CEAA Review Process

Mi'gmawe'l Tplu'tagnn Inc.

12/14/2016

Table of Contents

A. BACKGROUND

i. The Mi'gmaq

The Mi'gmaq people have always lived in and occupied our traditional territory, which is known as Mi'gma'gi. The Mi'gmaq, as an indigenous people, have a unique cultural, social and economic identity that we have lived for millenia and which is embedded in the ecological and natural resources that are found throughout our territory. For thousands of years prior to European contact, the Mi'gmaq people recognized the significance of the environment to our survival as their very livelihood was grounded on the exploitation of its' natural resources, in accordance with their cultural understandings. Mi'gmaq hunting, fishing and resource use were all done in accordance cultural values, which were commonly established with the goal of protection and sustainability of resources the importance of the ecological integrity of the environment. This Mi'kmaq perception of the natural world around them is referred to as the Mi'kmaq "World View" concept, where Mi'kmaq understood the interdependence of ourselves with all aspects of the natural world.

> *Mikmaq People lived and died within the constraints of the natural world as they found it. They made no attempt to change the natural order to suit the convenience of human beings, for man was only one part of a totally interdependent system that saw all things, animate and inanimate, in their proper places…..*[1]

The Mi'gmaq continue today to maintain our sacred relationship with our lands, waters and resources, as we rely on such for the practice of our Aboriginal and Treaty Rights, rights which are constitutionally protected under s.35 of the *Constitution of Canada*. Further, much of the lands and waters that fall within the provincial jurisdiction of New Brunswick are the traditional lands of the Mi'gmaq and the Malecite. The Mi'gmaq have never ceded Aboriginal Title to any of their traditional lands and today continue to assert their Aboriginal Title to such.

ii. Mi'gma'gi and Mi'gmawe'l Tplu'tagnn Incorporated, ("MTI")

Mi'gma'gi includes the present day lands of Nova Scotia, Prince Edward Island, most of New Brunswick and parts of Quebec and Newfoundland. After the onset of colonization the Mi'gmaq were forced off of much of their traditional lands and

[1] Susanne Berneshawi, Resource Management and The Mi'kmaq Nation, *The Canadian Journal of Native Studies* XVII, 1(1997):115-148, page 120.

under the *Indian Act*, organized into Indian reserve land communities and Indian Bands. In New Brunswick there are presently 9 Mi'gmaq First Nation communities who occupy both their reserve land communities and their traditional territory lands throughout the province. Amlamgog (Fort Folly) First Nation, Natoaganeg (Eel Ground) First Nation, Elsipogtog First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipõgtõtjg (Buctouche) First Nation, L'nui Menikuk (Indian Island) First Nation, Ugpi'ganjig (Eel River Bar) First Nation and Metepenagiag Mi'kmaq Nation.

The 9 Mi'gmaq communities currently govern themselves as a collective Mi'gmaq government under the organization Mi'gmawe'l Tplu'tagnn Incorporated, ("MTI"). Translated from Mi'gmaq Mi'gmswe;l Tplu'tagnn means "Mi'gmaq People's Laws" or "how we govern ourselves". MTI's mandate includes the protection, assertion and implementation of Aboriginal and Treaty Rights. For the purpose of this submission to the Minister of Environment, MTI is acting on behalf of the 8 Mi'gmaq communities. Elsipogtog, one of our 9 Mi'gmaq members, will be providing its own submission.

It is MTI's position that CEAA 2012 will require substantial amendments if it is to properly address the rights of the Mi'gmaq. Currently, the present legislation falls short of recognizing and facilitating the inclusion of Mi'kmaq rights within the current regime, and does not support the government's constitutional and legal obligations to Aboriginal people.

When making a decision that may affect asserted or established Aboriginal and/or Treaty Rights the Crown has a legal obligation to meaningfully consult with indigenous people, which includes the Mi'gmaq. Project development in Canada will more often than not involve the destruction or significant denigration of lands or waters by proposed projects, which will clearly and unquestionably affect Indigenous peoples and their established and asserted Aboriginal rights. In the context of environmental approval and environmental legislation, it becomes imperative that federal legislation is consistent with the duty to consult, supporting an environmental regulatory process that ensures the inclusiveness and necessity of Indigenous people.

Going forward Canada's legislation for environmental approval of project development must be inclusive of indigenous people, their perspectives and rights, in a meaningful inclusive manner, and not as a second after thought. We are providing the following submission, including recommendations, which we

believe, if considered and incorporated by the Minister of Environment, will meet that imperative.

B. CEAA 2012

i. CEAA 1995 - Environmental Assessment Triggers

Within CEAA 1995 any project that met the definition of "project" under the legislation and fell under a pre-determined list of projects would automatically trigger a federal Environmental Assessment (EA). This triggering mechanism focused on federal jurisdiction, providing that a broad range of projects would automatically require an EA. As well, the definition of "project" that fell under the legislation was extremely broad and inclusive. Once triggered, a project would be assessed to determine what EA process it would be subject to; a screening or a comprehensive study. Further, the process also contained an option for recommendation to a review panel or meditation. All of this ensured that at the initial stage all federal projects received an in-depth environmental assessment, supporting a precautionary approach to project development.

Within CEAA 2012 the automatic triggering mechanism for an EA no longer exists; the Minister and the Agency now have broad discretion as to whether an EA is required and this "gap" is detrimental to the rights of the Mi'gmaq.

CEAA 2012 provides that only "designated project" has to be registered with CEAA.. A designated project is either a project designated in the regulations, or designated by the Minister if, in the Minister's opinion that;

> ***"…the carrying out of the physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation"***.

Those projects designated by the regulations are usually projects that meet certain thresholds in terms of size. This has led to the problem of proponents "tailoring" their project to fit under the thresholds in the regulations, regardless of the actual environmental impacts. For example, the Chaleur Terminals oil terminal project in our territory was reduced in size to fit under the thresholds such that an EA was not required, despite the obvious risks to our lands and waters. A provincial EIA was conducted, but ignored those environmental impacts that fell under federal jurisdiction, such as increased rail and tanker

traffic, with associated risks of oil spills and pollution. The end result is the project was approved without proper environmental scrutiny.

Further, even once a “designated project” is registered, with the exception of projects that fall under the National Energy Board (NEB) or the Canadian Nuclear Security Commission (CNSC), a screening of the project is conducted under s. 10 to determine whether an actual EA is required. And under s. 10, the Agency has broad discretion as to whether to require an EA, taking into consideration the project description (provided by the proponent), the possibility of adverse environmental effects, and public comments received during a 20 days comment period after notice is given on a website.

It is problematic that the decision is discretionary, that the only notice of the registration is given via a website, with a too brief period for public comment, and that the proponent’s own description is the main document considered. It is further problematic that environmental effects are one of only several factors the Minister can take into account in making a determination as to whether an EA is required. Environmental Assessment should be required for all projects where significant environmental impacts are likely.

This Ministerial discretion that is now contained within CEAA 2012 is problematic and detrimental to all Canadians, and in particular to Indigenous people, such as the Mi’gmaq. The legislation provides that project development can move forward based on political will and economics, rather than a legal test whose focus is based on reasonable environmental considerations. The result of this process is that there no longer exists certainty that project development is consistently subject to environmental scrutiny. Potentially environmentally damaging projects on lands and resources can slip through the existing “gap”, which, for the Mi’gmaq has serious implications for their lands and resources, their Aboriginal and Treaty Rights and their ways of life. Because of our close relationship and dependency on the lands and resources, project development should never proceed until full scrutiny of the environmental effects can be considered. Protection of lands, waters and resources should always be a first consideration of any federal environmental legislation, supporting a next-generation view of the environmental landscape.

C. DUTY TO CONSULT

i. <u>Duty to Consult</u>

As established by the Supreme Court of Canada, the Crown has a duty to consult with indigenous people when it is making a decision that has the potential to affect established or asserted Aboriginal and Treaty Rights, which includes accommodation where necessary, (*Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73, para 43, 44.). In that decision Maclaughlin C.J., addressed the issue of consultation and the exploitation of natural resources, identifying that the honour of the Crown requires government to act honourably;

> "*The Crown, acting honourably, cannot cavalierly run roughshed over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiations and proof…"*, (para. 27).

This obligation of the Crown to consult with Aboriginal people has been further reiterated and supported by further decisions of the Supreme Court of Canada, who have provided guidance to approaching consultation, emphasizing that;

> "*… consultation that excludes from the outset any form of accommodation would be meaningless*, *Mikesew Cree First Nation v Canada,* 2005"; para.55);
>
> "..*Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group, Tsihqoti'n Nation v British Columbia,* 2014 SCC 44, (para. 97).

The Supreme Court has also confirmed that the duty to consult can, in part, be discharged through regulatory processes such as environmental assessment, provided First Nations are meaningfully included in that process, not just as members of the public, but as rights holders. For the Mi'kmaq, if the Crown intends to rely on the EA process as part of the consultation process it is critical that any and all EA legislation is inclusive of the Crown's obligation to consult with indigenous people. The Mi'gmaq maintain a close relationship with the lands, waters and resources and rely on such for the exercise of Aboriginal and Treaty Rights, and our way of life. As well, CEAA's mandate is consideration of the lands, waters and resources. This common interest of both the Minister of Environment and the Mi'gmaq reinforces CEAA's role as one of the most significant pieces of federal legislation for indigenous people and as such it must be inclusive of an "Aboriginal Consultation Process".

Currently CEAA fall short of recognizing or including Aboriginal people as holders of constitutionally protected rights and/or recognizing the Crown's duty to consult with Aboriginal People on issues that may affect their constitutional rights. Current references to Aboriginal people within the legislation are as follows:

Purposes

4(1) The purposes of this Act are

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

Environmental Effects

5(1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designate project or a project are

(c) with respect to aboriginal peoples, an effect occurring on 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.

Factors To Be Considered

Factors

Community knowledge and Aboriginal traditional knowledge

19(3) The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge.

Canadian Environmental Assessment Agency

Agency's Objects

105 The Agency's objects are

(g) to engage in consultation with Aboriginal Peoples on policy issue related to this Act.

Upon review of the above clauses it is clear that there is no recognition of the constitutional character of Aboriginal and Treaty rights and/or the Crown's duty to consult. The present legislation does not provide for any recognition of Aboriginal and Treaty Rights or that any EA process must include consultation with indigenous peoples, which in some instances may require their consent and accommodation. The current legislation provides that Aboriginal people will be communicated and cooperated with, which falls short of the legal obligations that the Crown owes to Indigenous peoples.

This lack of acknowledgement of the special status of Aboriginal people is a contributing factor to the current problems with CEAA. With minor legislative language referencing the role and status of Aboriginal People the CEAA, both government and project developers fail to recognize their legal obligations owed to Aboriginal people. The legislation must be amended to incorporate the Crown's duty to consult to support a meaningful consultation process that better streamlines and accommodates Aboriginal people throughout the EA process.

For the Crown to properly address the duty to consult owed to Aboriginal people within the CEAA legislation it must

- Acknowledge that the Crown owes a duty to consult with Aboriginal People where they have knowledge that a project may affect asserted or recognized Aboriginal and Treaty Rights;
- Provide that the duty to consult must be meaningful consultation based on the reconciliation of Aboriginal and Treaty Rights.
- Provide for the meaningful inclusion of Aboriginal people <u>as rightsholders</u> within the environmental review at the onset and throughout the environmental review process.

Other principles must also be included, such as the *United Nations Declaration of Indigenous People*, the inclusion of Indigenous Knowledge and funding provisions, all of which are further addressed below.

ii. <u>Administrative Delegation</u>

The Crown owes a duty to consult with Aboriginal people within the EA process whenever it has knowledge of asserted or existing Aboriginal and Treaty Rights that may be affected by project development. Often, this obligation sees the Crown directing the proponent of a project to engage in consultation with Aboriginal people regarding the project. As was identified in *Haida*, the Crown may delegate procedural aspects of consultation to the project proponent, but where substantive consultation is required, the Crown must participate directly. The Crown is prevented from delegating substantive consultation because the "honour of the Crown cannot be delegated." (para. 53).

This principle correlates with the term "meaningful consultation", for in order for consultation to be meaningful it must be able to reconcile aboriginal and treaty rights and to address the concerns raised by Aboriginal people. In discussions on substantive issues, it will be likely that only the Crown will be in a position to ensure the inclusion of necessary condition or amendments to project development and ensure that Aboriginal rights issues are addressed.

Unfortunately, too often the Crown delegates consultation to proponents, and then relies on the proponents efforts to justify meeting its' duty to consult. As well, where proponents are delegated procedural aspects of consultation it is often unclear where the dialogue between proponents and Aboriginal people is a form of delegated consultation, resulting in situations where Aboriginal people don't even realize they are being consulted.

An example of this occurred in new Brunswick with respect to the Sisson Mine Project. When MTI met with CEAA staff and asked if consultation had been delegated to the proponent the answer was at first no, then later stating that there had been "implied" delegation to the proponent. This type of consultation "manoeuvering" is inconsistent with the honour of the Crown and hinders the Mi'gmaq and all Aboriginal people in their efforts to properly understand or prepare for consultation engagement. This must be addressed by the legislation. When and if CEEA is delegating procedural aspects of the duty to the proponent, they need to do so clearly, in writing, and with notice to First Nations. Delegations of procedural aspects of the duty cannot be implied. Such clarity will assist the consultation dialogue between all the parties and will be in keeping with the honour of the Crown.

As well, the legislation must be amended to include that in instances where project effects or the existence of Aboriginal Rights are substantial, only the Crown can fulfill the duty to consult.

iii. Lack of Environmental Assessments (EA's)

Within the environmental review process, whether and EA is undertaken or not will not be a determinative factor in the Crown's obligations to consult with the Mi'gmaq. However, the lack of an EA for project development does little to support an open, transparent and meaningful process that the Crown must embark on to fulfill its duty to consult.

In instances where an EA is required, proponents are required to provide project environmental reports identifying potential environmental effects, project location and description, mitigation measures, etc. Such project documentation becomes significant to the Mi'gmaq for their understanding of project effects and potential impacts on lands, waters and resources. The EA also becomes an essential resource to the Mi'gmaq in the consultation process as they are then better equipped to engage in a dialogue on potential effects, remedies, and mitigation.

In instances where no EA is required, the availability of information regarding project development becomes sparse, is often unavailable, or is provided extremely late in the consultation process. For the Mi'gmaq this translates into a consultation process that is not transparent and not meaningful as the lack of information hinders any real consideration of Mi'gmaq issues or potential mitigation efforts. If we consider that it is estimated that 95% of projects that required an EA under CEAA 1995 are now exempt under CEAA 2012, it is understandable why the Mi'gmaq often find themselves without full disclosure regarding project development.

In order to ensure that project information is made available to the Mi'gmaq and all Aboriginal people, the legislation must be amended to ensure that EA's are triggered once a project triggers federal jurisdiction. If the environmental legislation of CEAA 2012 continues as is, the Mi'gmaq and all indigenous people throughout Canada, will continue to be hindered in their ability to understand the environmental implications of a project on their lands, resources and Aboriginal and Treaty Rights.

iv. UNDRIP

The *United Nations Declaration on the Rights of Indigenous People* is relevant to environmental legislation as it includes various Articles that address lands, resources and consultation. Specifically, Articles 18, 19, 25, 26, 31, and 32 must be considered in the amendments to future environmental legislation to ensure Canada's compliance with their international commitments. We draw your attention to Article 32 (2), which reads;

"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 resource, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

Free, prior and informed consent means that federal environmental legislation must ensure that Canada is consulting with Mi'gmaq at the high level of the spectrum where consent is required on issues affecting their rights, including their lands and resources. In New Brunswick, Mi'kmaq have unceded title to their traditional lands as well as proven, court affirmed Aboriginal and treaty rights. Thus, for us , UNDRIP demands that Canada engage in a process with us that provides full disclosure of project development in a timely manner, and engage in a dialogue where we are given the opportunity to consider a project and decide whether we consent to its development or not.

v. Indigenous Territory

CEAA continues to rely on the location of the *Indian Act* reserve system, with respect to project development and consultation, as a means of determining which indigenous communities are the most impacted by a project and thus should be included in consultation efforts. This approach by CEAA fails to take into account the fact that the reserve system is product of colonialism, and has little consideration of the actual territory of the Mi'gmaq, which in New Brunswick is a substantial component of the land and water base. The Mi'gmaq have never surrendered their traditional lands and waters and continue to assert Aboriginal Title to their traditional lands.

This is a colonialist approach by CEAA which ignores the fact that the Mi'kmaq have Peace and Friendship Treaties, also known as the Covenant Chain of Treaties, which contain no boundaries or geographic limitation on the exercise of treaty rights or land occupation and use. Today, the Mi'gmaq exercise their recognized Aboriginal and Treaty rights throughout their territory and that of their Wabanaki brothers and sisters.

This omission by CEAA in failing to recognize that the Mi'gmaq can be affected by project development that is not in the immediate vicinity of one of the 9 *Indian Act* Mi'gmaq reserves has resulted in the Mi'gmaq not being meaningfully consulted on projects that effect their Aboriginal and Treaty Rights. An example of this occurred in 2015 with respect to the Sisson Mine project. The Mi'gmaq

leadership requested that CEAA provide for the inclusion of an Indigenous Knowledge Study (IKS) to consider their land/water/resource use patterns. CEAA refused on the assumption that there was no Mi'gmaq current use in the area of the proposed project, the rationale being that the Mi'gmaq traditional territory did not extend to the area of the project, which the Mi'gmaq disputed. Recent IKS work that the Mi'gmaq completed on a separate project has shown that there exists an abundance of current traditional land use in the area of the Sisson Project and that project will, indeed, profoundly impact the New Brunswick Mi'gmaq.

Therefore, consideration of the impact on Aboriginal and Treaty Rights must not be limited to the colonial construct of reserves, nor inaccurate historical sources. Instead, the legislation must consider the traditional territory of the Mi'gmaq, and all indigenous people, when considering when, where and with who consultation must occur. As well, there must be recognition that the practice of Aboriginal and Treaty Rights does not require Aboriginal Title and in many instances indigenous peoples often co-exist, practicing rights in areas of shared territory. For the Mi'gmaq of New Brunswick this is reflective of their situation.

vi. Indigenous Knowledge Study

Indigenous Knowledge (IK) is a body of knowledge that is also commonly referred to as traditional ecological knowledge, TEK, indigenous knowledge, Mi'kmaq ecological knowledge or Aboriginal knowledge. Most generally, indigenous knowledge refers to a body of collective information about the natural world and or environment that is derived from the experiences and traditions of a particular group of people. It is a legitimate indigenous knowledge system that is practiced and passed down from generation to generation.

The role of IK within the EA process is an essential component to understanding environmental impacts and issues with respect to indigenous practices and rights. One of the earliest examples of where IK was included within an EA process occurred in the *Mackenzie Valley Environmental Project, Berger Inquiry,* where IK was considered to further understand the impacts of the project on the activities of the indigenous people. [2] Since that time IK information has been documented through Indigenous Knowledge Studies (IKS), which have continued to develop as a necessary inclusion for understanding indigenous rights practices, ecological knowledge and potential impacts issues.

[2] Minister of Supply and Services Canada, "Northern Frontier, Northern Homeland, The Report of the Mackenzie Valley Pipeline iNquiry, Vol.1" 1977, p.xiii.

In New Brunswick, the Mi'gmaq recognize that IK is imperative to environmental considerations and have developed a *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide* to ensure that IK is documented in accordance with the values and principles of the Mi'gmaq. In Nova Scotia the situation is similar and the Mi'kmaq there have developed a *Mi'kmaq Ecological Knowledge Protocol (MEKP),* to also ensure that when IKS's are developed, they comply with the requirements as provided for by the Mi'gmaq communities. Both of these Guides are attached to this submission for your consideration of the significance of IK.

IKS has also spread beyond Aboriginal impact consideration and is now also recognized as an essential component to ecological knowledge from a holistic environmental consideration. It is often referred to as a "two-eyed" seeing approach which provides for the convergence of western science knowledge with indigenous knowledge, providing a more comprehensive and holistic approach to environmental and ecological considerations.

CEAA 2012 presently has no requirement for an IKS but provides that Aboriginal traditional knowledge MAY be included in an EA; CEAA 2012 must be amended to require that all environmental assessments must include an Indigenous Knowledge Study ("IKS") or traditional knowledge study (TKS). The current legislation, s.19 (3), states that environmental assessments MAY take into account community knowledge or Aboriginal traditional knowledge. IKS is a critical component for indigenous people, including the Mi'gmaq, when considering the potential impacts or effects of a project on their rights, resources or lands. An IKS will identify on what lands or waters indigenous people are exercising their rights and will also identify further information about ecological resources significant to the Indigenous group. This information is necessary to ensure that the consultation process that should be occurring between the Crown and Indigenous people is meaningful, supporting accommodation and reconciliation between project development and indigenous rights. Without an IKS, the ability for indigenous groups to understand the effects of a project on their rights is severely limited.

Factors to Be Considered
S.19

Community Knowledge and Aboriginal traditional knowledge
(3) The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge.

This is problematic for the Mi'gmaq as holders of s. 35 constitutionally protect Aboriginal and Treaty Rights for a number of reasons. First, the present wording of the legislation provides that indigenous knowledge is not a necessity of an EA, but rather is at the discretion of the proponent or government. This is unsatisfactory as the Crown has a duty to consult with indigenous peoples and thus to consider the potential impacts of a project on their rights and where necessary, accommodate. As well, Indigenous people also have a reciprocal duty to engage with government in consultation process. However, if there is no requirement for an IKS, the consultation process will be hindered in understanding the impacts of a project as the information necessary to understand potential impacts will be contained within the IKS. The IKS will demonstrate where, how and when Indigenous people are exercising their rights, their interactions with resources and their ecological knowledge regarding species and habitat. All of this information is essential to the parties in a consultation dialogue. To engage in consultation on potential impacts of project development without an IKS is to render the process meaningless. The present legislation requirement for IK is clearly insufficient for supporting a consultation process that is obligated to take into account the constitutionally protected aboriginal and treaty rights held by indigenous people.

The further exclusion of indigenous issues is evident in the triggering mechanism of CEAA 2012 where the lack of a pre-determined legal test for EA requirement has resulted in a substantial decrease of EA's being required by project development. This now means that not only are IKS's discretionary, but since they will only ever occur if an EA is required, the chance of an IKS being undertaken by the proponent will be minimal. This further perpetuates the exclusion of indigenous issues within the federal environmental process, contributing to a consultation engagement that will never be meaningful.

vii. Participation Funding

In order for the Mi'gmaq to meaningfully participate in the CEAA processes, the Mi'gmaq must be provided adequate funding to assess the impact on our rights. This includes being provided funding that allows for undertaken of three key components that are necessary to a meaningful consultation process: Indigenous Knowledge Studies, Technical Review of Environmental Documentation, and Community engagement with member communities. The funding required to support such will be fact specific and depend on the scope and size of the project being developed and the potential implications/effects of the project on the Mi'gmaq members.

While it is difficult to create a budget in the absence of a specific project, the following is a general guide to the types of funding support required, making general assumptions on two types of projects: one that is very site specific to a limited land or water base, and one that is very broad in its' scope and application.

Site Specific Project

A. Technical Review

This would involve a review of the environmental reports that have been developed by the proponent respecting project risk assessment (land and waters implications), construction and infrastructure assessment, environmental and socio-economic considerations, decommissioning, and other technical factors of the project, where applicable. This would involve review by in-house staff and consultants, legal counsel, and, depending on the nature of the project, may also require MTI to engage outside experts in areas such as mining.

B. Indigenous Knowledge Study

This would involve engaging in interviews with on and off-reserve community members who frequent the area or may have used the area in the past to gather indigenous knowledge. A final report would be developed which would provide a detailed understanding of the Mi'gmaq use of the project area.

C. Community Engagement

This would involve the Mi'gmaq leadership and organizations engaging with on and off-reserve community members regarding the project in at least 3 community or focus group sessions.

COSTS:

Technical Review

Review of Technical Documents by Staff, Legal Counsel and Outside Consultants
Meetings with CEAA Staff
Produce Responses to EIS and CEAA Report

$200,000

Indigenous Knowledge Study

15 interviews – video and audio taping

Transcribing
GIS mapping
Development of Final Report

$150,000

Community Engagement
1 Elders/Youth Session
2 large Community Session x 2 On-reserve Communities
1 large Community Session x 1 Off-Reserve location

$120,000

TOTAL COST **$470,000**

Broad Scope Project

i. Technical Review

This would involve a review of the environmental reports that have been developed by the proponent respecting project risk assessment (land and waters implications), construction and infrastructure assessment, environmental and socio-economic considerations, decommissioning, and other technical factors of the project, where applicable. This review would involve a much larger documentation review as the project is large in its application and activity. Again, this would involve in-house staff, legal counsel, and for larger projects, almost certainly outside consultants.

ii. Indigenous Knowledge Study

This would involve engaging in interviews with on and off-reserve community members who frequent the area or may have used the area in the past to gather indigenous knowledge. A final report would be developed which would provide a detailed understanding of the Mi'gmaq use of the project area. This would involve a larger number of interviews than a site specific project, as the project has implications for all of the Mi'gmaq located throughout the territory.

iii. Community Engagement

This would involve the Mi'gmaq leadership and organizations engaging with on and off-reserve community members regarding the project in at least 3 community or focus group sessions. This would involve a larger number of

community meetings than required for a site specific project, as the project would have implications for all of the Mi'gmaq located throughout the territory.

iv. Review Panel Participation

We have also included estimated costs to participate in a review panel process (where applicable).

COSTS:

Technical Review
Review of Technical Documents by Staff, Legal Counsel and Outside Consultants
Meetings with CEAA Staff and Proponent
Attend various technical sessions and meetings
Produce Various Reports and Studies
$$500,000

Indigenous Knowledge Study
90 interviews – video and audio taping
Transcribing
GIS mapping
Development of Final Report
$$900,000

Community Engagement
1 Elders/Youth Session x 8 On-Reserve Communities
2 large Community Session x 8 reserve Communities
2 large Community Sessions x 2 off-reserve locations
Funding for community liasons to keep communities informed on ongoing basis
$$1,000,000

Participate in review panel process (if necessary):
$1,000,000

TOTAL COST **$$2,400,000-3,400,000**

Core consultation funding provided by Canada is inadequate to support more than one staff position, which is inadequate when dealing with major project reviews. As such, MTI is forced to submit needs-based budgets to CEAA on a

project by project basis for each review, which include funds for technical review (including time for additional staff, as well as lawyers and consultants), IK studies, and community engagement.

Typically, CEAA then responds with a budget allocation that is based on a formula, and which bears little resemblance to the budget submitted, and sets hard caps on certain types of spending. This often forces us to curtail necessary aspects of our activities, notably community engagement.

If First Nations require additional funding to complete their work, they are directed to talk to the proponent. However, as we saw with the Sisson Brook project, if the proponent refuses to provide additional funding (in that case for an IK Study for the Mi'gmaq), or cannot agree an adequate funding level with First Nations, CEAA does not require the proponents to provide such funding.

Funding for consultation should also be provided directly from government and not from the proponent. By the proponent providing financial support to First nations directly it contributes to a lack of trust and understanding by community members who see the transfer of funds as an acceptance by Mi'gmaq leadership of the project being developed. This hinders the consultation process as many indigenous people, including the Mi'gmaq, are hesitant to meet with proponents and accept financial support, for perception of the acceptance of the project. This practice, if continued, will continue to be detrimental to meaningful consultation.

The Crown is the party that owes the duty to consult and as such they should be providing the financial support to indigenous people for consultation and inclusion. If the Crown wishes to recoup financial contributions from the proponent for consultation that is an administrative detail that should be dealt with internally between the parties and can be addressed in the *Cost Recovery Regulations*.

ix. Timelines

CEAA 2012 made significant changes to the timelines within which an environmental assessment must be conducted, including imposing a 365 day time limit for the Minister to make a decision once an environmental assessment by a responsible authority has been commenced.

This has resulted in extremely short timelines being imposed on First Nations to provide comments or input in the process. As an example, on the Sisson Brook

and BP Scotian Basin reviews, MTI has been provided with as little as 21 to 30 days to comment on an environmental impact statement, and a similarly short time period to comment on any EA Reports. This is an inadequate time period in which to complete a review of technical documents which are hundreds (and sometimes over a thousand) pages long, understand them, make sense of the impact on rights, and provide a response. It requires organizations like MTI to mobilize staff and consultants on extremely short notice, and requires extraordinary amounts of work in a short time frame. This increases costs and taxes the resources of the organization. It does not provide adequate time for a proper technical review, let alone any community engagement whatsoever.

The short timelines for review in both the Sisson Brook and the BP Scotian Basin Projects stretched the resources of our organization to breaking point. They did not allow adequate time for meaningful input, meaningful engagement with our communities, or proper consideration of our Aboriginal and Treaty Rights. This is not meaningful consultation, it is not consistent with our Aboriginal and Treaty Rights, and it is not consistent with the Honour of the Crown. The Act must be amended to provide more reasonable minimum timelines for First Nations input.

D. CONCLUSION AND RECOMMENDATIONS

Presently CEAA 2012 is legislation that does not sufficiently address Aboriginal rights, nor the Crown's obligation to address such rights in the broader Canadian environmental framework. The legislation fails to recognize Aboriginal peoples as the s.35 rights-holders, which is a necessary starting point if the Crown is to undertake consultation on development which will more often than not, infringe on Aboriginal Rights.

Moving forward the following Recommendations should be addressed in future amendments to CEAA 2012:

1. **That CEAA 2012 is amended to encompass the CEAA 1995 pre-determined federal list of projects that automatically triggered an environmental assessment**;

2. **That CEAA 2012 is amended to encompass language that recognizes Aboriginal people as the holders of s.35 Aboriginal Rights and recognizes the Crown's duty to meaningfully consult with them when the Crown has knowledge that a project may affect their Aboriginal Rights, including asserted rights**;

3. **That where CEAA 2012 identifies its' requirement to consult with Aboriginal People regarding their S,35 Aboriginal Rights it identifies that consultation will be meaningful and will include Aboriginal Peoples at the onset and throughout the environmental review process.**

4. **That CEAA 2012 is amended to ensure that where the Crown delegates procedural aspects of their duty to consult to the proponent they must do so clearly and in writing to the Aboriginal Peoples affected;**

5. **That CEAA 2012 is amended to reflect the international commitments of Canada in the *United Nations Declaration on Indigenous People* and that consultation with Aboriginal Peoples must include their "free, prior and informed consent" on projects that affect their Aboriginal Rights.**

6. **That when identifying who to consult with CEAA 2012 must recognize that Aboriginal Peoples' occupy and practice Aboriginal Rights throughout their traditional territories, lands where they also may hold Aboriginal Title, and that they can be affected by projects that may have no proximity to the present day *Indian Act* reserves.**

7. **That CEAA 2012 is amended in order to ensure that Aboriginal people are provided adequate funding to undertake the activities necessary to achieve meaningful consultation;**

8. **That CEAA 2012 is amended to ensure that when undertaken consultation, Aboriginal Peoples are provided project information in a timely manner and are also provided sufficient time that allow them to review technical project information to ensure their ability to provide an informed response.**

9. **That CEAA 2012 is amended to recognize that where an Environmental Assessment is to be undertaken by Government or a Proponent, an Indigenous Knowledge Study will be a requirement.**

10. **That CEAA 2012 is amended to ensure that funding provided to Aboriginal Peoples for consultation is provided directly from the Crown and not from the Proponent.**