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August 13, 2010

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Ms. Lesley Griffiths and Mr. Herbert Clarke  
Co-Chairs  
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33 Pippy Place, P.O. Box 8700  
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**Re:** Proposed Lower Churchill Hydroelectric Generation Project (Gull Island et Muskrat Falls); Your file no. CEAR 07-05-26178; our files nos. 7550/001 and 7550/002

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Dear Madam, Dear Sir,

## **I. Introduction**

This is further to the letter of June 17, 2010 sent to you by counsel for the proponent, concerning the intervention by our client the Conseil des Innus de Ekuanitshit with respect to the above-mentioned project.

We would point out that the lawyer who signed this letter was previously unknown to us: he has never been in contact with the Innus of Ekuanitshit, nor the undersigned in my capacity as their representative.

We regret that the proponent seems more inclined to have lawyers from a third province interpret its inability to consult our client than to make the necessary efforts to meet the requirements of the guidelines.

Moreover, we are taking the liberty to attaching our own courtesy translation. The June 17<sup>th</sup> letter suggests that: "It is noted in the May 25, 2010 letter that Ekuanitshit will be 'conducting' an 'environmental assessment' of the Project." No such statement appears in our May 25<sup>th</sup> letter.



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## **II. State of the law**

### **A. The Guidelines**

Nalcor's principal obligation under the *Environmental Impact Statement Guidelines* is not to consult the Innus of Ekuanitshit.

The actual obligation to consult Aboriginal peoples belongs to the Crown as the legal decision-maker, not to a project's proponent, as the Supreme Court of Canada explained in the *Haida v. British Columbia* judgment. Moreover, the question of the adequacy of Crown consultation is specifically excluded from your mandate pursuant to the "Agreement Concerning the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project" (2008).

The proponent's real obligation is to demonstrate in its environmental impact statement (EIS) that it understands "the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing" the Innus of Ekuanitshit, among others, and to "indicate how these will be considered in planning and carrying out the Project": *Guidelines*, July 2008, §4.8.

It is only in order to "assist in ensuring that the EIS provides the necessary information to address issues of potential concern to these groups, [that] the Proponent shall consult with each group" specified in the *Guidelines*.

### **B. Nalcor's new distorted position**

Previously, Nalcor at least admitted that it had to ensure the "participation of each Quebec Innu community" as well as the "collection of accurate and comprehensive data relating to Project impacts upon current land and resource usage": Response to Information Request No. JRP.2, p. 3.

Nalcor admitted it had to provide your panel with a "final assessment of the Project's anticipated effects on the current use of lands and resources for traditional purposes by the enumerated Quebec Innu communities": Response to Information Request No. JRP 2, p. 25

Without giving an unqualified endorsement to this analysis, we note that these steps would at the very least require: 1) a study of the current occupation and traditional uses; and 2) an exchange between the proponent and the Aboriginal group in order to determine the project's anticipated effects.



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However, the new position adopted by Nalcor's counsel in his June 17<sup>th</sup> letter is very different. It alleges that the obligation is only to "provide an Aboriginal group with information" as well as "opportunities to consult."

Moreover, Nalcor's counsel alleges that the proponent met its obligation to consult by "providing Project-related information to all Aboriginal groups named in the Guidelines, by meeting or offering to meet with each group, by inviting each group to communicate its issues and concerns and, where appropriate, by offering to enter into formal consultative agreements supported by capacity funding." But as described below, it seems that for Nalcor, it is only appropriate to offer the agreement that suits the proponent and nothing else.

The proponent would thereby set itself above the Guidelines issued by the federal and provincial governments. Nalcor would no longer have to provide a study of "the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing" the Innus of Ekuanitshit, nor would it have to "indicate how these will be considered in planning and carrying out the Project."

## **II. Correcting the facts**

### **A. Steps taken by the proponent**

We remain surprised that the proponent continues to set out to the panel details of negotiations that Nalcor itself characterized as "confidential and 'without prejudice'": Response to Information Request No. JRP.2, p. 25.

In face of a dubious version of the facts, we are obliged to summarize for the panel the steps taken by the proponent in a process its counsel now characterizes as "consultation" or an "offer to consult".

In May 2008, Nalcor asked for a meeting with the Conseil des Innus de Ekuanitshit as soon as possible but without offering any framework for its efforts, nor any support for community capacity. In May 2009, Nalcor asked the Chief immediately to sign an agreement drafted in English only and which included neither a budget nor a work plan. After a meeting between elected officials from Ekuanitshit and Nalcor executives on June 1, 2009, the proponent's in-house counsel proposed a series of draft agreements to the undersigned, without finalizing any.

After a second meeting between elected officials from Ekuanitshit and Nalcor representatives on January 27, 2010, the parties agreed verbally to follow the model of the La Romaine hydro-electric project with respect to the process by which the proponent would meet its obligations under the environmental assessment guidelines.



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More particularly, the parties agreed to work on an agreement under which Nalcor and Ekuanitshit would agree on the mandate for an expert, to be paid by the proponent to carry out a study on the Innus of Ekuanitshit; his or her work would be supported by community liaison officers paid by the proponent and would be supervised by a Nalcor-Ekuanitshit joint committee.

A month after a meeting between lawyers held on February 26, 2010, and after Ekuanitshit provided a detailed draft agreement based on this meeting, Nalcor disavowed its earlier commitment and proposed a totally different approach.

On March 26, 2010, Nalcor proposed a short-term agreement meant to pay for a consultant to be hired by the community for work which the proponent characterized as a “scoping exercise”. This work would have to be carried out quickly and any follow-up would depend upon the results, except that the criteria for continuing the work were not defined. Moreover, Nalcor refused even to take a position on the principle of reimbursing the now considerable legal fees Ekuanitshit had incurred to negotiate an agreement, unless Nalcor received a copy of the accounts, which are confidential.

After the undersigned stated his surprise at Nalcor’s change in position and insisted that the principle of reimbursing legal fees had to be recognized, Nalcor’s in-house counsel indicated that its executives would contact Chief Jean-Charles Piétacho directly.

On April 6, 2010, the proponent wrote directly to Chief Piétacho and alleged, despite its change in position, that the parties were close to an agreement; Nalcor also offered to visit the community to explain the project. On April 14, 2010, Chief Piétacho answered directly: he accepted the proponent’s offer of a visit to the community but added that providing information did not relieve the proponent of its obligations under the Guidelines. In the same letter, Chief Piétacho explained that Nalcor’s recent actions had in fact prevented finalization of an agreement and he reiterated the undersigned’s mandate.

On April 15, 2010, Nalcor’s in-house counsel proposed yet another draft agreement to Ekuanitshit: briefly stated, it would entail the payment of \$87,500, with which the community would itself prepare the study of the topics set out in section 4.8 of the Guidelines and that it would have to do so within four months. (An amount of \$3,000 was included to pay for legal fees.) A few weeks later, Nalcor explained that this study would not be followed by any other phase of work unless the proponent concluded it was necessary, thereby again changing its position.

In a letter dated April 23, 2010, the proponent asked to come to Ekuanitshit as part of a “Summer Consultation Program” for the “collection of land and resource use information and to provide Project related information to residents.”



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However, the direction decided upon and the goals pursued by Nalcor were revealed by the “Panel Update on Consultation Activities and Negotiation of Agreements; May 2010” which the proponent provided to you on June 2, 2010.

On the one hand, Nalcor stated that without even meeting the Innus of Ekuanitshit, it had already concluded there was “no record of historic or current land and resources use and occupancy by the community in the Project Area.” On the other hand, it wished to complete its collection of information during summer in order to be able to file a “2010 Consultation Assessment Report” by September 30, 2010.

It is worth noting that even though Nalcor reached an agreement with the Innus of Pakua Shipi on the model it had proposed to Ekuanitshit, the proponent stated it had already concluded that this community also could not demonstrate any historic or contemporary use of the project area.

**B. Inaccuracies in the June 17, 2010 letter**

Based on the offer the proponent has made, Nalcor’s view of its obligation to “consult” the Innus of Ekuanitshit is that it amounts to:

- providing them with \$87,500 for them to carry out themselves and within four months the study which section 4.8 of the Guidelines has required of the proponent since July 2008;
- coming to the community to explain the project but on a schedule allowing the proponent to file a report on the meeting with the panel by September 30, 2010;
- evaluating the study to be prepared by the Innus of Ekuanitshit and meeting them to collect information about them, even though the proponent has already decided that they do not use and have not occupied the project area historically.

Under the circumstances, there is reason to doubt whether Nalcor is “aware of its obligations to consult with Aboriginal groups as set out in the Environmental Impact Assessment (‘EIS’) Guidelines.”

On another topic, the June 17<sup>th</sup> letter from counsel alleges that Ekuanitshit’s response to his client’s offer of an agreement was “met with a demand for upfront compensation and a reiteration of Ekuanitshit’s position that, as a precondition to the commencement of hearings, Nalcor commit to enter into the negotiation of a mitigation/accommodation agreement before impacts would be identified and assessed.”

We do not know what the basis for this statement might be, but we believe it is appropriate to cite the following excerpts from an exchange of email between the undersigned



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and Nalcor's in-house counsel on March 26, 2010, at the time the proponent had made its unilateral proposal of a new "phased" approach.

Counsel for Nalcor wrote:

1. Phase One: this would be a 3 to 4 month agreement which would entail the retention of a consultation coordinator to work in the community and who would have the following responsibilities: work with a Nalcor designate to develop an agreed-upon workplan; disseminate Project information supplied by Nalcor; conduct an initial issues scoping exercise to gather and analyze the views of the community respecting the Project; produce a report to be shared with Nalcor and the community which would essentially be an issues scoping document. Upon finalization of the initial report the parties would develop a workplan for Phase Two based on the outcome of Phase One consultation. This approach is somewhat similar to the Community Capacity Agreement draft provided to you previously. However, the associated budget would be commensurate with the enhanced nature of the responsibilities of the coordinator. Nalcor would be prepared to work very closely with the coordinator and would in addition, undertake its own obligations re: provision of project information.

2. Phase Two: the content of Phase Two would be to a large extent dictated by the results of the Phase One consultation but as a working hypothesis, we think that this might be the 'consultant' stage (based on a modified version of the HQ agreement). In addition, we anticipate that it is at this stage that any requirements for mitigation/accommodation would be identified which could then be implemented through a Phase Three agreement.

We responded to this proposal with the following concerns:

3) Phased approach to community studies

The following does not exhaust my questions and concerns about the approach you set out below. Among other things, I note that Phase 1 does not provide for the services of anyone other than a "consultation coordinator" which, by the nature of the work, would not appear be a position that could be filled within the community (if only because of the language requirements). For reasons similar to those set out above, we do not foresee providing facilities and services to such a coordinator without compensation by Nalcor and would need to see this principle reflected in any agreement.

More important at this point, however, is for me to understand where you see this multi-stage process fitting in the Joint Review Panel's schedule.

As I understand your current proposal, it is after Phase 2 that Nalcor will be able demonstrate to the JRP compliance with requirements of the guidelines which I would summarize as an understanding of the Innu of Ekuanitshit's land use and social, cultural and economic activities, both contemporary and historic, their Aboriginal traditional and community knowledge, as well as the values they attach to these environmental components.



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In reference to the guidelines, Phase 3 would involve the means to consider this information in planning and carrying out the Project, as well as mitigation and compensation measures.

You will recall that as recently as a few months ago, your client's position before the JRP was that a casual exchange of correspondence and an afternoon meeting had discharged Nalcor's obligations with respect to the EIS guidelines as far as the Innu of Ekuanitshit were concerned.

Either you will need to be clearer on the timelines or you else we will need to address Ekuanitshit's position that its participation in Phases 2 or 3 cannot be relied upon before completion as justification by Nalcor for the EIS to go to hearings before the JRP.

(emphasis added)

In other words, Ekuanitshit never asked for compensation as a precondition but instead, for agreement on the principle that the community should be compensated should the Conseil des Innus be required to devote resources to the study proposed by the proponent.

Similarly, Ekuanitshit never insisted on negotiating mitigation and accommodation measures as a precondition but instead indicated that its participation in a study of project impacts could not be taken to indicate its agreement that the environmental impact study was sufficient.

It was the proponent which abandoned a collaborative approach in favour of proposing a study which only advanced its own interests and schedule. Nevertheless, its counsel now accuses Ekuanitshit of being obstructionist when the community was merely reacting by setting out its own position. The only explanation we can see is that Nalcor's offer was made on a take it or leave it basis, which would not be a sign of good faith.

### **III. Conclusion**

The letter of June 17, 2010 sent to you by counsel for Nalcor demonstrates a mistaken analysis of his client's obligations and an inaccurate version of the facts.

The Conseil des Innus de Ekuanitshit would much prefer to receive serious offers of consultation rather than to be obliged to correct inaccuracies in letters filed by the proponent in the Joint Review Panel's registry.

In fact, the proponent changed its position several times since January 2010 before finally offering the Conseil des Innus de Ekuanitshit an amount of \$ 87,500 with which it would have had to complete by itself and within four months the study which section 4.8 of the Guidelines has nevertheless required of Nalcor since July 2008. It wishes to evaluate this study and to meet the Innus of Ekuanitshit even though it has already decided that they do not use and have not occupied the project area historically.





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With this approach, it is hard for us to see how the proponent will meet its obligation to file a sufficient environmental impact study. Our client nevertheless remains open to helping Nalcor meet its obligations on terms that are both realistic and respectful.

On another topic, the Conseil des Innus de Ekuanitshit anticipates providing a response to the proponent's request to come to the community but based on a schedule which would allow for meeting a sufficient number of members, which a visit during the summer would not allow.

Yours,

**DIONNE SCHULZE**

David Schulze

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