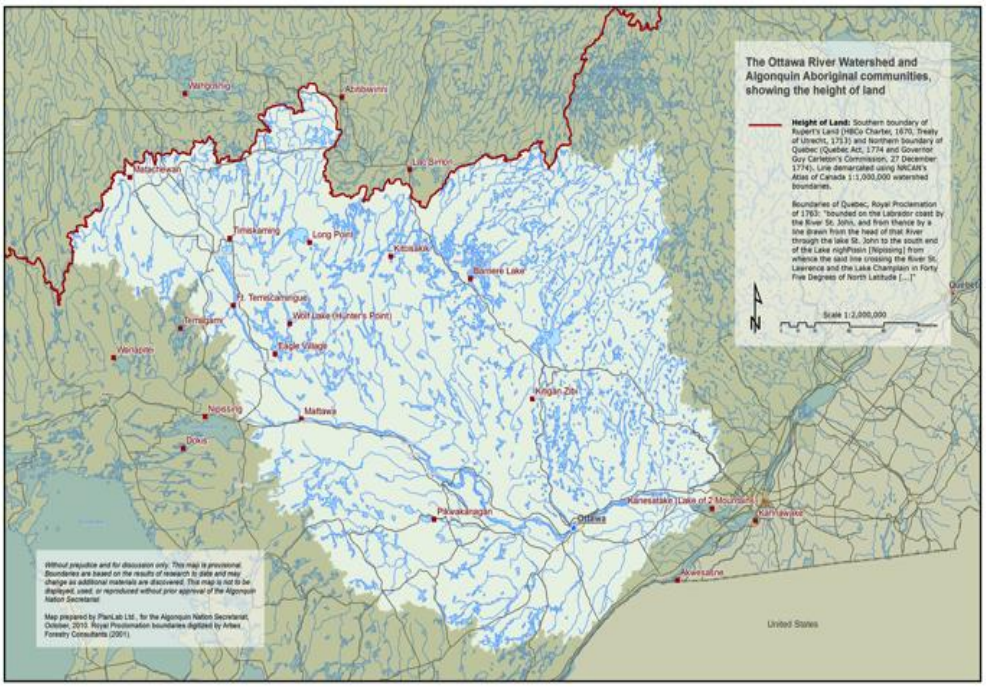

Figure 2: The Algonquin Nation

From the late 1800s onwards, the regional economy around KFN was focused on extractive timber harvest and later pulp and paper production. To facilitate the development of a forestry industry, Québec and Ontario gave “open access” to First Nation lands, including those of KFN, so that forest companies could maximize yields and create more jobs. **By the early 1900s, KFN traditional livelihoods came under severe pressure not only from forestry but also from hydro-electric dams, farming, mining and non-native traplines (Morrison 2005)** that expanded transportation networks, non-Algonquin settlements and economies entrenched in extraction and the persistence of air pollutants. **Algonquin property rights were flagrantly ignored during expansion of these activities (Morrison 2005), as were the inherent ‘conservation’ practices of the KFN – the ‘seven generations’ obligation to ensure all environmental resources were sustained over the long term. Indeed, beaver and other fur-bearers were brought to near local extinction by the 1920s.** The late Elinor Ostrom, 2009 recipient of a Nobel Memorial Prize in Economics, referred to this as “roam and steal” resource management. Historically, extractive activities and supporting government legislation has forced KFN displacement from traditional land management units and continues to this date to cause unresolved conflicts.

In 1982, the *Constitution Act* was adopted as part of the patriation of the Constitution of Canada. Section 35 of the Constitution Act, 1982, recognizes and affirms ‘existing’ Aboriginal and Treaty rights in Canada. The importance of consultation processes and

the responsibilities of the Crown are now affirmed by existing case law.[2]

On January 23, 2013, Kebaowek First Nation (KFN) along with Wolf Lake First Nation (WLFN) and Timiskaming First Nation (TFN) jointly released a Statement of Asserted Rights (SAR) which summarizes the Aboriginal rights, including title, that the three First Nations assert and provides detailed evidence to substantiate it. Copies of the SAR, maps and background documentation were transmitted to the governments of Canada, Quebec and Ontario in January 2013. In summary, these communities have not relinquished Aboriginal rights and title, over lands that straddle the Ottawa River basin on both sides of the Quebec-Ontario boundary.

Today, KFN's members live on reserve lands on Lake Kipawa Quebec and outside of reserve lands within the Provinces of Québec and Ontario. Members continue to occupy, manage, safeguard and intensively use their territory as they carry out traditional and contemporary activities. All such initiatives are based on a model of self-determination and a history of Algonquin traditional knowledge, eco-logical sustainability and land governance.

We commend the expert panel in reviewing the shortcomings of the *Canadian Environmental Assessment Act, 2012* **(CEAA 2012)** and its environmental review processes. Our recommendation is for your panel to look beyond the Act itself and take into account other pieces of policy that further weaken Aboriginal peoples' capacity to participate in the resource development review process (for example, the federal Comprehensive Claims Policy, the *Fisheries Act*, *Navigation Protection Act*, *Indian Act*) These pieces of legislation combine as an assault on Indigenous sovereignty and the protection of land, air and water. The cumulative policy effect has intentionally silenced Aboriginal communities across this country as resource development proceeds as planned.

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[2] *Haida Nation v. British Columbia (Minister of Forests)* http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html., *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* http://scc.lexum.umontreal.ca/en/2005/2005scc69/2005scc69.html.

Recommendations

2. *Federal environmental assessment should recognize community and customary laws and legal traditions with respect to decision-making and environmental stewardship.*

3. *Federal environmental assessment should recognize and seek to apply the Algonquin principles of mutuality, respect and consultation when making decisions with respect to territories and resources under the stewardship of the Algonquin Nation.*

4. *Adequately reforming federal environmental assessment and the role of Aboriginal peoples in such assessment requires reviewing other pieces of federal legislation and policies that undermine Aboriginal participation in environmental decision-making. To this end, federal authorities evaluating "environmental effects" pursuant to CEAA should not limit the participation of Aboriginal peoples in EA based solely on the legislative powers of band councils under the* Indian Act *or the willingness of Aboriginal peoples to subscribe to Comprehensive Claims Policy, as neither of these instruments provide adequate basis for a nation-to-nation relationship.*

2. MOVING BEYOND CEAA 2012- INTERNATIONAL COMMITTMENTS

In carrying out the review, we understand the Panel is to recognize the objectives of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in that, "the Panel shall reflect the principles of the Declaration in its recommendations, 'as appropriate', especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal and treaty rights."

KFN, with other First Nations in Canada, is advocating for UNDRIP as a framework for advancing their rights, dignity, survival, security and well-being. This is in keeping with Indigenous Affairs Minister Carolyn Bennett May 2016 announcement at the UN that Canada was officially removing its objector status to the Declaration.

We note, however, that UNDRIP sets out "minimum standards" and is not intended to undermine constitutional and other legislative protections in Canadian law (article 43).

In practice, UNDRIP would promote, amongst other things, transitions toward sustainable development and enhanced legitimacy in EA decisions and project outcomes, rather than the current drift towards more conflict, legitimate activism and litigation as a result of the failure to consult and accommodate Aboriginal peoples in Canada. The concept of free, prior, and informed consent (FPIC) promoted by the UNDRIP in advance of project development is of paramount importance in terms of Canadian EA reform.

The UN Declaration includes a number of articles, towards recognizing the need for a dominant state to respect and promote the rights of its Aboriginal peoples as affirmed in

treaties and agreements, including how Aboriginals participate in decision-making processes that affect their traditional lands and livelihoods (UNDRIP, 2007).

For example, article 18 provides as follows:

> 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 procedure, as well as to maintain and develop their own indigenous decision-making institutions.

Moreover, article 32 (2) of the UN Declaration states:

> 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 and other resources.

We also recommend to the Panel to strengthen EA climate assessment components as per Canada's International commitments related to the Paris Climate Agreement as well as the Convention on Biological Diversity (CBD) in recognizing the benefits of incorporating Aboriginal knowledge for natural resource management and conservation.

In 2008, Elinor Ostrom introduced how governments should "evolve institutional diversity". What this refers to is the adaptation of the existing mono-cultural institutions and/or the fostering of new institutional arrangements that recognize Aboriginal rights and empower communities to enter into co-operative schemes – schemes that respect and recognize First Nation rights, values and priorities even when different to those of dominant society. As she stated, "we have got to understand the institutional diversity that is out there, because if we are actually going to protect biodiversity we have to have institutions that match the complexity of the systems that are evolved and those systems have to be complex." Her motto was, "Build enough diversity of the world and allow multi-tier systems at multiple scales so that you don't have an uniform top down panacea that is predicated to cure everything and instead of curing it, kills it".[3]

It is this kind of multi-tier system that could provide KFN with the political space to work in partnership with other stakeholders, industry and government agencies. However, it remains to be seen whether federal EA can be reformed to recognize the cultural and other legal specificities of First Nations rights and land use, and allow the kind of institutional diversity that Ostrom calls for to truly build sustainable societies.

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[3] Ostrom, Elinor. 2008. *Sustainable Development and the Tragedy of the Commons*. Stockholm Whiteboard Seminar, Stockholm Resilience Centre TV: http://www.youtube.com/watch?v=ByXM47Ri1Kc

Recommendations

5. *UNDRIP must be a minimum framework for the relationship between Aboriginal peoples and the Canadian State in development decisions across Canada.*

6. *CEAA should better reflect Canada's commitments through international instruments to reduce carbon emissions and recognize Aboriginal knowledge with respect to natural resource management and conservation of biological diversity.*

3. SPECIFIC THEMES FOR IMPROVEMENT

Changes to the Canadian Environmental Assessment Act (CEAA) in 2012 clearly represented the Conservative government's intentions to focus efforts on stimulating economic growth through more rapid resource exploitation at the expense of the environment.

- Under CEAA 2012, only those projects designated by the Regulations Designating Physical Activities (RDPA) or designated by the Minister of Environment on a discretionary basis may be subject to federal environmental assessment.

- Assessments are based on determining "significant" environmental effects – which in the past would have been grounds for rejecting it – now project is referred to cabinet to determine whether those effects are justified in the circumstance, politicizing approvals while severely cutting the number of projects screened.

- Time frame for environmental reviews tightened, a standard environmental assessment must be completed within 365 days, an environmental assessment by the NEB be completed within 18 months and an environmental assessment by a review panel be completed within 24 months.

- Opportunities for public participation are reduced, and provincial assessments are recognized as equivalent to federal reviews.

  Before 2012 there were 2,970 projects on the CEAA registry for screening. Under the new Act, 2,900 of those projects – were dropped.[4]

[4] Hume, Mark "HEADWATERS: Reduced federal oversight leaves a critical resource exposed" Globe and Mail November 29, 2015 http://www.theglobeandmail.com/news/national/under-pressure-water-management-in-a-new-politicalera/article27512244/

A. Understanding KFN expectations in EA

Developing Indigenous partnerships in environmental assessment

For over 7000 years the forest and waterways have provided the Algonquin people with their livelihood: food, energy, materials, landscapes, spiritual grounds, economic trade and peace of mind. The distinctive feature of Anishinaabe society over this period was that resources were managed as sacred. The past 300 years, Algonquins have witnessed the results of an exploitive management regime. Much of their traditional territory and livelihoods have been significantly degraded and many ecosystems have permanent or severe damage with numerous species are at risk and approaching threatened status. All the while Algonquin people have suffered disproportionate poverty.

KFN is interested in new EA models/institutions federally and provincially that respect meaningful interaction between proponents, authorities and affected Aboriginal communities in the EA process.

KFN stresses that they have specific legal rights that need to be reflected in an EA processes that does not treat them as "just another stakeholder" but rather a constitutional partner to be consulted on a "nation-to-nation" basis.

The analysis of Article 32(2) of UNDRIP by former UN Rapporteur on Indigenous Rights, James Anaya, provides a model for the "good faith" process of consultation and collaboration that is envisioned internationally when States make decisions "affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources." Comparing the language of UNDRIP to the language of ILO Convention No. 169, Mr. Anaya explains (emphasis added):

> The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are <u>in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process</u>.[5]

EA in its current form is information-gathering. It neither fulfills the Crown's consultation duty to consult and accommodate KFN nor, in KFN's experience, allows the community "genuinely to influence the decision-making process" as would be the "minimum standard" set internationally by UNDRIP.

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[5] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, HRC, 12th Sess., UN Doc. A/HRC/12/34 (2009) at para. 46.

Sustainable development as a commitment to seven generations

What is more, current federal environmental assessment is not sufficiently committed to sustainable development, which KFN believes should be the basis for all development decisions.

CEAA 2012 constitutes a watering down of the principle of "sustainable development," which should be the central focus of federal environmental assessment. Prior to the coming into force of this Act, CEAA 1992 contained a preamble that set out "sustainable development" as a main goal of environmental assessment:

> WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;
>
> WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

This preamble is no longer contained in the Act and, instead, the only reference to "sustainable development" that remains is the purposive provision at paragraph 4(1)(h) as follows:

> 4 (1) The purposes of this Act are:
> …
> (h) to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy;

The notion of that the Act will somehow "encourage federal authorities to take actions that promote sustainable development" in the absence of this being the central purpose of EA, significantly undermines the federal government's commitment to this principle. We recommend that sustainable development be explicitly listed as a central purpose of federal environmental assessment. Federal authorities should be guided by this principle when assessing the environmental impact of a project or undertaking.

An environmental assessment regime aimed at sustainable development should "first require recognition of the custodial responsibility of indigenous peoples for the beings with whom they share the land" [6] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also recognizes this principle at article 25 when it acknowledges Indigenous peoples right to uphold our "responsibilities to future generations" with respect to our distinctive relationship with our "lands, territories,

[6] Davidson-Hunt, I.J., 2003. Indigenous lands management, cultural landscapes and Anishinaabe people of Shoal Lake, Northwestern Ontario, Canada. *Environments*, *31*(1), p.21.

waters and coastal seas and other resources…"

Recommendations

7. *Aboriginal peoples require a role in EA that recognizes their particular attachment to territory and resources involved in development. They should be recognized as partners in EA, not simply "stakeholders."*

8. *Sustainable development should be made the central goal of federal environmental assessment.*

B. Developing Algonquin jurisdiction for EA through an Algonquin institution

KFN's oral presentation introduced the concept of an Algonquin institution to encourage Algonquin involvement in Canadian environmental assessment in order to pay more careful attention to matters of Algonquin concern. This is desirable, not only to combat development biases of proponents and government agencies that we have experienced in EA under CEAA 2012, but to explore the greater role of indigenous institutions in environmental impact assessment and planning in Canada. Such a task depends largely on the ecological knowledge base and practices of sustainability that Indigenous peoples have practiced for thousands of years. This is not to romanticize Indigenous knowledge but to facilitate a more modern approach in integrating culturally appropriate and sustainable aspects of indigenous knowledge and practices with Western scientific knowledge in Canadian environmental impact assessment and planning.

The sustainable use of environmental and land resources stems from a combination of two factors: (1) the possession of appropriate local ecological knowledge and suitable methods or technology to exploit resources and (2) a philosophy and environmental ethic to keep exploitive abilities in check and to provide ground rules by which the relation among humans and the environment are regulated (Sadler et al., 1993).[7]

In this context, we suggest an **Algonquin indigenous institutions** could play a significant role in environmental management and assessment. The institution would guide, encourage, and dictate environmental responsibility into all stages of the conception, planning, approval and monitoring of environmentally significant major and minor projects. An Algonquin institution would:

[7] Sadler, B. and P. Boothroyd. (1993). *Traditional Knowledge and Environmental Assessment.* A Manuscript Report Prepared for the Canadian Environmental Assessment Research Council, Ottawa, Canada.

1) **Be presented with the purpose of undertaking**. This involves examination or clarification of the need or opportunity to be served and the determination of initial scope of inquiry;

2) **Identification of reasonable alternatives to the undertaking**. This involves delineation of possible means of meeting a defined need or opportunity, and the elimination of options that are not feasible;

3) **Assessment of alternatives to the undertaking**. This involves identification and study of the existing environment that may be affected and the prediction of potential effects, and then identification of reasonable mitigation options and the evaluation of potential non-mitigable effects and risks in areas of uncertainty;

4) **Selection and elaboration of preferred Indigenous alternatives**. This involves comparison of alternatives and identification of preferred alternative(s), as well as detailed planning and mitigation measures;

5) **Documentation and submission of assessment and proposal**. This involves preparation of the Algonquin assessment document and submission to approval agency, and public notice;

6) **Review of assessment and proposal**. At this stage. the assessment document is reviewed by government agencies and interested public. This may involve public hearings and other dispute resolution procedures. Conclusions are drawn by a review panel or agency;

7) **Decision** of approval, rejection, or approval with terms and conditions, or subsequent specific approval where required; and,

8) **Implementation and monitoring**. This stage involves implementation including mitigation, monitoring of actual effects and compliance with commitments and conditions of approval, correction, and re-evaluation. [8]

You asked how we viewed the institution as working. Mulvihill (1988) offers some guidance. According to him, an indigenous institution should not attempt to duplicate or reinforce bureaucratic, top-down hierarchical structures.[9] Integration of the two systems need not necessarily dilute the essence of either system, nor should it invalidate the underlying principles of either one. Integration of the two systems could be considered within the context of devolution. Usher (1981) sees devolution taking two forms: (a) the

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[8] Appiah-Opoku, Seth. *Indigenous institutions: a resource for environmental impact assessment and planning in Ghana*. Waterloo, Ontario: University of Waterloo, 1997.

[9] Mulvihill, P. (1988). "Integration of the State and Indigenous Systems of Wildlife Management: Problems and Possibilities," Unpublished paper, School of Urban and Regional Planning, Faculty of Environmental Studies, University of Waterloo, Waterloo, Ontario, Canada.

movement of authority and responsibility from a higher to a lower level within an established and intact framework; and, (b) the actual transfer of authority and responsibility from one system to another.[10]

Also, the growing recognition of the limits of Western science in solving environmental problems of increased complexity and magnitude has resulted in calls for the incorporation of Indigenous people and their ecological knowledge systems in resource management and development. It is in this light that we propose the potential contribution of Indigenous institutions to environmental impact assessment and planning in Canada.

As described in the panel session, when KFN lost its means of traditional management over its un-ceded territory, deterioration of our natural resources occurred. Historically, we have been manipulated and dominated by powerful laws and actors in varied ways. This history continues on today, exemplified in CEAA 2012 and NEB legislation under review. The structure of these pieces of legislation to support industrial development is neither benign nor innocent. Davidson-Hunt (2003) notes that a society's management goals and objectives for a specific landscape is a reflection of environmental perception, values, institutions and political interests. [11]

In addition to creating legislative room for greater indigenous environmental assessment institutions, we would like to suggest that Canadian EA processes be subject to indigenous institutional audit or grading such as follows:

A -- **Excellent**, no indigenous engagement tasks left incomplete
B -- **Good**, only minor omissions and inadequacies
C -- **Satisfactory** despite omissions and inadequacies
D -- Parts are well attempted, but **generally unacceptable**
E -- **Poor**, significant omissions and or inadequacies noted; or, as in the case of PWGSC,
F -- **Very poor**, important tasks poorly done or not attempted[12]

It has been demonstrated that the exclusion of Indigenous peoples from development decisions affecting their territories has had disastrous environmental consequences in all regions of the world where outsider knowledge

[10] Usher, P.J. (1981). "Sustenance or Recreation? The Future of Native Wildlife Harvesting in Northern Canada," *In* M.M.R. Freeman (ed.) *Proceedings: First International Symposium on Renewable Resources and the Economy of the North,* Association of Canadian Universities for Northern Studies, Ottawa 56-71.

[11] Davidson-Hunt, I.J., 2003. Indigenous lands management, cultural landscapes and Anishinaabe people of Shoal Lake, Northwestern Ontario, Canada. *Environments*, *31*(1), p.21.

[12] Appiah-Opoku, Seth. *Indigenous institutions: a resource for environmental impact assessment and planning in Ghana*. Waterloo, Ontario: University of Waterloo, 1997.

has been imposed in development without regard to local knowledge (Kroma 1995).[13] In contrast, we suggest an ideal environmental assessment process be as comprehensive, inclusive and participatory in terms of expertise with obligatory examination of Indigenous based alternatives as examined and proposed through an Algonquin institution.

Recommendations

9. *Amend CEAA to recognize the jurisdiction of indigenous environmental assessment institutions, including community-based structures, other than those currently covered by the definition of "jurisdiction" at s.2(1).*

10. *Provide financial and human resource support for an Algonquin institution to perform environmental assessment within Algonquin Nation territory, independently or as part of a Joint Review Panel.*

11*. Federal authorities should be subject to Aboriginal institutional audits or grading in an effort to develop best practices in EA and EEE.*

C. Assessing the current effectiveness and responsiveness of CEAA 2012 to Aboriginal communities.

While it appears that the CEAA 2012 sets out goals with respect to Aboriginal interests and engagement in the environmental assessment process, it is our experience that all is not what it seems to be. Current Federal environmental assessment processes are insufficient and do not properly address impacts to Aboriginal rights. Environmental effects evaluations (EEE) are ineffective and do not target cumulative impacts or sustainability issues. Below we present some examples of our experiences.

Lake Temiscaming Holding Dam Replacement Project

Our first experience with CEAA 2012 was with the recent 20.9 million dollar Lake Temiscaming Holding Dam Replacement Project. The project was managed by Public Works and Government Service Canada (PWGSC) who ignored our demands for a consultation framework and insisted it only "had a duty to inform" our First Nation because the dam works were underwater. They took the position that KFN had no jurisdiction over the Ottawa River bed.

The project included the removal of an old dam and construction of a replacement on the western side of Long Sault Island in the Ottawa River. In 2012, under the new

[13] Kroma, S. (1995). "Popularizing Science Education in Developing Countries Through Indigenous Knowledge," *Indigenous Knowledge and Development Monitor* 3(3):13-15

legislation, the project lost its “major project” designation and was only subject to PWGSC overseeing an “environmental effects evaluation” and Department of Fisheries and Oceans (DFO) issuing a project permit.

However, as is evident from our Statement of Aboriginal Rights (SAR) material that has been provided to the Government of Canada, as well as to the Provinces of Ontario and Quebec, KFN claims Aboriginal title over the Ottawa River at Long Sault Island, where the project took place. What is more, as already discussed, the Ottawa River Basin is a waterway of historical and cultural importance to the Algonquin Nation, including Kebaowek First Nation, which we continue to use and occupy today for food and cultural purposes.

Irrespective of our Aboriginal rights and title over the waterbed at issue, article 5(c) of the *Canadian Environmental Assessment Act 2012* requires a proponent to take into account the potential of a proposed development on:

> (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.

As well, article 5(b) requires consideration of those interprovincial effects which necessarily flow from construction in the Ottawa River.

However, KFN was not engaged in the analysis of any of the above considerations. Although KFN offered PWGSC to engage our local experts in developing the best project options through research and co-ordination of our traditional knowledge, PWGSC intentionally obstructed funding support for our participation in any design planning or environmental review exercises regarding the new structure.

The result was a new dam constructed downstream of the existing dam in an active spawning bed without our input or even a simple fish or eel ladder. Department of Fisheries (DFO) co-operated with PWGSC and granted the construction permit without consulting us whatsoever on our Aboriginal fishery at the site. The fact that serious harm or death to fish was considered acceptable in this project development has serious implications.

Furthermore, at the time of the dam relocation project, the National Energy Board (NEB) conducted a regulatory review in accordance with s. 58 of the *NEB Act* and s. 45.1 of the *National Energy Board Onshore Pipeline Regulations* (SOR/99-294), responding to the request of a gas pipeline company to relocate their pipeline under the new dam.

The “Class B” review took place without adequate time or effort for consultations or engagement with our community by either the gas line pipeline proponent or the NEB. The NEB issued an exemption order and a decommissioning order in a 56-day review period to Corporation Champion Pipeline to insert a natural gas pipeline in the Ottawa River bed rather than mount it on the dam, as it was previously. There was no formal consultation with the affected Aboriginal communities.

There is now a gas pipeline buried in one of the highest volume water release areas on the Ottawa River. Potential implications remain to be seen to both our fisheries and pipeline safety if the pipe becomes exposed and breaks in the turbulence of river outflow, often increasing in intensity due to climate change related events.

In summary, the Public Works and Government Services Canada (PWGSC) 2013 Temiscaming Dam replacement project environmental effects evaluation under CEAA 2012:

- failed to incorporate positive aspects of our local fisheries knowledge and perceptions into study, design and construction working procedure;

- co-ordinated a permit with Department of Fisheries and Oceans who failed to consult with us when the project was proposed, which caused serious harm or death to fish, directly impacting our fisheries;

- co-ordinated the burial of an industrial gas pipeline under the Ottawa River during dewatering without the proponent or NEB taking time to consult with KFN;

- depended totally on non-Algonquin ideas, goals, technology, workers and project supervision. This is inappropriate because of differences in environmental, socioeconomic, cultural, and political contexts between our First Nation and the proponent in this case Canada; and

- provided no financial resources to KFN, engaged only outside experts in all fields needed to implement the project while blatantly displaying a lack of commitment to consultation and ignoring the environmental and socio-economic aspirations of the host Algonquin nations.

From these experiences, we conclude that, while both the NEB and CEAA require an EEE to address socio-economic and cultural conditions in this project, both federal authorities set the bar extremely low in terms of what information would satisfy EEE and barely managed to meet what is required by regulators and definitely failed to meet what is required by science or Aboriginal communities.[14] Federal government

[14] Elais D.2016 Comments on the review of environmental assessment processes expert panel draft terms of reference.

agencies treated Aboriginal consultation as a hindrance to development by completely by-passing Aboriginal engagement or support for consultation and allowing this level of performance to be deemed acceptable by the federal government and its bureaucracy.

We recommend a means of monitoring Federal level of compliance to EA legislation and 'deep and meaningful' Aboriginal consultation, which should be implemented as per recent court rulings.[15] Consultation practices should also be assessed as to whether they adequately constitute "good faith" consultation aimed at achieving Indigenous FPIC.

We also recommend returning to a broader scope for federal environmental assessment that does not limit it to those "designated projects" listed in the *Regulations Designating Physical Activities*, SOR/2012-147. Where there is an interprovincial aspect, when Aboriginal peoples are affected or when other federal aspects are triggered (as listed at article 5 of the current Act), screening should take place to determine the level of environmental assessment that is required. Aboriginal people must be included at this early screening process to ensure that we participate in determining how environmental effects will be assessed.

Recommendations

12. *Federal authorities should be monitored for their adequate compliance with EA legislation as well as with the duty to consult and accommodate in a manner aimed at achieving the free, prior and informed consent of Aboriginal communities for those projects under review.*

13. *Federal environmental assessment should extend beyond the "designated projects" listed in the 2012 regulations and potentially extend to all federal projects, subject to screening that necessarily involves the Aboriginal peoples affected by the project.*

Kipawa Rare Earth Mine

Our second project experience was requesting a Federal Joint Panel EA review of the proposed Kipawa Rare Earth Mine in Quebec on Kebaowek and Wolf Lake First Nation territory. In 2013, we wrote to the federal Environment Minister, Peter Kent, expressing our concerns that a standard EA of the proposed Matamec Project would not be sufficient to address the unknown toxicity of mining, processing and waste storage of rare earths near Algonquin waterways and wetlands. The project was not subject to provincial environmental assessment.

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[15] See, for example, *Gitxalaa Nation v. Canada* 2016 FCA 187 *("Gitxalaa Nation")*

We asked the Minister for a Joint Review Panel based on CEAA section 38(c) that provides for joint review processes with other decision-makers, including Indigenous governments. As proposed to Minister at the time, a joint federal-Algonquin review panel would have provided the basis for better consultation and accommodation measures than a federal EA alone, based on the significant adverse effects and public concerns of the Algonquin communities on whose land the mining project was located. However, Minister Kent declined our request and decided on a standard EA process for the proposed Kipawa Rare Earth Project.

Minister Kent's decision did not provide any reasons for his refusal to appoint a Joint Panel Review (JPR). He simple reassured us that both EA and JPR would assess the same environmental effects and involve the same level of public and Aboriginal consultation. However, he neglected to address KFN's concerns of serious environmental effects, particularly due to the unknown science with respect to rare earth open-pit mining. Nor did he address the assertion of environmental assessment jurisdiction by Kebaowek and Wolf Lake First Nation to participate in a JPR.

Presently, KFN is concerned about the influence of the Province of Quebec over this mining development and its influence on future decisions of major concern. For example, without the Algonquin communities' knowledge – let alone free, prior and informed consent (FPIC) – Premier Jean Charest traveled to Japan to develop a joint venture with Toyota and the Matamec junior mining company to attract interest in the project. Toyota has since invested in the feasibility of the project and the Province has invested in the development of the rare earth processing technology. We are concerned that without the right EA regulatory environment this project could be a repeat of the McInnis Cement Plant in Port-Daniel, Gaspésie where Premier Couillard introduced Bill 37 to allow the project to be exempted from a review by the BAPE (*Bureau d'audiences publiques en environnement*), because of threats from the proponent to pull out if the project would have to go through a more extensive EA process.[16]

Our recommendation to the Expert Panel is to amend CEAA to provide for more regular recourse to requests from Aboriginal communities for Joint Panel Reviews that involve the Aboriginal community or an Aboriginal EA institution as conducting the EA, not simply participating in it (see Recommendations **9** and **10** above). It is time for governments to stop opposing serious environmental concerns with short-term economics. We need to have the ability to focus governmental due diligence around serious environmental concerns.

[16] Shields, Alexandre. (2015). La cimenterie de Port-Daniel échappera définitivement au BAPE. Le Devoir. Actualités sur l'environnement. 19 février 2015. http://www.ledevoir.com/environnement/actualites-sur-l-environnement/432213/la-cimenterie-de-port-daniel-echappera-definitivement-au-bape
It should also be noted that the construction of the plant had already started before the introduction of Bill 37.

On the topic of appropriate jurisdictions to undertake environmental assessment, we do not find that Quebec is such a jurisdiction. A number of actions should be undertaken to strengthen the environmental impact assessment (EIA) process in Quebec. The BAPE, requires a more fulsome legislative framework so that it can become a basic part of environmental decision-making in Quebec and have the means to implement and oversee its recommendations. It also requires participatory funding in order for Aboriginal peoples to adequately participate. Until such changes are made, the BAPE should not be considered as an adequate "substitution" process under s. 32 and following of CEAA 2012.

Finally, governments and industry need to be prepared to seek Aboriginal FPIC when making strategic development decisions that impact Aboriginal lands, waters and resources. This means considering the "no-project" alternative when evaluating projects.

Recommendations

14. *The Province of Quebec does not currently have an adequate environmental assessment regime or hearing process and should, therefore, not be considered for substitution under s. 32 of CEAA 2012.*

D. Assessing the resources for effective Aboriginal engagement in EA

Adequate resources to carry out meaningful consultation between parties must be assessed and negotiated, not unilaterally determined. Our experience to date is that the Federal government does not make reasonable cost or time considerations when attempting to fulfill its legal obligations to consult and accommodate Aboriginal peoples.

The availability of adequate participatory funding is essential to KFN's ability to participate in federal EA. Although we recognize that some funding through the Participatory Funding Programme (PFP) is very important, the current levels are inadequate for KFN to fill in the information gaps it sees in the EA reports of proponents. For EEE requests by federal authorities, the funding is rare or woefully inadequate.

If KFN and other Algonquin First Nations are going to establish a legitimate EA process over its territory that engages the Algonquin as assessors of projects, not simply participants, there needs to be an adequate transfer to resources to such an Algonquin entity. First Nations repeatedly pay the price of the so-called "devolution" of government services to their band councils without the adequate funding for human resources to administer the program. KFN does not wish to repeat the experience with federal EA.

Recommendations

15. *Participant funding needs to be increased to allow adequate Aboriginal participation in federal EA and EEE under CEAA.*

16. *Aboriginal institutions require sufficient financial resources to build capacity to undertake EA properly. They require increased funding as they take on increased responsibility.*

E. Strengthening the relationship between EA and traditional knowledge

Traditional values and knowledge are fundamental to formulating responses to climate change and environmental stewardship. This information should be given equal value to science-based appraisals. Science is slower than the speed of existing EA timeframes whereas Indigenous knowledge is local and based on their knowledge of place and environment over many years of observation.

However, currently, responsible federal authorities conducting EA have the discretion to consider "community knowledge and Aboriginal traditional knowledge" or not (s. 19(3), CEAA 2012). This legislative discretion does not provide ATK with equal value with respect to other considerations.

Another hindrance to the disclosure of ATK in federal EA and federal consultations related to EEE is the lack of legislative protection for the confidential nature of these exchanges, particularly when involving First Nations. The federal *Access to Information Act* does not include *Indian Act* "band councils" or representative First Nation organizations such as tribal councils among the "aboriginal governments" whose information is "obtained in confidence" and, therefore, protected from disclosure, pursuant to s. 13 of the Act. This basic protection should be provided to band councils.

Recommendations

17. *We recommend that "Aboriginal community knowledge and traditional knowledge" be mandatory considerations under CEAA and for any jurisdiction that the Minister seeks to substitute for federal EA.*

18. *The federal* Access to Information *Act should be amended to include* Indian Act *"band councils" and tribal councils as "aboriginal governments" or "aboriginal government institutions" whose information, including ATK, is protected from disclosure in accordance with s. 13 of the Act.*

F. Consider the Impact on FN rights of Regional Strategic EA planning tables.

Although there is much talk about the benefits of regional strategic EA planning tables, our experience with forestry planning tables in Quebec is that they can dilute First

Nation representation and rights in order to govern environmental assessment over common pool resources. KFN stresses that they have specific legal rights and title that need to be recognized in EA processes and that they are "not just another stakeholder" but expect to be consulted on a "nation-to-nation" basis.

KFN favours strategic regional social and environmental assessment conducted by Aboriginal institutions connected to Aboriginal rights and title holders. These institutions are best placed to carry out their own territorial land use plans and environmental assessments. For Kebaowek, an Algonquin EA institution could perform such an assessment and potentially interface with other assessment bodies.

G. Improving the scope of EA to address the realities of climate change and health related pollutants from industry in evaluating project approvals

The Government of Canada, in partnership with provincial and territorial governments, adopted the *Vancouver Declaration on Clean Growth and Climate Change*, which recognizes that the transition to a low carbon economy must be done "in partnership with Indigenous peoples based on recognition of rights, respect and cooperation." Future EA processes and legislation need to fulfill the objectives of the Vancouver Declaration.

CEAA should reflect the Government of Canada's commitment to reducing carbon emissions. All projects, actions and undertakings evaluated under CEAA should, therefore, contain information about foreseeable greenhouse gas emissions at all stages of the project, to be able to assess the overall carbon emissions impact of the project.

Recommendation

19. *To follow up on Recommendation 4 and the Vancouver Declaration, federal EA should assess all foreseeable greenhouse gas emissions at all stages of the project.*

H. Introducing protection of sacred sites and FPIC into new legislation

KFN is concerned that the current federal environmental assessment legislation is not implemented in such a way as to accord sufficient importance to indigenous sacred sites and indigenous stewardship of such sites.

In July 2014, the National Capital Commission (NCC) entered into a memorandum of understanding with Windmill Development Group Ltd. and Domtar Inc. for the sale of lands owned by the NCC and Domtar to Windmill. The latter proposes high-end residential and commercial development on Chaudière and surrounding islands.

Almost a year later, on April 22, 2015, the NCC recommended approval for a new hydro-electric facility at Chaudière Falls. Although the decision was conditional on "an Environmental Assessment Decision as required by the *Canadian Environmental Assessment Act* (CEAA) of 2012, and the completion of the aboriginal consultation process required under the Constitution Act,"[17] Kebaowek has not been engaged by any federal authority or the Crown in either process.

Chaudière Falls (Akikodjiwan), Chaudière Island, Albert Island and Victoria Island and adjacent lands and waters, are sacred sites for the Algonquin Nation and part of unceded Algonquin territory over which the Nation exercises Aboriginal Title. Kebaowek and most of the historically-established Algonquin communities have expressed their opposition to the type of development currently being proposed for Chaudière Island and Falls. In November 2015, this opposition garnered the support of the Assembly of First Nations of Quebec and Labrador (AFNQL) in the form of a resolution that demanded, among other things, immediate and adequate consultation and engagement by all the relevant governments (Canada, Quebec, Ottawa, Gatineau and Ottawa) with the Algonquin people affected by the development plans, the designation of the sites as "sacred" and, therefore, requiring Algonquin control and stewardship and the application of Algonquin FPIC to any development on the islands.[18]

Although the sacred quality of the Chaudière Falls area could be addressed as an "environmental effect" subsumed in the environmental change effecting "physical and cultural heritage" of an Aboriginal people (article 5(1)(c)(i) or a site of historical significance (article 5(c)(iv), it is unclear whether these provisions and the current federal EA process would be sufficient to address the sacred nature of this territory and the responsibilities for stewardship incumbent on the Algonquin Nation in regard to decisions affecting the site.

As previously mentioned in the context of sustainable development, article 25 of UNDRIP recognizes the distinctive sacred relationship that Indigenous peoples can have with those territories they are entrusted to maintain for future generations (emphasis added):

> Indigenous peoples have the right to maintain and strengthen their <u>distinctive spiritual relationship</u> with their traditionally-owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

As well, article 32, emphasizes Indigenous peoples' "right to determine and develop priorities and strategies for the development" of their territories, includes the obligation of States to take "appropriate measures … to mitigate adverse environmental, economic, social, cultural or <u>spiritual</u> impact" (sub-paragraph 3, emphasis ours).

[17] NCC Decision no. 2015-P56e to Board of Directors, April 22, 2015.

[18] Assembly of First Nations of Quebec and Labrador, resolution no. 27/2015, November 19, 2015.

Once again, in such a context, a good faith consultation process focused on achieving FPIC is required by the State "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" (article 32(2)).

Kebaowek is not convinced that the assessment of environmental effects by the federal authorities involved in these development projects will adequately respect the principles of articles 25 and 32.

Recommendation

20. *We recommend stronger legislative protection for sacred Aboriginal sites as part of social, cultural and environmental assessment undertaken by the Federal government in collaboration with Aboriginal peoples.*

I. Co-ordinating the *Species at Risk Act* with Provincial EA and resource management planning.

The Aboriginal Fund for Species at Risk (AFSAR), established in 2004-2005, supports the development of Indigenous capacity to participate actively in the implementation of *Species at Risk Act* (SARA). The protection of species at risk in Canada depends upon a meaningful collaboration with Indigenous peoples and organizations. The Act recognizes the important role that Aboriginal peoples play in wildlife conservation and the need to consider Aboriginal Traditional Knowledge (ATK) in the assessment of which species may be at risk, as well as in the development and implementation of protection and recovery measures. The overall goals of AFSAR are to contribute to the recovery of species at risk and their habitat, as well as to prevent other species from becoming a conservation concern.[19]

As AFSAR moves forward in partnership with First Nations in species-at-risk management, we would expect this effort to be harmonized in federal EA processes. Such harmonization will act as a safeguard where Provinces do not even recognize or support certain federally-recognized species-at-risk. For example, eastern wolf (*C.lyacaon*) are recognized as "threatened" by the SARA regime but have no such recognition and protection in Quebec.

Kebaowek supports SARA and co-stewardship initiatives and see these as a model for the implementation of mitigation measures for federal EA generally. Rather than a hindrance to development,[20] such measures reinforce sustainable development and an ecosystem approach to environmental decision-making.

[19] AFSAR website: https://www.retablissement-recovery.gc.ca/AFSAR-FAEP/index.cfm

[20] This is certainly how the Premier of Quebec, Mr. Philippe Couillard, qualified protection of caribou in 2014 when he said, "Je ne sacriferai pas une seule job dans la foret pour le caribou": Côté, Charles

Recommendation

21. *Co-stewardship initiatives, such as those supported by AFSARA, should be examined as models for the implementation of mitigation measures as overseen by the affected Aboriginal peoples. Such initiatives can inform the implementation of mitigation measures in EA beyond SARA alone.*

4. CONCLUSION

KFN is grateful to have this opportunity to address improvements to current EA legislation in Canada. To move beyond Indigenous silence, to introduce new policy and legislation in the spirit of reconciliation to help fix historical injustices – building an EA framework that is better, stronger and fairer and allows Aboriginal parties to speak on a nation-to-nation basis.

Creating a sustainable future for Canadians will critically depend on the active and effective participation of Indigenous peoples. EA consultation agreements with Canada and the provinces on evaluating strategic regional EA assessments can provide the opportunity for communities like Kebaowek First Nation to establish a common vision with governments through FPIC and a nation-to-nation relationship.

Current Federal environmental assessment processes are insufficient and do not properly address impacts to Aboriginal rights. Environmental effects evaluations are ineffective and do not target cumulative impacts or sustainability issues. The current CEAA 2012 legislation creates conflicts rather than reconciliation with our community and other First Nations across Canada.

KFN, with other First Nations in Canada, is advocating for UNDRIP as a framework for advancing our rights, dignity, survival, security and well-being.

If governments and First Nations continue to disagree on issues surrounding rights and responsibilities it is likely that costly legal and environmental challenges will ensue. Indigenous peoples like KFN can no longer be an object in a consultation check box to governments and project proponents but rather must be regarded active subjects with the rights and responsibilities to their territory and the processes of environmental planning, sustainability management and economics that happen in them. For this reason, we are recommending the development of indigenous institutions to steward development on our territories.

(2014). Bras de fer en vue sur le caribou. La Presse. Last update: April 28, 2014 : http://www.lapresse.ca/environnement/especes-en-danger/201404/28/01-4761476-bras-de-fer-en-vue-sur-le-caribou.ph
Since then, the situation has reached a critical level for Aboriginal people in northern Quebec: Jaime Little, Christopher Herodier (2016) Cree Reiterate Call for End of Sport Hunt, December 16, 2016: http://www.cbc.ca/news/canada/north/cree-reiterate-call-for-end-of-sport-hunt-1.3901034

The intent of the Algonquin institution is to simultaneously redesign Algonquin values and planning practices on Algonquin lands into a new social contract, one that creates market and cultural space for Indigenous ways of knowing while increasing sustainability as a means of co-existing. The work is about a cultural shift in current EA to include and expand links between environmental protection, including the conservation of biodiversity and species at risk, Indigenous cultural landscapes and traditional ecological values in Canada.

Mme Chair and fellow commissioners, we wish you success in this important task.

Meegwetch
Kebaowek First Nation