Submissions of Elizabeth Metis Settlement and Fishing Lake Metis Settlement

Review of Environmental Assessment Processes
Expert Panel
December, 2016

I. Introduction

These are the submissions of Elizabeth Metis Settlement ("EMS") and Fishing Lake Metis Settlement ("FLMS") to the Expert Panel regarding the Review of Environmental Assessment Processes.

EMS was founded in 1939. Its Settlement lands are located along the Alberta-Saskatchewan border, approximately 36 kilometres south of Cold Lake. It has approximately 982 members.

FLMS was founded in 1938-1939. Its Settlement lands are located approximately 67 kilometres south of Cold Lake. It has approximately 784 members.

EMS and FLMS are land-based, rights-bearing Metis communities .

The establishment of the modern Metis Settlements regime in Alberta is the result of negotiations between the Government of Alberta and the Metis throughout the 1980s. These negotiations resulted in the *Alberta-Metis Settlements Accord* ("Accord"). Pursuant to the terms of the Accord, and the legislation passed to implement it, Alberta granted the Metis Settlements General Council fee simple title to the lands of eight Metis communities, including EMS and FLMS and a suite of modern self-government powers.[1]

EMS and FLMS's members are Aboriginal peoples within the meaning of the *Constitution Act, 1982*.[2] EMS and FLMS have unextinguished Aboriginal rights to hunt, fish, trap and gather, as well as the right to exercise activities reasonably incidental to these activities. Their Aboriginal rights are protected under section 35 of the *Constitution Act, 1982*.

EMS and FLMS's submissions will focus on four main areas of concern regarding the environmental assessment process: consultation; the *United Nations Declaration on the Rights of Indigenous Peoples*;[3] Indigenous representation; and, environmental effects and assessments.

II. Summary

In summary, EMS and FLMS ask the Expert Panel to make the following recommendations:

- The Agency needs to develop expertise on the impacts of resource development on Indigenous rights, including Indigenous culture. This includes hiring staff who understand the impacts of resource development on Indigenous rights and appointing Indigenous panel members with this understanding;

- The Agency should work with Indigenous communities to develop guidelines for the effective assessment of impacts on Indigenous peoples;

[1] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 14-17.
[2] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/295, 2007 1 [UNDRIP].

- The Agency should work with Indigenous communities to collaboratively develop guidelines respecting the appropriate use, disclosure and protection of Traditional Land Use information collected in the course of project assessments;

- Funding should be provided for non-project specific capacity building with respect to federal environmental assessment processes;

- The timing of capacity funding for Indigenous community participation ought to be better coordinated with the timing of the regulatory process;

- The *Canadian Environmental Assessment Act*[4] should be amended to require the Agency to lead all environmental assessments, as opposed to proponent-led environmental assessments;

- *CEAA 2012* should be amended to require Agency involvement when provincial regulatory processes regarding Metis and First Nation consultation and accommodation are lacking or inadequate;

- SAGD projects over 12,000 barrels/ day should be added to the designated projects list;

- *CEAA 2012* should be amended to require a Crown consultation plan for each project requiring an environmental assessment;

- *CEAA 2012* should be amended to reflect the spirit and intent of UNDRIP. Proposed amendments should be developed in collaboration with Indigenous communities;

- The definition of "environmental effects" in *CEAA 2012* should be amended to include effects on current and future use of lands for traditional purposes;

- *CEAA 2012* should be amended to require traditional land use ("TLU") studies to be completed as part of an environmental assessment;

- The Agency should work with Indigenous communities, particularly in development-intense areas such as north-eastern Alberta, to establish a process for measuring and addressing regional cumulative effects and impacts on Aboriginal rights; and

- The Agency should develop a clear mechanism for monitoring and follow-up programs.

[4] SC 2012, c 19, s 52 [*CEAA 2012*].

III. DISCUSSION

a. Consultation

i. Crown Consultation

The duty to consult is the Crown's constitutional obligation to consult with Indigenous peoples and to accommodate their interests when the Crown contemplates conduct that may adversely impact potential or established Indigenous rights.[5] It is grounded in the honour of the Crown, which requires the Crown to act honourably in reconciling the pre-existence of Indigenous societies with Crown sovereignty.[6] The duty to consult prevents the Crown from acting in a way that could cause irreparable harm to an area or resource that an Indigenous group has a right to or may establish a right to.

CEAA 2012 should be amended to require that a Crown consultation plan be posted to the Canadian Environmental Assessment Registry ("Registry") along with the Canadian Environmental Assessment Agency's ("Agency") determination of the need for an environmental assessment. The Crown consultation plan should provide a preliminary assessment of the proposed project's impacts on any existing or claimed Indigenous rights. It should also explain how the Crown intends to fulfill its duty to consult and its commitments under UNDRIP.[7]

ii. Capacity funding

Capacity funding must be provided to Indigenous communities early in the environmental assessment process. Under the current regime, the availability of participant funding is announced approximately 30 days after the close of the comment period on the draft Environmental Impact Statement ("EIS") Guidelines. This means that Indigenous communities have no capacity funding when providing comments on project descriptions and draft EIS guidelines. Participation by Indigenous communities at the planning stages of the environmental assessment can ensure that Indigenous rights will be properly accounted for during the assessment.

In addition, capacity funding for non-project-specific training should be provided. This funding could be used to train community members and staff in order to better understand the environmental assessment process, ways the community can participate, and project proponent and Crown consultation obligations. This would ensure that project-specific funding is more efficiently and effectively used.

iii. Proponent Consultation

Project proponents should be required to consult during project-planning phases, before an application is formally filed with CEAA. This would facilitate early communications to obtain

---

[5] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 [*Haida*].
[6] *Haida* at para 17.
[7] Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/295, 2007 1 [UNDRIP].

traditional knowledge ("TK") and TLU information and to allow for this information to be incorporated in the planning process.

The *Prescribed Information for the Description of a Designated Project Regulations*[8] should be amended to require project proponents to provide a preliminary assessment of any impacts that the project will have on any existing or claimed Indigenous rights. Proponents should also be required to include a plan for further consultation with Indigenous communities in the project description.

b. UNDRIP

On May 10, 2016, Canada became a full supporter of UNDRIP.

The Canadian Environmental Assessment Agency (the "Agency") should consult with Indigenous communities to develop a consultation framework to amend *CEAA 2012* to reflect the spirit and intent of UNDRIP.

CEAA 2012 should be amended to require good faith consultation in order to obtain Indigenous peoples' free, prior and informed consent to development in their traditional territories. In addition, environmental assessments should be required to demonstrably incorporate relevant TK.

c. Indigenous Representation

Under subsection 42(3) of *CEAA 2012*, the Minister is required to establish a roster of persons who may be appointed as members of review panels or joint review panels. The appointed members are to be "unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects."

Indigenous peoples who understand TLU and the impacts of development on the exercise of Indigenous harvesting rights ought to be included on the roster. Indigenous peoples should be appointed to review panels when a project's environmental effects will affect Indigenous rights. Such representation will increase the legitimacy of review panels, add a valuable perspective and increase public confidence in the process.

d. Environmental Effects and Assessment

i. General

1. *CEAA 2012* should be amended to require the Agency – not project proponents - to lead all environmental assessments. This will ensure that assessments are completed with full disclosure, transparency and objectivity. There is a lack of confidence that that

[8] SOR/2012-148.

environmental assessments led by private sector proponents are sufficiently objective to effectively assess impacts of proposed project activities.

2. For projects proposed to be located on provincial Crown land, *CEAA 2012* should be amended to require Agency involvement when provincial processes do not properly account for impacts on and accommodation of s. 35(1) rights.

3. Construction and expansion of *in situ* oil sands projects that produce 10,000 barrels/day or more ought to added to the list of designated projects.

4. The definition of environmental effects in *CEAA 2012* includes the following:

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

This definition should be expanded to include effects on asserted or established Indigenous rights. The narrow definition of effects on "Aboriginal peoples" could result in assessments that fail to account for the Crown's obligation to protect Indigenous rights for current and future generations. The focus on "current use" may also fail to account for uses that have been forcibly modified by existing development.

ii. TLU Studies

The Agency should consult with Indigenous communities to develop a policy or guidance document regarding the assessments of impacts on Indigenous people, culture, traditionally used resources, and spiritual connections to the land. The policy would ensure that TLU studies conform to and demonstrate the highest relevant methodical standards and would support better environmental assessment scoping. The policy would also ensure that the assessment of impacts to Indigenous interests is conducted by persons who have relevant and adequate professional qualifications.

In addition, TLU studies should be required as part of the environmental assessment process and should be completed before the EIS is submitted to the Agency. Too often, TLU studies are conducted following the filing of the application with regulators.

Finally, impacts to TLU must be assessed on a community-specific basis. One method of achieving this would be to provide sufficient capacity funding to Indigenous communities, earlier in the process, in order for them to conduct assessments of impacts on their own TLU.

iii. Cumulative effects

The Agency should consult with Indigenous communities to establish a process for addressing regional cumulative effects. This process would address all non-project specific effects, including monitoring and reclamation planning.

In addition, environmental assessments should reflect the fact that existing development affects the exercise of Indigenous rights. As a result, project proponents should be required to provide a pre-disturbance baseline and to commit to reclamation activities to restore lands to their pre-disturbance capability.

iv. Monitoring

The Agency should develop a clear mechanism for the enforcement of federal conditions and federal recommendations for monitoring and follow-up programs. Clear timelines for implementation and an enforcement mechanism should be established. Specifically, the effectiveness of mitigation measures on TLU, and Indigenous rights generally, must be monitored and reported on. This will ensure that measures can be adapted as needed and provide a better understanding for the development of mitigation measures in future projects. When possible, this monitoring should be done by the impacted communities.

v. Confidentiality of TLU Information

The Agency should consult with Indigenous communities to establish guidelines to protect the confidentiality of TLU information. The Registry reflects the importance of the "open court" principle. However, the law regarding ownership of TLU information remains unsettled. In the meantime, the information that communities and individual members provide may be accessible on the Internet indefinitely. Guidelines should be established regarding the collection of TLU information, its use, and methods of maintaining the confidentiality of TLU information.