PROBLEMATIC ISSUES WITH CANADIAN ENVIRONMENTAL ASSESSMENT AND FIRST NATIONS

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Introduction:

My name is Kekinusuqs, Judith Sayers. I am from the Hupacasath First Nation whose territory includes the City of Port Alberni. I am not here on behalf of my Nation but rather as an expert in the area of Environmental Assessment. When I was Chief of my Nation I participated in two Environmental Assessments as the First Nation whose territory the proposed projects were on. I also participated in one environmental assessment where Hupacasath was one of the proponents. I have also taught Environmental Assessment at UVIC law and studied many assessments and worked with First Nations going through environmental assessments.

I will be focusing on First Nations as that is my area of expertise. I won't be addressing Metis of Inuit issues. First Nations have specific rights and a body of law that applies specifically to them.

I would like to address what is not working well and needs to change with the current federal assessment processes.

CONCERNS

1. Independence ss. 103-113

The Canadian Environmental Assessment Agency (CEAA) is no longer an independent agency. It used to be an independent federal government agency that administered the federal environmental assessment process that was accountable to parliament through the Minister of the Environment.

If the Canadian public is to have any confidence restored, the Agency must be given independence once again. Even when CEAA was independent there were still some people who believed they were directed by the government/Minister and was not free of political interference. There must be a clear separation of CEAA from the Government especially as governments promote projects before they are given approval and people feel there is direction to the Environmental Agency to produce recommendations for the project.

2. Purpose and Mandate of CEAA (s. 4(1)(a))

The purposes of CEAA 2012 was limited to Significant Adverse Environmental Affects that **are within the federal jurisdiction.** The previous CEAA determined the scope of the project and all environmental affects of the project. It is very difficult to do an environmental assessment on a project without looking at all affects of the project or the results would be limited. A review can look changes to the environment that are directly linked to or necessarily incidental to any **federal decisions** about a project but it is always within the discretion of CEAA to determine what those are.

(Federal jurisdiction includes: fish and fish habitat; other aquatic species; migratory birds; federal lands; effects that cross provincial or international boundaries; **effects that impact on Aboriginal peoples, such as their use of lands and resources for traditional purposes)**

Mandate of CEAA

> "Encourage Federal authorities to take action that **promote sustainable development in order to achieve a healthy ENVIRONMENT and a healthy ECONOMY"**

It is interesting to see this mandate as the decisions that have been made by CEAA have not shown they are making recommendations that will achieve a healthy environment there is more emphasis on a healthy economy. There needs to be a balance between the two and the legislation should be clarified to do that. There is also no mention of healthy people.

Sustainable development means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs. In every decision regarding a project, it should be clear how a healthy environment can be assured on all the environmental affects and how the resources is being used that will be available for future generations as this is never enunciated. There is no plan on how to take non-renewable resources on a scale that will last for generations.

3. CUMULATIVE EFFECTS s. 4(1)(i)

Another purposes of CEAA is to encourage the study of CUMULATIVE EFFECTS of physical activities in the region and the consideration of those studies in EAs. Studying and taking into account Cumulative effects must be mandatory and a requirement in the legislation. In some areas of BC, northern BC for example, the area is inundated with mining, oil and gas development, forestry and other developments. To look at one project in isolation of what is already there would be detrimental to First Nations. More specifically, fracking projects, and others are given the use of large amounts of water. No one specifically looks at the totality of water use and can have detrimental long lasting negative consequences for the area. This was documented in the Auditor General of BC Report entitled "managing the

cumulative effects of Natural Resource Development in BC."[1]

One thing that concerns me is the ability of the federal government to infringe on aboriginal or treaty rights (abrogate or derogate) for the greater public good using the justification test that was set out in cases like Sparrow(1990)[2] and Delgamuukw[3]. But if every decision the federal government is justified on the grounds of the greater public good (jobs and revenue), at what point will there be any aboriginal rights to exercise if the habitat for birds, animals, trees and plants have been destroyed. The more recent Tsilhqot'in[4] decision says that the aboriginal perspective must be considered as well as from the perspective for the broader public and must foster reconciliation. Since these court cases have been decided at the Supreme Court of Canada, these principles have not been followed or fostered by the government.

4. ENVIRONMENTAL AFFECTS ON INDIGENOUS PEOPLES s. 5(1)(c)

The Act attempts to define the environmental effects on indigenous peoples and does not do a good job as it is not really clear what it means.

It is 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 (Fossil record) or architectural significance

The definition does not talk about the effect on the ability to protect and preserve the aboriginal rights that are protected under s. 35 of the Constitution Act. Is this physical heritage? Can the continual development leave enough habitat to support hunting, fishing and gathering?

It does talk about the health conditions-but in many EA's, the fact that First Nations health depends on consumption of fish and wildlife is not taken seriously enough. The quality of fish and wildlife and the effects of the development on quality, is not given serious enough weight. In the past that was the main diet and still is for many. To not get enough of the foods we live on changes the health of our people. There are always scientists who will say that things like moose will not be affected yet First Nations have experienced opening up a moose and finding the meat to be

[1] http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Cumulative%20Effects%20FINAL.pdf
[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do
[3] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do para 165
[4] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do para 80-82

greenish in color, the effects from dams already in the area. Or past experiences with things like dams and the effect of dust on health. Or a diamond mine is built in the middle of the barren lands and caribou are harder and harder to find. Many of these findings are based on theory but when First Nations have to live with the effects of these projects it is a harsh reality.

One area that falls within provincial jurisdiction but also within this definition are sacred sites or burial sites or cultural landscapes. These are often sacrificed for the sake of development. The Site C dam in north eastern BC allows for the destruction of over 300 recorded archaeological sites which includes burial sites. There are also many more unrecorded sites that are important to the First Nations in the area of the dam but do not fall within the definitions in the BC Heritage Conservation Act. Destruction of these sites affects the emotional and mental health of First Nations people. The sense of loss is immense but very little consideration is given to these very important sites as it is difficult to convey to review panels and government how integral this is to First Nations lives, practices and how it affects the health of First Nations. These losses are invaluable and compensation cannot replace that which is lost.

The important point here is that while there is a list of possible changes to the environmental affects on indigenous people, there is not consideration given to these in the EA Process, or enough weight on how things will affect indigenous people. Or the importance of these elements are not fully understood. I have often seen First Nations people pour their hearts out before a panel and to have all of that ignored in the actual recommendations.

5. CABINET POWERS

s. 5(3) allows Cabinet to add or exempt a component of the environment from the application of the Act by Order-

The discretion of the cabinet to add or exempt a component of the environment presents a lot of uncertainty for First Nations and all people in environmental assessment. So if the cabinet really wants to push a project through, they can say that water or air or land effects will not be considered. Getting the cabinet to change an order they made is very difficult.

The fact that the cabinet has this discretion does not provide anyone with the confidence that environmental assessments will be done properly and without political interference. There needs to be strict requirements or definition of why the Cabinet could exempt a component of the environment or as it stands, the cabinet can exempt a part of the environment without giving reasons or having a valid basis.

If First Nations are not consulted or their consent given, and the cabinet makes a decision, First Nations recourse is in the courts, or on the land.

6. SCREENING DECISIONS:

Screening Decision does not mention consultations with FN to determine if they want an EA only mentions the public that has 45 days to be consulted. First Nations are added into the public and First Nations have rights to be considered and often 45 days is not enough.

7. WHAT WAS AND IS EFFECTS OF CEAA 2012?

With the limitations set out in CEAA, there will be approximately thousands of fewer EA's (screening or otherwise) under federal EA will happen. There was also a reduction of the number of federal agencies and departments conducting Federal EAs to 3 (the Canadian Environmental Assessment Agency (CEAA); the National Energy Board (NEB); and the Canadian Nuclear Safety Commission (CNSC) or in some cases another federal authority that holds hearings and is designated by Order or regulations

These changes means that there will many developments out there that will be done without environmental assessment. This also does not give the public confidence that the environment will be looked after.

CEAA 2012 narrowed EA considerations and no longer includes considering the "need" for the project but can look at alternative to the project. This was an important question that needed to be asked, was developing a project that would create negative environmental affects actually needed? Past EA reviews would spend considerable time on this very important question that is no longer asked and should be.

8. TIMELINES:

Set timelines for completion of EAs for projects (i.e. those remaining subject to Federal EA), regardless of complexity and availability or lack of critical information

Panel reviews must be completed within 24 months and Minister will set project-specific timelines for each phase of the review panel process or 365 days from the commencement of an EA by the Agency to the final EA decision

Not all environmental assessments are the same and the complexity and type of development and the number of people/communities it impacts will vary so having one length of time for all projects does not take into consideration these various factors.

The Minister may extend these timelines for up to 3 months to enable cooperation with another jurisdiction or because of circumstances that are specific to the project. Federal Cabinet can extend timelines beyond 3 months. Receiving

extensions of time are onerous and become political when it comes to the cabinet level and many of the Cabinet may not have the level of understanding in the environmental assessment process or the particular project in order to consent to an extension.

The Minister must terminate a review panel that fails to meet its deadline, and may also terminate a review panel when he or she is of the view that it is not likely to meet its deadline. In both cases, the Agency is required to complete the EA. This also puts doubts in peoples minds about the independence of an environmental assessment. There may be valid reasons why the panel is taking longer and with the ability of the Minister to terminate a panel when in his view the panel won't meet its deadline is very discretionary. There should be strict rules on when a panel can be terminated other than deadlines, there may be valid reasons that the cabinet may want to accept like waiting for a critical study or waiting until consultations with First Nations are complete. Or something more fair, the Minister gives them a deadline to produce a result that gives them time to finish their work. Why have a panel take two years to do the work, consult people and then have it abandoned. Agency staff did not hear the presentations and understanding what was said is different than reading a transcript.

Such strict timelines may impede a proper environmental assessment. Some developments are more complex and involve a lot of jurisdictions and people. It is difficult to do all things within

9. DECISION MAKING

The Minister used to make the decision on a proposed project based on the Review Panels recommendations. Now, at the end of an EA, the Minister of the Environment determines whether the project is likely to cause significant adverse environmental effects, taking into account mitigation measures that were identified during the EA. If it is determined that a project is likely to cause significant adverse environmental effects, the **federal Cabinet will then decide** whether these effects **are justified** in the circumstances. The Minister is more informed on the project as he has had more involvement. Trying to brief all of the cabinet on all the technicalities is a large job and unless they understand all the aspects of the project, they are making their decisions not well informed.

In my recollection there was only one EA in BC that the developer was turned down and that was the Prosperity Mine. This was a decision of the Minister who believed the effects of the project on First Nations people were too destructive. I believe this was the motivation behind decision making being made by the cabinet.

10. PROJECTS ON RESERVE:

Projects on reserve will be subject to review if the EA office decides one is needed. As this is reserve land, the First Nation Chief and Council should tell the EA Office if

there should be an EA or if they have an internal process for EA even if it isn't a formal process under a treaty or self-government agreement. This should not be a decision of the EA office. If the Crown is ever to reconcile and establish a new relationship with First Nations there has to be recognition of the jurisdictions of the First Nation.

11. JOINT PROCESSES s. 34 and 35

Minister can substitute a provincial process/agency or body that has been established under Act of the province to do the EA. While there are conditions to the Federal government to be able to do it, if they use the provincial process or substitute another process that has already been completed, they are abandoning their responsibility to the environment/indigenous people. If they are also delegating their consultation of indigenous peoples they are also breaching their duty to consult as this cannot be delegated.

12. Traditional Knowledge: s. 19(3)

The Act states that the EA can take into account community knowledge and aboriginal traditional knowledge. Aboriginal knowledge is not defined anywhere in the act. Traditional knowledge has many terms such Traditional Ecological knowledge (TEK), indigenous wisdom. The term traditional is one that implies the past. Indigenous knowledge or ways of knowing have been passed on from generation to generation and are not in anyway in the past. The term should be redefined.

The act says traditional knowledge MAY take into account traditional knowledge. This should say must take into consideration traditional knowledge. There should not be any discretion to the decision maker.

The biggest concern that I have is when First Nations people present to non First Nations peoples on indigenous wisdom is how much do they understand, or try to understand and how much weight to they give it? They do not give it as much weigh as science even though they should. I have watched First Nations presenting to panels and see panel members bored, bewildered or not focusing on the important information being provided.

Have First Nations on panels may help, but if there is only one member and are not in the majority, will it make a difference.

I understand that there is limited indigenous staff and they don't have the time to work with panel members on understanding indigenous wisdom.

Mechanisms need to be put in place so that indigenous wisdom is taken seriously and is part of what is relied on for decision making.

13. CONSULTATION WITH FIRST NATIONS

It is important to not that when the previous government totally rescinded the Environmental assessment and introduced CEAA 2012, there was no consultation with First Nations and so First Nations did not have input into this legislation.

It is even more important to note that when the previous government introduced Bill C-38 and 45, many important acts were stripped of higher environmental Standards. This included important laws like the Environmental Assessment act, Fisheries Act , Navigable Waters Protection Act, NEB Act,. First Nations were not consulted on any of these laws.

Now when projects are approved under CEAA 2012, the federal laws no longer have environmental stands that could protect what is important to First Nations and there is no faith in the Environmental system because of this. The public feels the same way and when the Prime Minister said he would be looking at these, and the federal government is reviewing a few, there have been major projects such as Site C, Pacific NorthWest LNG, and now KInderMorgan Trans Mountain pipeline based on ineffective laws.

The Courts have clearly laid out that the Federal Government the duty to consult extends to strategic, higher level decisions that MAY impact on aboriginal claims and rights.

In the Rio Tinto[5] (2010) case before the Supreme Court of Canada the Court said

"Further government action is not confined to decisions or conduct which have an **immediate** impact on lands and resources. A **potential** for adverse impact suffices. Thus the duty to consult extends to "**strategic, higher level decisions** that may have an impact on Aboriginal claims and rights." The Court gave examples of strategic higher level decisions as: transfer of tree farm license, multi year forest management plan, establishment of a review process for a major gas pipeline and conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission. The courts have not fully explored what a strategic Higher Level Decision is but I am sure legislative measures such as CEAA 2012 is one of those decision as such laws have a potential affect on rights and title.

While this panel is a good idea and are hearing from First Nations people, a full consultation with First Nations across the country should take place.

13. IS A FIRST NATION CONSULTED IF PART OF REVIEW PANEL PROCESS?

The Taku River Tlingit[6] Case before the SCC (2004) said that Taku's participation in

[5] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7885/index.do
[6] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2190/index.do

the project committee was consultation. This case was based on the BC Environmental Assessment Act 1996 and had different provisions than CEAA 2012. Take participated in the committee, commissioned studies with the committee, sat on an aboriginal issues committee and took three and a half years. When Taku did not like one study, they did their own and submitted that. Due to the involvement of Taku in the process, they were determined to have been consulted.

When one reviews the CEAA 2012, First Nations are not on project committees. There are a few methods of doing an EA. One is that the Responsible authority brings the review (s.18 and 21) and a review Panel (s. 38). These processes are laid out in the Act. First Nations may be consulted on the Terms of reference and have the ability to review the information and appear before the Review panel but it is not as an extensive process as that in the Taku case.

Consultation cannot be delegated to another person/body except for procedural things. A review panel is appointed by the Minister but members on those panels must be unbiased and free from any conflict of interest relative to the designated project and have knowledge or experience. The Review Panel cannot be considered government and the government must consult outside the Review Panel.

While the NEB is not a part of this review although it is a Responsible Authority under this Act. (s. 30(1)). Under the NEB First Nations are given limited times to present, no opportunity to cross examine the proponents evidence and are denied the rules of Natural justice. That cannot be considered consultation.

There have been many court cases that have set out what consultation is. Simply put Consultation is a good faith, reasonable information disclosure between the FN and Government. It has the purpose of substantially addressing the First Nation interest at stake and the duty arises **before** legislation is enacted or measure taken The source of the duty to consult is grounded in the Honour of the Crown. The Honour of the Crown requires Crown to <u>always</u> act honourably when dealing with aboriginal peoples. The Honour of the Crown is an ancient common law principle requiring the Crown to treat its subjects fairly – a cornerstone of modern administrative law principles. "The honour of the Crown is ***always*** at stake in its dealings with Aboriginal peoples."

The Duty to consult is much more comprehensive, but the elements of the duty is not present in the CEAA 2012. The government needs to have a clear policy on consultation outside the EA process or ensure that consultation in the CEAA is not delegated, reflects the honour of the crown, and is comprehensive enough to meet all the duties of consultation and possible consent. Right now there is confusion as whether a First Nation is being consulted when they participate in the process. Some First Nations stay away from Joint Review Panels of NEB panels because they specifically want to be consulted and not just be able to make a presentation to a panel.

14. ACCOMMODATION

The Courts have also said if there is any infringement on the cultural and economic interests of aboriginal rights and title governments must accommodate and that there are a wide range of possible arrangements on what accommodation can look like.

In my experience with EA's, the governments and proponents want to start talking about what economic benefits First Nations wants. It is almost as if they want to buy your cooperation.

For Most First Nations, the land, water and resources are the highest priority and protecting the lands so that we can continue to exercise our rights. When you start into the EA process, you know immediately if you are opposed to the project or if you have concerns and want them addressed. At the beginning of the process First Nations don't want to talk about benefits until they are fully informed on the projects and may oppose them.

Governments and proponents often insist on an accommodations agreement before there is a project decision. They tell First Nations that if they don't sign on to the project and benefits, you won't be ale to get any after the decision is made. The court have never said this is the case. If A First Nation opposes a project and then it is approved, they should if they so desire be able to negotiate that after the project decision by the Cabinet.

We have been witnessing this phenomenon as of late where First Nations are publicly admitting they are torn about accepting an economic package but are afraid to say no in case they miss out on benefits when the project is approved. This is economic intimidation and to First Nations that struggle financially, is totally unfair. This whole issue of accommodation or economic benefits must be worked out in law or policy with the consent of First Nations or First Nations will be not be given their FREE, prior and informed consent.

This become critical as the governments like to say publicly there are 35 of the 69 First Nations who have consented and signed benefits agreement. They use it as a selling point to the public.

15. CONSENT OF FIRST NATIONS

Does the right of Consent apply in Canada? There are many people in government that say that the right of consent does not exist but I would differ with them in that opinion. A quick review of the cases is as follows:

Delgamuukw (1997) ***at the Supreme Court of Canada*** said that "Some cases may even **require the full consent** of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands" (para. 168)

Haida (2004) at SCC said " This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent spoke of in **Delgamuukw is appropriate in cases of established rights, and then by no means in every case**. Rather what is required is a process of balancing interests of give and take." (para 48)[7]

The court didn't rule out consent entirely, but did say there had to be a balancing of interests. Unfortunately it has been government that determines that balance, but now Tsilhqot'in says First Nations must have a say in that balancing. Not sure that has happened since the Tsilhqot'in or if the government takes it into consideration.

Tsilhqot'in (2014) at the Supreme Court of Canada was clear that when aboriginal title has been proved as the Tsilhqot'in have, they must consent to any development on their lands. If they do not consent to the development, the governments must follow a stringent three-pronged test for a project to go ahead:

1. Fully follow its procedural duty to consult and accommodate
2. The proposed action must have compelling and substantial objectives and these objectives must be done from the aboriginal perspective as well as the government.
3. Must be consistent with their fiduciary obligations and within the framework of s. 35 requirements-meaning there must be minimal impairment to aboriginal interests and that the interest of First Nations inheres to present and future generations.

The court also added that there must be a principled reconciliation of aboriginal rights with the interest of all Canadians.

Most importantly, the Chief Justice had this advice to give:

- ***"I add this. Governments and individuals proposing to use or exploit land, whether before of 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." (paragraph 97.)***

The Chief Justice would not have said this if he thought the consent of First Nations people was required. There will be a case that finally recognizes the right of consent, but until that time the Crown should be obtaining the consent of the First Nation so they can avoid lawsuits and project delays.

The Universal Declaration of Indigenous Rights uses the term Free, Prior and Informed consent (FPIC) in 6 articles. These articles were placed in the declaration so as to avoid the issues they address. I attended at the Working Group on Indigenous Peoples from 1982-1992 and know that Indigenous Peoples were pursuing consent.

[7] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do

When campaigning for Office, PM Justin Trudeau promised to implement the Declaration on the Rights of Indigenous Peoples. On APTN he said publicly that when a First Nation said no, it meant no. Now, there has been a draw back on government on what this terms means. Minister Carolyn Bennett and Jody Wilson-Raybould at the United Nations stated that they would fully implement the Declaration within the constitution of Canada. Minister Jim Carr has now said First Nations do not have a veto and they will not be able to stop a development.

I fail to understand this. The Supreme Court of Canada was very clear that consent/veto could still considered if the impact of a development was great so consent/veto are within the Constitution of Canada.

If the government wants to implement UNDRIP in Canada, it must necessarily include consent. This is going to continue to be at the forefront of approved projects and pending projects.

It must also be understood that social license may be a term that is used for the general public. Consent, consultation and accommodation are the rights that First Nations hold.[8]

"First Nations are rights holders and thus, different from stakeholders, such as the general public. First Nations rights are recognized in the Canadian constitution, and a whole body of law exists that sets out how governments must consult and accommodate First Nations people. Social licence, as it pertains to Aboriginal-Canadians, should be viewed as secondary or supplemental to the legal duty to be consulted and accommodated, and the right of consent where it applies.

The federal and provincial governments should take ownership of this duty to consult and ensure that it is done in a comprehensive manner that has been set out by both domestic and international law. Development of consistent processes across levels of government around consultation will enable greater uniformity and consistency in how consultation is undertaken, making the process more fair and equitable. In addition, best practices from Aboriginal consultation and engagement could be used to improve public consultation, and vice versa, potentially leading to higher levels of public acceptance of energy projects."[9]

Relevant Article of UNDRIP on FPIC

Article 19, FPIC before legislative measures or administrative measures that may affect them

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[8] http://www.policyschool.ca/wp-content/uploads/2016/06/energy-white-paper.pdf s. 3.3 page 20 First Nations and Social License.

[9] Ibid s. 6.4 page 73.

Article 32, 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.

Articles 10: No relocation without the FPIC of indigenous peoples.

Article 11: Indigenous peoples are entitled to redress for their cultural, intellectual, religious and spiritual property that was taken without their FIP or in violation of their laws.

Article 28: Indigenous peoples have the right to redress for lands, territories and resources which they owner, occupied or used or damages that did not have their FPIC.

Article 29: No storage or disposal of hazardous materials shall take place in the lands, territories of indigenous peoples without their FPIC.

CONCLUSIONS:

Environmental Assessment in Canada leaves a lot of uncertainty to First Nations people. Uncertainty that to participate in the process that their rights and title will be properly addressed and protected.

There is a lot of discretion in CEAA 2012 to the Ministers and to the cabinet and there must be much more accountability and guidelines and reasons given than is currently required.

The whole debate on consent versus consultation must be resolved especially in relation to the UNDRIP. UNDRIP wasn't put in place to be adjusted in meaning according to the desires of the government.

Before any final amendments are made or a new CEAA is made, First Nations must be given the right to be fully consent or even better the right to be consulted.

There must be mechanisms put in place to deal with the difference in values from First Nations people to people in The EA Office and to anyone put on panels. Understanding First Nations way life, the importance of a way of life that depends on the lands, water and resources, and understanding indigenous wisdom is critical for First Nations to have any confidence in EA processes. Removing traditional from knowledge also will recognize that the knowledge First Nations have of the lands is current.

Respectfully Submitted
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