

**PRESENTATION OF THE GRAND COUNCIL OF THE CREES (EYYOU ISTCHEE) /
CREE NATION GOVERNMENT TO THE EXPERT PANEL**

REVIEW OF ENVIRONMENTAL ASSESSMENT PROCESSES

OCTOBER 27, 2016

1. The Grand Council of the Crees was formed in 1974. It was then the Cree entity mandated by the Cree Chiefs of the various Québec James Bay communities to represent regional interests.
2. With the signing of Canada's first modern treaty in 1975, the *James Bay and Northern Québec Agreement* (JBNQA), and subsequent amendments, it is now the Cree Nation Government who is the Native Party to the JBNQA mandated to execute amendments thereto, together with the responsible governments and government agencies.
3. Section 22 of the JBNQA contains the first modern regime to assess development projects. This assessment is done by tripartite and bipartite committees that assess both the **environmental and social impacts** of projects. One of the main objectives of the regime is to ensure that the Cree hunting, fishing and trapping rights and rights to participate in development are protected in the context of development in Eeyou Istchee, the traditional territory of the Crees.
4. The three committees established under Section 22 of the JBNQA are:
 - a) the COMEV for "Comité d'évaluation" mandated to screen developments and to recommend levels of assessment, if any. COMEV

is composed of 6 members appointed by Québec, Canada and the Cree Nation Government;

b) COMEX or “Comité d’examen” mandated to review provincial projects. COMEX is composed of five members, three appointed by Québec and two appointed by the Cree Nation Government;

c) COFEX for “Comité fédéral d’examen” mandated to review federal projects. COFEX is composed of three members appointed by the Federal Government and two members appointed by the Cree Nation Government.

5. Over the years, the Crees have been involved in litigation regarding Section 22 of the JBNQA and the various federal assessment tools external to the JBNQA, including the EARP (Environmental Assessment and Review Process) guidelines and CEAA 1992.
6. The Crees never considered that the projects should be distinguished as “provincial” or “federal” as a result of their nature. This distinction is the result of the case law, most notably the *Eastmain*¹ decision as well as the *Moses*² decision of the Supreme Court of Canada.

¹ *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501.

² *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

7. The federal assessment tools external to the JBNQA have always been problematic. They set out a foreign regime in JBNQA territory.
8. The Crees have always tried to convince their federal counterparts to use the existing JBNQA structures to assess all projects and not to impose a foreign process to them.
9. We have only succeeded once in ensuring that structures similar to the JBNQA structures be used to assess a project. In 2003, Canada agreed to the “*Agreement concerning the Environmental Assessments of the Eastmain 1-A and Rupert Diversion Project*” which sets out that, in addition to the COMEX review of the project, a review would be conducted by a joint Canada-Cree panel composed, like COFEX, of three members appointed by the Federal Government and two members appointed by the Cree Nation Government.
10. In the *Moses* judgment, the Supreme Court was convinced of the Cree arguments in respect to the necessity to ensure Cree participation in the assessment of projects in a manner compatible with the JBNQA process, even when the assessment is external to the treaty. Justice Binnie wrote the following simple sentence that captures it all:

[48] Common sense as well as legal requirements suggest that the CEAA assessment will be structured to accommodate the special context

of a project proposal in the James Bay Treaty territory, including the participation of the Cree.

11. For us, this simply means that a project assessed by COMEX should also be assessed by COFEX when called for with respect to its federal components.
12. We have been in discussions with Canada since 2010 in an attempt to ensure that changes called for in the *Moses* judgment are negotiated and properly implemented.
13. In 2012, Canada decided to completely do away with CEAA as it existed in 1992 to create a new CEAA without taking into consideration the *Moses* judgment, Section 22 of the JBNQA and the ongoing Cree-Canada discussions.
14. The Grand Council of the Crees and the Cree Nation Government have opposed CEAA 2012 since its inception.
15. We were ready to challenge CEAA 2012 in the Courts but we first triggered the Dispute Resolution Process which is provided by the 2008 New Relationship Agreement we signed with Canada. We have set out in detail the reasons why CEAA 2012 is problematic in JBNQA territory in a document dated September 2013, which is confidential under the Dispute Resolution Process.

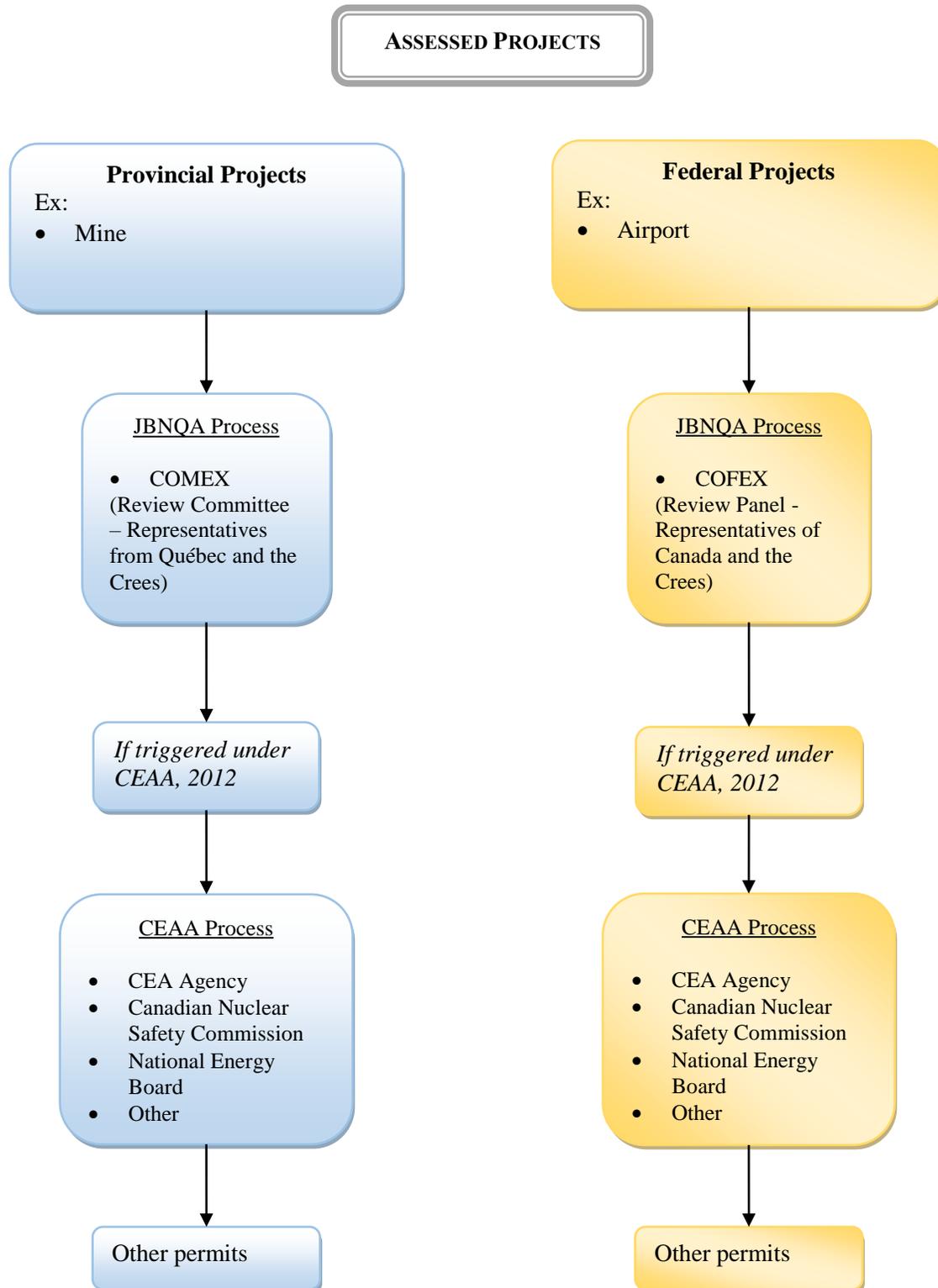
16. Thereafter, we have provided to our federal counterparts two (2) other confidential documents:
 - a) in February 2014, what we referred to as an “Outline of the Adapted Federal Assessment Process (CEAA 2012) in Cree Territory”;
 - b) in February 2016 a detailed flow-chart which we called an “Adapted Cree-Canada Environmental Process in Cree Territory”.
17. These documents set out in detail various options for solution to the Dispute. We have not yet been provided by our federal counterparts with options to settle the Dispute as they have yet to be fully mandated six (6) years after the *Moses* judgment, surprisingly.
18. We understand that these matters are excluded from your deliberations, as they are already subject to the formal Dispute Resolution Process. However, we wish to inform you in general terms of the Dispute and some recommended solutions.
19. Ironically, the federal reviews which lead to CEAA 2012 contributed to block progress. We expect that this mistake will not be repeated and that, this time, federal review will rather enhance and accelerate the settlement of the Dispute.
20. So, what is the solution for JBNQA territory? It is fairly simple and anchored in three (3) basic principles:

- a) all reviews have to be done by the JBNQA Section 22 entities, not by entities that are foreign to the territory and its inhabitants;
 - b) all projects which have impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk or which are otherwise triggered, should be screened and assessed;
 - c) the required permits from all authorities should also be obtained.
21. In other words, a provincial project such as a mine would be assessed by COMEX. If such project has potential impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk, or if other jointly agreed triggers required it, it should also be assessed by COFEX. The COMEX and COFEX processes can be merged. Finally, all required permits should be obtained.
22. The Canadian Environmental Assessment Agency, Fisheries and Oceans Canada, the Ministry of the Environment and Transport Canada could all contribute to this process, through the JBNQA structures.
23. We have prepared summary flow-charts which demonstrate how federal assessment is currently carried out in JBNQA territory and how we see it evolving (see the flow-charts entitled “**Current Process for Assessments under the JBNQA and CEAA 2012**” and “**Proposed Process for Assessments under the JBNQA and federal legislation**”).

24. In order to ensure certainty, we favour to amend Section 22 of the JBNQA.
25. Amending Section 22 would also allow the parties to modernize certain aspects of the regime, which dates back from 1975 in order to ensure, notably, that the process is as transparent as it can be, in a manner similar to CEAA reviews.
26. It would be ideal to have Québec participate in this process, but we consider that nothing stops the Crees and Canada to modernize the parts of Section 22 of the JBNQA which touch upon federal matters.
27. We are available to answer any questions you may have. However, we must caution you that the discussions to resolve the dispute are confidential.

Meegwetch. Merci. Thank you.

CURRENT PROCESS FOR ASSESSMENTS UNDER THE JBNQA AND THE CEAA, 2012



PROPOSED PROCESS FOR ASSESSMENTS UNDER THE *JBNQA* AND FEDERAL LEGISLATION

