**Lower Churchill**
**Engagement Strategy with Aboriginal Groups**

## ISSUE

Planning an appropriate agenda and strategy for initial discussions with Aboriginal groups that are likely to be impacted by the Lower Churchill Generation Project.

## CONSIDERATIONS

Given the diverse interests and potential expectations of Aboriginal groups regarding s.35 consultation and Aboriginal roles and participation in the environmental assessment (EA) process, a detailed and comprehensive strategy is required before engaging any of the groups that have been identified as having an interest in the project. This will allow for a more coordinated and efficient approach to initial and ongoing discussions between the Crown, the regulators and the proponent with Aboriginal groups.

Three Aboriginal groups appear likely to indicate that their interests will be impacted by the Lower Churchill generation project (project) and have been identified for initial discussions:

- Innu Nation of Labrador
- Nunatsiavut Government (Labrador Inuit)
- Labrador Métis Nation

The potential involvement of each of these groups will take place in different legal, factual and policy contexts. Contextual information is set out in the Background section, below.

Given the apparent interest of the Aboriginal groups to initiate discussions and the need to proceed with consultations in a timely manner, it is proposed that the Crown (federal and provincial) should initiate discussions with all groups separately, but as soon as possible. No significant benefit appears to exist from isolating one Aboriginal group for initial discussions while waiting a longer period of time to involve the other groups. In fact, significantly different timing in the scheduling of initial meetings could lead to a additional legal and political risks.

An appropriate agenda and strategy for initial discussions should include the following considerations:

### Issue 1: Describing the Project

It will be appropriate to begin discussions with each Aboriginal group based on a common and consistent understanding of the nature of the project. Although some Aboriginal groups, the Innu Nation in particular, are likely very familiar with

the project details, this may not be the case with all groups. In addition, there may be questions or concerns regarding the nature of the project (including, for example, the exclusion of an eventual transmission component from the proposed project) that may require discussion.

Recommendation

Request that the proponent attend initial meetings with Aboriginal groups to present in person, project details, project scope and potential impacts of the proposed project and to be available to respond to questions. The proponent would not be present for the subsequent discussions. While some groups, such as the Innu Nation, may view this step as unnecessary, it would be useful to provide certainty and consistency to discussions. It would also ensure that the proponent, rather than the Crown, would be answerable to potential concerns regarding the absence of a transmission component in the proposed project.

**Issue 2: Establishing Details on Nature of Claims**

For legal, factual and policy reasons, it is important that we ask the Aboriginal groups to provide specific and detailed evidence of their claim - i.e. the scope and nature of the Aboriginal rights they assert that they claim will be impacted by the project. In its decision in *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada stated that Aboriginal groups had an obligation provide this information, from para. 36:

> *This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in Marshall, supra, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6. (emphasis added)*

However, it would likely be difficult to insist upon making the receipt of this information the sole agenda item for initial discussions without raising concrete issues of potential involvement in the EA process and the development of consultation protocol agreements.

Recommendation

Propose initial meetings by way of letter to each Aboriginal group that has attached, a preliminary agenda identifing as an agenda item, details on the Crowns' need to have the Aboriginal Group provide the scope and nature of the Aboriginal rights and title they assert and the alleged infringements to those rights. The letter could suggest that the Aboriginal group explain to us with clarity in writing and in advance of meeting the scope and nature of the Aboriginal rights they assert and the alleged infringements to those rights so as to provide a better basis to conclude on subsequent agenda items.

The advantage of this approach is that, based on this information, the Crown will have a better understanding of the strength-of-claim and the respective obligations of the federal and provincial Crowns will be better understood. This will assist the federal and provincial Crowns in establishing which issues will need to be discussed in the EA process and which issues will need separate treatment. It will facilitate the drafting of any consultation protocol. It will also be useful in any future claim before the court. The disadvantage is that the Aboriginal groups may choose not to provide this information in advance. Delaying these discussions until such information is provided would not be recommended.

**Issue 3: Describing the nature of regulatory interests**

The third agenda item would be to ensure a common understanding of the nature of the Crown's regulatory and other interests in the project.

Recommendation
Follow the presentation of the project by the proponent and a discussion on scope and nature of the Aboriginal rights and title they assert and the alleged infringements to those rights with a discussion by federal responsible authorities and provincial authorities of the nature of their regulatory interests in the project, the decisions that will have to be taken and the permits or authorizations required.

**Issue 4: Discussing consultation protocols**

At this time, there has not been a direct request by any of the Aboriginal groups for a negotiated consultation agreement or protocol. It is highly likely though, that such an approach will be necessary, particularly if Aboriginal groups are not invited to be signatories to the joint panel agreement, as was the case for the Voisey's Bay Joint Panel Agreement.

The nature and extent of the consultation and whether any accommodation is

required will depend upon the extent to which Aboriginal groups can establish for the Crown the nature of their asserted rights and the alleged infringements to those rights by the proposed project.

In the case of the Labrador Métis Nation, it will first be necessary to establish the nature of its authority to represent claimed Métis rights holders.

Recommendation

The concept of a consultation or protocol agreement should not be raised by the Crown in the agenda or at the initial meeting. If raised by the Aboriginal groups, Crown representatives should have the mandate to agree to consider such an agreement and should be willing to commit to a timeline and process for completing such an agreement. If it is not raised at the preliminary discussion, objectives regarding consultation or protocol agreements will ultimately be based on the information provided either in writing or in person by each Aboriginal group regarding the nature of its asserted rights and the alleged infringements to those rights, or based on the EA process and agreed to roles of the Aboriginal groups in that process.

**Issue 5: Discussing involvement by Aboriginal groups in the EA process**

One of the key issues to be raised by Aboriginal groups in initial discussions will be the nature and extent of Aboriginal involvement in the EA process. An appropriate strategy for such discussions should consider a number of factors:

- The different legal context in which each Aboriginal group is seeking involvement;
- The perceived precedent established by the inclusion of the Innu Nation and the Labrador Inuit Association with the Governments of Canada and Newfoundland and Labrador in the Memorandum of Understanding (MOU) to establish a joint EA review of the Voisey's Bay Nickel Company mine and mill. These considerations included: Innu and Inuit representative organizations being signatory to the MOU; Innu and Inuit provided lists of nominees for panel membership; the report was provided directly to Innu and the Inuit organizations; the Crown committed to consult on the implementation of the MOU; the required input of Innu and Inuit comments on the EIS guidelines and scoping, and; specific translation requirements.
- Existing expectations of Aboriginal groups for substantial involvement in the EA process; and
- The nature and extent of Aboriginal rights that may be impacted by the project.

One potential strategy would be to consider negotiating the involvement of each Aboriginal group in the EA process in a manner similar to the precedent established in the Voisey's Bay project. This would provide for the greatest level

of involvement in the EA process by Aboriginal groups, but would entail many significant challenges and could prove unworkable.

A second potential strategy would be to consider negotiating only a minimal level of involvement in the EA process for each of the Aboriginal groups. However, this approach may be unsupportable given the precedent of the Voisey's Bay project and the legal entitlements for participation by the Aboriginal groups.

Recommendation

Assess the legal, policy and factual context surrounding each Aboriginal group's potential involvement in the EA process, and negotiate the level of involvement in the EA process by each Aboriginal group separately, based on this assessment. This will provide for an appropriate and defensible level of involvement by each group. This may entail not committing to any particular role for Aboriginal groups initially, listen to their requests and expectations and decide on a formal approach and position at a subsequent meeting.

There will be challenges in treating each Aboriginal group separately in this respect. In particular, there will be a risk that some groups will claim unfair or inequitable treatment if they are offered a lesser role in the EA process than other groups. Any such objections should be neutralized to a large extent by a careful assessment of the context of each group's potential involvement.

**Issue 6: Specific approaches for each Aboriginal group consulted**

**Nunatsiavut Government**

The Nunatsiavut Government participated in the Voisey's Bay project as a party to the MOU, and may expect a similar level of involvement in the EA process of this project.

Legal entitlements for involvement are governed by the Labrador Inuit Land Claim Agreement, which was finalized after the Voisey's Bay MOU was negotiated. Initial legal analysis indicates that the proposed project would be defined as an 'Undertaking' as set out in the Agreement, as it would not be located directly on the Labrador Inuit Settlement Area. To establish this with certainty would require confirmation by the Nunatsiavut Government precisely how the project may impact Labrador Inuit Settlement Area lands. As a result, Article 11 of the Agreement sets out the nature of the specific involvement in the EA process by the Nunatsiavut Government. Initial legal analysis by Justice Canada indicates that there is no obligation to allow the Inuit to be a signatory to an MOU or Joint Review Panel agreement. The Inuit would constitute a jurisdiction for the purposes of CEAA, but since they would have no EA responsibilities with respect to the proposed project, they would not have a joint role in the EA, pursuant to the Land Claim Agreement.

Recommendation

Propose involvement in the EA process by the Nunatsiavut Government consistent with the provisions of the Labrador Inuit Land Claim Agreement.

**Innu Nation of Labrador**

The Innu Nation of Labrador participated in the Voisey's Bay project as a party to the MOU, and has indicated its expectation for a similar level of involvement in the EA process of this project. The Government of Newfoundland and Labrador, in a letter dated February 8, 2007 to the Innu Nation from Clyde Jackman, Minister of Environment and Conservation has indicated its intention to proceed with negotiations towards an agreement for EA involvement by the Innu Nation in a manner consistent with the Voisey's Bay MOU.

The proposed project is located on lands claimed by the Innu Nation and the Innu land claim has been accepted by the governments of Canada and of Newfoundland & Labrador. Although land claim negotiations are active and an Agreement in Principle is currently under negotiation, a final Land Claims Agreement defining Innu rights to participate in the EA process is not expected for several years. Any reference to rights proposed in un-signed agreements under negotiation could compromise federal and provincial negotiating interests

A threshold question is whether to negotiate the kinds of rights for the Innu Nation as contemplated in the draft Agreement in Principle. The draft Agreement in Principle provides for similar types of rights as the Labrador Inuit Land Claims Agreement and the opportunities provided by the Voisey's Bay MOU. If rights as contemplated in the draft Agreement in Principle are negotiated, initial legal advice from Justice Canada indicates that these rights would actually be more extensive than those provided to the Inuit pursuant to that Land Claims Agreement. This is because it is likely that the proposed project would be defined as a "Project" rather than an "Undertaking" pursuant to the draft Agreement in Principle under negotiation, since it has been suggested that the proposed project would be located on Labrador Innu Lands.

As is the case for the Nunatsiavut Government (Labrador Inuit), legal advice by Justice Canada indicates that there is no obligation to allow the Innu to be a signatory to an MOU or Joint Review Panel agreement since the Innu have no EA laws at this time, nor are they technically a jurisdiction for the purposes of CEAA.

Recommendation

Propose involvement in the EA process by the Labrador Innu consistent with the provisions of the draft Agreement in Principle under negotiation.

**Labrador Métis Nation**

The Labrador Métis Nation has asserted claim to lands in Labrador and refer to a recent decision of the Newfoundland Supreme Court in respect to the Trans-Labrador Highway in support of their claim. However, their claim has not been accepted by either the federal or provincial governments. The Government of Newfoundland is appealing the Trans-Labrador Highway decision and in any case, question its relevance to the Lower Churchill project. The Innu Nation of Labrador has indicated its objection to involvement by the Labrador Métis Nation as a party to an MOU, given that the proposed project is located on lands claimed by the Innu Nation. As a result, involvement by the Labrador Métis Nation may jeopardize the cooperation of the Innu Nation, and should only be negotiated to the extent that it is fully supportable by the analysis of the LMN's legal rights to participate.

Recommendation

Limit LMN participation directly in the EA process to a role solely as an interested party and intervener in the process. Commitments could be made however, in writing that the Crown will consult the LMN on significant decisions or steps in the EA process.

**Issue 6: Capacity Funding**

Another key issue likely to be raised by Aboriginal groups in initial discussions will be the amount of capacity funding available to support their participation. The Participant Funding Program, administered by the Canadian Environmental Assessment Agency, has announced that up to $50,000 will be made available as an initial 'phase 1' amount to assist groups and/or individuals, including non-Aboriginal groups, to take part in the EA of the proposed project. A subsequent announcement of an additional 'phase 2' is anticipated. There will not be any additional capacity funding available from federal responsible authorities and it has not yet been determined if the Government of Newfoundland and Labrador is willing to provide direct capacity funding.

Recommendation

Explain that funding will be limited to the Canadian Environmental Assessment Agency's Participant Funding Program and any available provincial capacity funding, and seek to not raise expectations for additional subsequent funding. Explanations on how to access this funding and efforts to assist them in filing an application can be offered.

Discussion regarding capacity funding should be directed to the 'reason' and 'need' for the funding, not just the Crown's difficulty in providing it. There is no

established legal principle that requires the Crown to provide capacity funding. Insofar as it is nonetheless a practical issue for the conduct of meaningful consultations, the group must be able to link its need for capacity funding to issues relevant to consultation (i.e. potential adverse impact of Crown conduct on their asserted rights).

**BACKGROUND**

Newfoundland and Labrador Hydro proposes to develop the hydroelectric potential of the Lower Churchill. The proposal includes two sites: a 2,000 megawatt project at Gull Island, which is 225 kilometres downstream from the existing 5,428 megawatt facility at Churchill Falls, and an 800 megawatt project at Muskrat Falls, 60 kilometres downstream of Gull Island.

The Gull Island facility will include a dam 99 metres high by 1,315 metres long with a reservoir 225 kilometres long, flooding an additional 85 square kilometre area. The Muskrat Falls facility will have a capacity of 800 MW, including a dam at the north section 32 metres high by 180 metres long, and, south section 29 metres high by 370 metres long with a reservoir 60 kilometres long, flooding an additional 36 square kilometre area. The project will also include interconnecting transmission lines to the existing Labrador grid at Churchill Falls Generating Station.

In addition to construction of the dams and interconnecting lines, it will be necessary to construct new transmission lines for distribution. This is not part of the current proposal. Market options include NL, Ontario, Québec, the Maritime Provinces and the north-eastern United States. Proposals for transmission could include both sub-sea and land transmission options.

A planning schedule has been developed that will see a project sanctioning decision by 2009, and first power by 2015. Activity is taking place on several fronts including preparations for negotiations with the Innu Nation of Labrador on an *Impact and Benefits Agreement* and laying the groundwork for the environmental assessment process leading to the filing of an EIS by the fall of 2007.

There are three main Aboriginal groups who will participate in the environmental assessment and the project; the Nunatsiavut Government (Labrador Inuit), the Innu Nation of Labrador, and the Labrador Métis Nation. These groups assert Aboriginal rights and Aboriginal title in the area. However, the federal Crown does not have a full understanding of what these asserted rights are or how they may be impacted by the project. As a result of the 2004 Supreme Court of Canada decisions in *Haida* and *Taku River* the Crown has a legal duty to consult, and where appropriate accommodate where it has knowledge of the potential existence of Aboriginal rights and contemplates conduct that might adversely impact those rights.

Innu Nation of Labrador
The proposed development is located on lands claimed by the Innu Nation and the Innu land claim has been accepted by the governments of Canada and of Newfoundland & Labrador. The land claim negotiations are active and ongoing with an Agreement in Principle expected in the near future. It is not unlikely that the claim will be settled before the project is commissioned.

Nunatsiavut Government
The land claim for the Inuit of Labrador is settled and has resulted in the creation of the Nunatsiavut Government. A portion of Lake Melville is included in the Labrador Inuit Settlement Area and in Labrador Inuit Lands. The shortest straight-line distance from Gull Island to the edge of the Labrador Inuit Settlement Area is approximately 120 kilometres.

Labrador Métis Nation
The Labrador Métis Nation has asserted claim to lands in Labrador. The claim has not been accepted by either the federal or provincial governments. The Labrador Métis have indicated publicly that they will take whatever steps necessary to stop the Lower Churchill Project unless there is a formal written agreement with Newfoundland and Labrador to detail how consultation and accommodation will be dealt with.