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**SUBMISSIONS OF THE CONSEIL DES INNU DE EKUANITSHIT
TO COUNSEL FOR
THE COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT
REGARDING CONSULTATION AND MITIGATION MEASURES**

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1. Context

These submissions briefly outline the position of the Conseil des Innu de Ekuanitshit (the “Council” or “Ekuanitshit”) with respect to consultations and mitigation measures imposed by the province and carried out by Nalcor in the context of the Muskrat Falls Project.

These submissions are provided in response to a request from counsel for the Commission of Inquiry and the position outlined here is not exhaustive and does not necessarily reflect the Council’s final or definitive position.

2. Summary of Ekuanitshit’s position

2.1. Context

Neither Nalcor nor the province showed any interest in seriously consulting the Conseil des Innu de Ekuanitshit, nor is the Council aware of any serious measures taken to mitigate adverse effects on the rights of the people of Ekuanitshit.

The Council was disappointed by pre-authorization consultations, but had hoped that Nalcor and the province would heed the guidance of the Federal Court of Appeal, ruling on Ekuanitshit’s application for judicial review of the federal authorization of the Lower Churchill Project, where the Court made the following comment that is of equal application to the provincial government:

There is no doubt that the Joint Review Panel, and as a consequence the respondents in this matter [the Government of Canada and Nalcor Energy], examined... the circumstances under which the appellant [the Conseil des Innu de Ekuanitshit] could continue to participate in the process so as to ensure that its concerns were taken into consideration and, if required, accommodated. It is therefore expected that at each stage (permits, licences and other authorizations) as well as during the assessment of the

adequacy of corrective measures taken by Nalcor and the relevant government authorities to address any adverse consequences of the Project, particularly on the caribou which is of interest to the appellant, the Crown will continue to honourably fulfill its duty to consult the appellant and, if indicated, to accommodate its legitimate concerns (see in this regard *Taku River* at para. 46).¹

The relevant guidance from the Supreme Court of Canada was as follows:

The Project Committee concluded that some outstanding TRTFN [Taku River Tlingit First Nation] concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.²

2.2. Post-authorization

Following the project's authorization, Ekuanitshit and its representatives raised several issues of particular importance to the community with Nalcor and the governments. These issues included:

- the protection of endangered species and other wildlife, especially caribou and salmon;

¹ *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, para. 109 (emphasis added).

² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, para. 46 (emphasis added).



- the protection of Ekuanitshit’s cultural heritage (archaeology).

Despite the Federal Court of Appeal’s promise of honourable consultation and accommodation, the Council was not seriously consulted about its concerns nor is it aware that any serious mitigation measures were taken to address its concerns. In particular:

- construction went ahead while caribou habitat protection plans were ten years overdue;³
- the province never met obligations under its own legislation intended to protect endangered species;⁴
- ever since the environmental assessment, Nalcor has declared that it could leave out mitigation measures mentioned in its environmental impact statement, if it decided that these measures were not practical or feasible, either technically or economically.⁵

At the federal level, despite promising to consult Aboriginal peoples, the Department of Fisheries and Oceans Canada (DFO) avoided triggering its duty to consult by issuing letters of advice allowing Nalcor to bypass the requirement that permits be issued. DFO did not consult Ekuanitshit before issuing the letters of advice and never informed Ekuanitshit of them before Ekuanitshit raised the issue. DFO took the position that no consultation was required, despite the

³ 20140925 from D. Schulze to M. Alexander and M. Landry_Fr: The Government of Newfoundland was due to enact its caribou recovery action plan in 2006, but has yet to do so.

⁴ A list of the province’s obligations under the *Endangered Species Act* may be found in the letter 20140925 from D. Schulze to I. Stone re Species at Risk and Monitoring Plan_Fr. For instance, the province, by virtue of paragraph 19(2) of the [Endangered Species Act](#), should have attached conditions to the permit, such as mitigation measures.

⁵ 20140925 from D. Schulze to I. Stone re Species at Risk and Monitoring Plan; see also undated “[Labrador-Island Transmission Link Species at Risk Impacts Mitigation and Monitoring Plan](#),” section 7.13, pp. 40, 43, section 8.2, pp. 51, 52, 60, 61, 62 .



fact that the environmental assessment had been based on the assumption that DFO would be called upon to issue permits about which Aboriginal peoples would be consulted.⁶

In reality, the post-authorization “consultations” with Ekuanitshit involved the imposition of arbitrary timelines, ignoring Ekuanitshit’s comments and concerns, and refusing to consider Ekuanitshit’s capacity and available funding, as the following examples demonstrate.

- The province and Nalcor imposed an arbitrary 30-day timeframe for all consultations, regardless of the nature of the impact or Ekuanitshit’s interest or the issue at hand. For instance, the consultation period for an application to build a parking lot not in any proximity to Muskrat Falls lasted 30 days,⁷ while the same 30-day consultation period was stipulated for the *Species at Risk Impacts Mitigation and Monitoring Plan*, a document with complex, technical language and with the potential to have serious consequences on the ability of the people of Ekuanitshit to exercise their constitutionally-protected hunting and fishing rights. The federal government’s stipulated consultation timeframe was almost identical. The authorization to construct the reservoir at Muskrat Falls, with the potential to directly affect Ekuanitshit’s fishing rights and involving the analysis of complex scientific documents, lasted a mere 45 days.⁸

⁶ 20160118 from Ekuanitshit to Hunter Tootoo re Labrador-Island Transmission Link Project.

⁷ 20120402 from L. Durno to Marie-Elda Mestokosho re ElectrSubstationCrownLands.

⁸ 20130228 from T. Bieger to Chef Piétacho re consultation habitat poisson.



- The timeframes imposed on Ekuanitshit did not apply to the Government of Newfoundland and Labrador, which routinely failed to provide meaningful responses to letters sent by the Council within 30 days and often extended to much longer periods of time, sometimes beyond 18 months.⁹
- The Government of Newfoundland and Labrador refused to provide any capacity or funding to Ekuanitshit, a community of only 500 people, to assist them in meeting the province's arbitrarily imposed 30-day consultation deadlines.¹⁰ Despite the Joint Review Panel's recommendation that sufficient resources be provided,¹¹ and despite the multitude and length of documents, and the complexity of the subject matter, Nalcor never offered any technical support.¹²
- The refusal to provide any capacity actually extended to demanding that Ekuanitshit pay for the costs of being consulted. After the Council asked to hold a meeting between its representatives, Nalcor and the Provincial Archaeology Office regarding the issuance of archaeology permits, the province refused to fund more than half of the cost of an

⁹ 20131209 from David Schulze to Stephen Corbett re Consultation ligne de transport, ponts: « nous attendons depuis 18 mois une réponse utile à nos lettres des 25 juillet et 30 août 2012 ».

¹⁰ 20131214 from David Schulze to Krista Rebello re consult; 20131209 from David Schulze to Stephen Corbett re Consultation ligne de transport, ponts.

¹¹ [*Report of the Joint Review Panel*](#) (August 2011), p. 295, Recommendation 15.5.

¹² 20120830 from D. Schulze to A. Gover re Consultation.



interpreter, effectively blocking any possibility of holding such a meeting and further obstructing the consultation process.¹³

- The Government of Newfoundland and Labrador routinely sent only English versions of complex documents to the Council, despite the fact that the people of Ekuanitshit speak Innu as their first language and French as their second language.¹⁴
- The Government of Newfoundland and Labrador neglected to send relevant documents to Ekuanitshit yet subsequently required comments pertaining to those same documents within 30 days.¹⁵
- Consultation documents were often vague and did not contain sufficient detail. For instance, a document from the Government of Newfoundland and Labrador's Crown Lands Administration Division notifying the Council of an application from Nalcor described the application as concerning "easement for two electric transmission lines" and simply provided a map of the proposed area, without any further details.¹⁶ This application did not give the Council any idea as to the real nature of the works planned.
- The federal consultation process was similarly vague. For the largest part of the transmission line right-of-way in Labrador, DFO simply described the letters of advice as

¹³ 20141216 from D. Schulze to B. Harvey re Historic Resources_Fr ; 20140822 from B. Harvey to D. Schulze re Historic Resources.

¹⁴ 20131214 from David Schulze to Krista Rebello re consult; 20130111 from David Schulze to Gilbert Bennett re lettre 19 dec.

¹⁵ 20131214 from David Schulze to Krista Rebello re consult.

¹⁶ 20120427 FromLynnDurotoM-E.MreConsult-140744Crown LandsAppl



concerning “temporary stream crossings and water withdrawal for transmission line construction” a phrase so vague that it did not give the Council any idea as to the nature and extent of the works planned¹⁷

Despite the inadequate consultation process and the absence of any serious mitigation measures, provincial departments and agencies ultimately approved no less than 1,969 different permits for the construction of Muskrat Falls, the Labrador Island Link, and the Maritime Link from 2012 through June 30, 2016.¹⁸

¹⁷ 20160118 from Ekuanitshit To Hunter Tootoo re Labrador-Island Transmission Link Project.

¹⁸ Labrador Affairs Secretariat, “[Lower Churchill Project, Government of Newfoundland and Labrador Permit Approvals.](#)”