



**Indigenous Consultation regarding the Lower Churchill Hydroelectric Generation (LCP),
Labrador Island Transmission Link (LITL), and Maritime Link Projects**

Prepared by the Government of Newfoundland and Labrador for the Commission of Inquiry
Respecting the Muskrat Falls Project

PART I: LOWER CHURCHILL HYDROELECTRIC GENERATION PROJECT

Litigation related to Indigenous Consultation on the LCP

- [1] This note is for the information of the Commission of Inquiry into Muskrat Falls.
- [2] The duty to consult is engaged whenever government contemplates making a decision which has the potential to adversely affect asserted or established Indigenous section 35 Constitutional rights when the government has actual or constructive knowledge of those asserted or settled rights as per the 2004 Supreme Court of Canada **Haida/Taku** decisions. Procedural aspects of the Duty may be delegated to proponents.
- [3] There are ten Indigenous governments and organizations (7 in Quebec and 3 in Labrador) that have settled (Nunatsiavut Government) or asserted claims relating to the LCP. Consultation was undertaken with all ten during the joint federal-provincial environmental assessment of the LCP and on post LCP environmental assessment permitting.
- [4] As is common, Indigenous consultation was integrated into the environmental assessment, since there is often an overlap between adverse environmental effects and adverse impacts on settled or asserted Indigenous rights.
- [5] Consultations were undertaken by both the federal and provincial governments and the proponent during the LCP environmental assessment and on post LCP environmental assessment permitting.
- [6] The following cases considered Indigenous consultation on the LCP.

- [7] *2011: NunatuKavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)* 2011 NLTD 44 (CanLII) On February 25, 2011, NunatuKavut sought for various forms of relief including an injunction to halt the Joint Review Panel's (JRP) public hearings on the LCP until the Court decided whether the duty to consult and accommodate NunatuKavut had been discharged. The Court determined consultation with NunatuKavut was sufficient and reasonable for the purposes of discharging the duty to consult, and dismissed NunatuKavut's application for an injunction. The Honourable Mr. Justice Garrett A. Handrigan stated: "I do not accept that Nunatukavut was not consulted appropriately. Perhaps more could have been done to hear and address their concerns but I cannot say what it would have been...My review of the massive amount of documents filed for this application indicates that Nunatukavut was involved at each stage of the EA process starting when the Project was registered and continuing until public hearings began four years later. It was accommodated to the extent that was appropriate and participated as fully as it wished."
- [8] *2012: Nalcor Energy v. Nunatukavut Community Council Inc., Todd Russell and Persons Unknown* 2012 NLTD(G) 175: Nalcor filed for an injunction against the NunatuKavut Community Council staging protests around the Muskrat Falls site. The injunction was granted, and Justice Robert P. Stack noted in the terms of the injunction the following: "We have seen that there have been extensive consultations and attempted consultations with NCC. It is not satisfied with them, likely because the s. 35 process has not been brought to a conclusion. That, however, does not detract from the fact that the Crown here has fully and faithfully discharged its duty to consult with NCC. In the context of this dispute, the necessity of maintaining access and safety mean that restricting the Respondents to protesting within the Safety Zone is an appropriate balancing of the competing interests". The injunction was later dissolved by the Court of Appeal in 2014 for non-consultation reasons. The Chief Justice had this to say "NCC submits, however, that because in its view Nalcor is an emanation of the Crown and owes its own duty to consult and accommodate, it was necessary for the judge to have addressed whether Nalcor, as well as the provincial Crown, had complied with its duty in that regard. . . . In the absence of evidence and full argument on the point, the issue does not arise with respect to the exercise of discretion in this case. In any event, in light of the conclusions I have reached on other issues, it is not necessary to address this point further."
- [9] *2012: Ekuanitshit Innu First Nation v. Government of Canada and Nalcor*, 2014 FCA 189: The Ekuanitshit argued the Crown's duty to consult and accommodate them was not fulfilled. The Federal Court of Appeal stated, "The appellant has not demonstrated, in the circumstances of this case, that the government neglected its duty to consult prior to the issuance of the order. Therefore, in light of the evidence in the record, I am of the view that the judge did not err in finding that the appellant was consulted in an adequate manner and that the mitigating measures address, for now, its concerns."
- [10] *2012: Grand River Keeper Labrador, Sierra Club of Canada and NunatuKavut Community Council Inc. v. Canada (Attorney General) and Nalcor Energy*, 2012 FC 1520: The applicants filed for judicial review to challenge the lawfulness of, the Report of the JRP, for the LCP – Federal Court ordered in favour of Nalcor on December 20, 2012.

- [11] *2015: Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1: The Nunatsiavut Government (NG) asserted that the provincial government had issued to Nalcor a Permit to Alter a Body of Water that authorized the construction of the dams, powerhouse and related infrastructure for the LCP, and that government failed in its duty to consult and accommodate the Inuit, in particular, regarding concerns related to the potential adverse impacts of methyl mercury accumulation. The application was dismissed. The Court found the issue of mercury accumulation, including its reduction, measurement, and necessary compensation, was dealt with in the earlier comprehensive environmental assessment review and in the process leading to the province's 2012 Order-in-Council releasing the LCP from further environmental assessment. The decision to issue the Order-in-Council fully engaged the issue of mercury accumulation and it was this decision that should have been challenged rather than a subsequent permit decision.
- [12] *2015: Nunatsiavut v. Canada (Attorney General)*, 2015 FC 492: NG asserted that the permit issued by the federal government to Nalcor allowed for impacts on fishing and fish habitat arising from the construction of the LCP was done without proper consultation and that concerns of Labrador Inuit were not fully and fairly considered or adequately accommodated by Canada. It was found that the NG was consulted and its concerns were reasonably identified and considered. They also were balanced reasonably with the potential impact of the Authorization on those concerns and with the competing societal concerns. While the NG did not obtain its desired outcome, the duty to consult was satisfied, the NG was adequately accommodated, and the decision to issue the Authorization was reasonable.
- [13] *2015: Nunatukavut Community Council Inc. v. Canada (Attorney General) and Nalcor Energy*, 2015 FC 891: NunatuKavut disputed the adequacy of consultation and accommodation on impacts to fish and fish habitat arising from the construction of the generating station. Consultation and accommodation was found to be adequate and the issuance of the permit to be reasonable.

LCP EA Registration

- [14] The LCP was registered with the Government of Newfoundland and Labrador and Government of Canada (Canada) on December 1, 2006.
- [15] On January 26, 2007, Nalcor was advised by the then-provincial Minister of Environment and Conservation (ENVC) that an Environmental Impact Statement (EIS) was required for the LCP under the *Newfoundland and Labrador Environmental Protection Act (EPA)*.
- [16] The LCP was also subject to the *Canadian Environmental Assessment Act*, and on June 5, 2007 the federal Minister of Environment announced that the LCP would undergo a federal EA by an independent review panel.
- [17] In 2007, harmonization of the provincial *Environment Protection Act* and the *Canadian Environmental Assessment Act* resulted in the two jurisdictions negotiating a joint review process, including a Joint Review Panel (JRP) process, for the LCP.

[18] The process had the following steps; EA registration, EIS Guidelines, EIS, JRP hearings, JRP report to governments, and final EA decisions by the governments, and publication of the governments' EA decisions, and governments' responses to the recommendations of the JRP. Indigenous consultation, as commonly occurs, was integrated into the EA process, and was present during all these stages. The final decision stage saw the governments take into account the comments of the Indigenous Governments and Organizations (IGOs) on the report of the JRP to the governments.

LCP Tri-partite Consultation Protocols

[19] In May 2007, the provincial government decided to negotiate consultation agreements with Innu Nation, NunatuKavut Community Council and the Nunatsiavut Government (NG).

[20] The LCP is in the Innu Nation's asserted land claim area, which is currently under land claim negotiations amongst the provincial government, Canada and the Innu Nation. Negotiations to conclude a LCP Consultation Agreement with Innu Nation began in August 2007.

[21] Canada, Government, and Innu Nation negotiated the *LCP EA Consultation Agreement* between August 2007 and January 2008. Following a meeting between the provincial government, Canada and Innu Nation on January 10, 2008, the final version of the Agreement was provided to Innu Nation's legal counsel on January 11, 2008. That Agreement was not signed.

[22] The failure to sign was likely caused by the fact that at the same time the governments were consulting on the level of funding for the Innu Nation's participation in the EA through the Canadian Environmental Assessment Agency's (CEAA's) *Participant Funding Program-Aboriginal Envelope*. The funding request from Innu Nation was higher than the total funding envelope prescribed by CEAA (please see below). While Innu Nation did not sign the Agreement, it ultimately acceded to its terms through conduct and communications. For instance, an email received from Rick Hendricks to CEAA and copied to ENVC on behalf of Innu Nation on September 8, 2010 states "as CEAA is aware, Innu Nation, the Province, and Canada negotiated a Consultation Agreement in relation to the environmental assessment for this Project [LCP]. This Agreement was concluded in February 2008".

[23] The governments met with NunatuKavut on January 21, 2008 to outline the EA process and identify critical points of consultation throughout that process, and provided that consultation process in a letter to NunatuKavut on February 1, 2008.

[24] The provincial government and Canada, jointly, provided a letter to the NG on May 1, 2008, appending a LCP consultation process for the NG.

[25] Both governments met with the six Quebec Innu First Nations (Council of the Innu of Pakua Shipu, Council of the Innu of Unamen Shipu, Nutashkuan First Nation, Council of the Innu of Ekuanitshit, Innu Takuaihan Uashat mak Mani-utenam Band Council, and Innu Nation of Matimekush-Lac John) in February 2008 in Quebec. These meetings consisted of discussion of the EA, as well as opportunities for consultation.

- [26] In April and May 2008, CEAA sent letters on behalf of CEAA and the provincial Department of Environment and Conservation to the noted six Quebec Innu First Nations setting out the EA process and Indigenous consultation opportunities in that process.
- [27] In October 2008, the Naskapi Nation of Kawawachikamach sent the governments a letter requesting that it be consulted by Nalcor and the JRP on the LCP as there was potential for the LCP to impact on the Naskapi Nation's asserted Indigenous rights.
- [28] CEAA responded that same month on behalf of CEAA and the provincial government, encouraging the Naskapi Nation, in addition to engaging in consultation with Nalcor, to make a submission to the JRP. The reply also outlined an opportunity to be consulted within 45 days of the public release of the JRP's report, and before the governments made any decisions which would enable the LCP to proceed. The Naskapi were added to the list of IGOs that were to be consulted throughout the EA and post-EA permits.
- [29] Given the desire for a clear and consistent consultation approach, a common consultation protocol for all IGOs in line with that prescribed for Innu Nation in their "Agreement", was transmitted to each IGO. This provided consistent guidance for Indigenous consultation throughout the EA process and timelines for each step. The protocols also directed the Proponent to release all EA documents to IGOs in advance of public release.

LCP Participant Funding Program – Aboriginal Envelope (PFP-AE)

- [30] Due to the high number of IGOs consulted through the LCP EA, CEAA developed a specific PFP-AE of \$500,000, in addition to another PFP envelope for public stakeholders. Allocations were made by a Funding Review Committee, which assessed applications from IGOs.
- [31] Innu Nation's request for funding through PFP was greater than four times the amount Canada had provisionally-designated to it. Government recognized that funds required to support Indigenous consultation were more significant than originally anticipated, and supported the federal government's resolution of the situation by contributing \$500,000 to the PFP-AE to be used after the exhaustion of the federal PFP-AE funding.
- [32] In total, CEAA allocated funding through PFP to the following applicant IGOs:
- Council of the Innu of Unamen Shipu and Council of the Innu of Pakua Shipu: \$106,875;
 - Corporation Nishipiminan (Council of the Innu of Ekuanitshit): \$55,850.25;
 - Fiducie Takuaikan (Nutashkuan First Nation): \$46,000;
 - Innu Nation: \$533,968;
 - Labrador Metis Nation (now the NunatuKavut Community Council): \$133,000;
 - Naskapi Nation of Kawawachikamach: \$9,165;
 - Nunatsiavut Government \$23,471.

Consultation on LCP Environmental Impact Statement (EIS) Guidelines

- [33] The EIS Guidelines guided Nalcor in its preparation of an EIS, and were to be used to inform the JRP's public hearings. The draft EIS Guidelines were provided to the three Labrador IGOs in October 2007, 30 days prior to the start of the public review period.
- [34] Detailed comments from the Innu Nation on the draft EIS Guidelines were received on December 4, 2007. Both governments held a meeting with Innu Nation on January 10, 2008, where Innu Nation's comments on the draft EIS Guidelines were discussed. Further comments were received on March 12, 2008 from the Innu Nation. Both governments provided full and fair consideration of all comments, and noted to the Innu Nation in a letter of June 2008, that the Guidelines were significantly changed to require Nalcor, to the extent that it was available, to make Indigenous traditional and community knowledge of the existing environment an integral part of the EIS. At this time, written consideration of all comments was provided in a Table of Concordance to Innu Nation on behalf of both governments.
- [35] The six noted Quebec Innu First Nations were provided the draft EIS Guidelines for review in December 2007. As noted above, the Naskapi Nation was not consulted on the LCP until October 2008 when it provided information on the potential impacts to its asserted Indigenous rights from the LCP, and were provided with the final EIS Guidelines.
- [36] Concurrently, the draft EIS Guidelines underwent public consultation starting December 2007.
- [37] The period of public review was extended to late-February 2008 to provide the Quebec Innu First Nations sufficient time to review the EIS Guidelines. During this time, provincial and federal officials met with the six noted Quebec Innu First Nations in Quebec (as set out above).
- [38] Following the governments' consideration of the comments received from the IGOs and the public, the EIS Guidelines for the LCP were finalized, and submitted to the then federal and provincial Ministers of the Environment for approval.
- [39] Between March and June 2008, the governments prepared written responses to all submissions received from the IGOs on the EIS Guidelines. A letter was then provided to all the IGOs, outlining the consultation process that Nalcor would use in development of the EIS for the LCP.
- [40] The EIS Guidelines were finalized and released publicly in July 2008.

Indigenous Participation in Establishment of the JRP

- [41] The IGOs were consulted on the JRP Terms and Reference. The Terms of Reference provided:
- “The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential*

infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.

The Panel shall include in its Report:

- 1. Information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.*
- 2. Any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.*

[42] The governments released the JRP Agreement and Terms of Reference in January 2009.

Nalcor's Consultation with IGOs during development of EIS

[43] Nalcor undertook its own proponent consultations with the IGOs in accordance with the EIS Guidelines. For information on Nalcor's Indigenous consultation, please refer to Nalcor's information on its consultations.

[44] In March 2009, Nalcor provided the EIS to IGOs and the JRP for review, and released it publicly.

[45] On January 14, 2011, the JRP determined that the EIS and additional information provided by Nalcor, contained sufficient information to proceed to public hearings.

Indigenous Participation in the JRP Public Hearings and Report for the LCP

[46] The JRP held its public hearings from March 3 to April 15, 2011 in several Labrador communities, St. John's and Sept-Iles (30 hearing days over 44 calendar days), hearing over 230 presentations.

[47] On August 25, 2011, the JRP's Report was released with 83 recommendations. The JRP concluded that, after implementation of the mitigation measures proposed by Nalcor and those recommended by the JRP, the impact of the LCP on land and resource use by the Labrador Innu, NunatuKavut Community Council and the seven Quebec Innu organizations would be "Adverse but not significant." With respect to the Labrador Inuit, the JRP concluded at page 167 that "The significance finding in Chapter 8 with respect to the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville would apply to traditional harvesting activities by Labrador Inuit, including the harvesting of country food in this area should Project-related consumption advisories be required."

[48] As per the Indigenous consultation processes noted above, the ten IGOs had 45 days from the public release of the JRP's Report date to prepare and submit their views in writing to provincial and federal officials. Views on the Report were submitted by Nunatsiavut Government, Innu Nation, NunatuKavut, Uashat mak Mani-Utenam, Ekuanitshit First Nation, Naskapi Nation, and Matimekush Lac John. Before taking any decision to proceed with the LCP the governments gave full and fair consideration to those views.

- [49] Any Indigenous comments pertaining to the JRP recommendations were circulated to members of the LCP EA committee, and members were reminded to consider all Indigenous comments and to identify, where appropriate, modifications to accommodate any concerns raised by IGOs.
- [50] On March 15, 2012, the governments published their responses to the JRP Recommendations and announced the LCP was released from EA.

PART II: LABRADOR-ISLAND TRANSMISSION LINK PROJECT

LITL EA Registration

- [51] LITL was registered with the governments on February 2, 2009.
- [52] Nine of the above noted ten IGOs were provided with the EA Registration, and provided 35 days to comment on it. Only Innu Nation and Nunatsiavut Government provided written submissions.
- [53] On March 23, 2009, Nalcor was advised by then provincial Minister of Environment that an EIS was required for the LITL. A federal EA was also required for the LITL.
- [54] Naskapi Nation provided correspondence to CEAA on May 22, 2009 requesting participation in the review process, and, so, they were added to the list of IGOs consulted on the LITL.
- [55] The governments agreed on a single set of EIS Guidelines to guide Nalcor in preparing an EIS.

LITL PFP – Aboriginal Envelope Funding

- [56] The LITL PFP was \$250,000, cost shared equally by the governments. On July 21, 2010, CEAA and the provincial Environment department provided a letter to each IGO notifying of the availability of the \$250,000 in funding to support Indigenous participation in the LITL EA and inviting all IGOs to submit funding applications by August 20, 2010. Due to requests for an extensions, CEAA granted a 3 week extension.
- [57] The Funding Review Committee recommended the allocation of the \$250,000 as follows:
- NunatuKavut Community Council Inc. - \$60,000
 - Innu Nation - \$50,000
 - Conseil des Innu de Pakua Shipi - \$45,000
 - Premiere Nation de Unamen Shipu - \$45,000
 - Fiducie Takuaikan (Natashquan) – \$20,000
 - Nunatsiavut Government - \$10,000
 - Innu Takuikan Uashat mak Mani-Utenam (ITUM) - \$10,000
 - Corporation Nishipiminan - \$10,000

The Governments' Harmonized Approach to Consultation on LITL

[58] The harmonized process for the LITL EA was set as follows:

1. A set of Component Studies were to be prepared by Nalcor in preparation of the full EIS. The Component Studies had their own Guidelines and review process for Indigenous consultation and public review.
2. Following this the EIS was submitted. If reasonable deficiencies were identified in the Component Studies or EIS by regulators, IGOs and/or public, Nalcor was directed to submit revised or additional information. These additional pieces were subjected to another Indigenous and public review.
3. After the EIS was determined to be sufficient, it was decided to release the LITL from provincial EA.
4. Following the EIS, CEAA directed to Nalcor to prepare a Comprehensive Study Report as a final step of the federal EA process. The draft Comprehensive Study Report also underwent an Indigenous and public review.
5. After Canada approved the Comprehensive Study Report, the final draft went for another round of Indigenous and public review, and upon consideration of additional comments on the Report, the LITL was released from the federal EA.

[59] In July 2010, the governments provided a letter to all IGOs, that described that the federal and provincial EA processes would be harmonized to the extent possible, noting that federally the LITL would proceed as a comprehensive study. The governments attached a copy of the draft EIS Guidelines and invited IGOs to comment on the draft.

Consultation on LITL Component Studies and EIS:

[60] On November 5, 2010, the IGOs were provided with another copy of draft EIS Guidelines, and advised that the Guidelines would be subject to a 30-day review by the IGOs before they went out for a public review, and with Indigenous comments due by December 5, 2010. The IGOs were also able to participate in the subsequent public consultation on the draft EIS Guidelines.

[61] On May 3, 2011, the Final EIS Guidelines were approved, and on the same date, the governments agreed to the *LITL Aboriginal Consultation Plan* (the Plan), which laid out a process for consultation which would be consistent for all ten IGOs.

[62] Nalcor indicated that due to the number of component studies for the EA, it was prepared to submit them in separate groups under separate review periods in order to ease the burden that would otherwise be caused by submitting them all at once. Nalcor would then submit the EIS following review of the Component Studies.

- [63] Nalcor submitted single and sets of Component Studies on the following dates to Government: May 19, July 5, August 16, September 6, and November 16, 2011. As per the Consultation Plan, IGOs were given 35 days to review each Component Study prior to the public review. Indigenous and public review of component studies were conducted by Government in support of the provincial EA. All Revised Studies, Addendum, Errata that included additional or revised information were subjected to consultation.
- [64] The EIS was submitted in April 2012 in 4 Volumes, with additional information submitted in December 2012.
- [65] In May 2013, Government advised Nalcor that no further information related to the EIS was required, and the LITL was released from Government EA on June 21, 2013.

Maritime Link EA Registration

- [66] ENL Maritime Link Inc. registered the Maritime Link Project with Government in December 2011 to transmit power from Muskrat Falls between the island of Newfoundland and Cape Breton.
- [67] Because the Maritime Link did not cover land to which Indigenous rights were asserted or could be established (see **Drew** leave to the SCC refused) in the province, there was no directed Indigenous consultation in the provincial EA.
- [68] However IGOs in the province were able to participate in the public EA review process, and the NunatuKavut Community Council did provide a response to a review of the EIS and raised concern that the subsea cable portion of the Maritime Link would disturb fish habitat, and would affect migratory species on their way to or from the coast of Labrador. However, upon review this suggested impact was found to be either non-existent or minor.
- [69] There was also a federal EA of this project in which Canada decided on and provided for Indigenous participation.

Indigenous Consultation on post-EA Permitting

- [70] Government sent the *Lower Churchill Hydroelectric Generation Project Aboriginal Consultation Guidelines* to the ten IGOs on March 22, 2012. The Guidelines were also provided to Nalcor and all provincial departments expected to receive requests for permits.
- [71] The Guidelines were designed to guide Nalcor, IGOs, and regulators through an appropriate Indigenous consultation process required for the decision on each provincial permit.
- [72] If there are concerns received on a permit application from an IGO within a review period prescribed for that application, Government committed to providing full and fair consideration of the comments and providing a written response prior to taking a decision on the permit. Requests for time extensions are also considered.

[73] Similar permitting Guidelines were provided to all ten IGOs for the LITL.

Post EA Indigenous Engagement

[74] As noted above, the NG failed in its judicial review of Province's issuance of a Permit to Alter a Body of Water, which effectively ended the NG's legal actions over the LCP. The NG continued advocacy, including the "Make Muskrat Right" campaign regarding methyl mercury concerns.

[75] In 2012, the Nunatsiavut Government began to establish a baseline for downstream effects. These efforts led to a 2015 Harvard study on the potential for methylmercury in Lake Melville.

[76] In 2016, the Nunatsiavut Government appealed the Minister's decision to approve the Human Health Risk Assessment Plan, but the original decision to accept was not varied.

[77] In view of ongoing concerns, in October 2016, the Government of Newfoundland and Labrador, Innu Nation, Nunatsiavut Government, and the NunatuKavut formed an Independent Expert Advisory Committee (IEAC). The IEAC was mandated to seek an independent, evidence-based approach that would recommend options for mitigating human health concerns related to methylmercury throughout the reservoir as well as in the Lake Melville ecosystem.

[78] The Independent Experts Advisory Committee has provided its final recommendations to the provincial government and the government is assessing those recommendations.

[79] NunatuKavut has long complained about the absence of an agreement with Nalcor in relation to the Projects. In December, 2017, Nalcor and NunatuKavut signed a Community Development Agreement. Some of the Agreement's objectives are to engage in environmental protection, provide commercial opportunities for NunatuKavut, negotiate future projects, examine the potential for offshore oil and gas near Cartwright, and develop an employment strategy for NunatuKavut.