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**SUBMISSION FROM THE INNU OF EKUANITSHIT
TO THE JOINT REVIEW PANEL PUBLIC HEARINGS**

CEAR 07-05-26178
Lower Churchill Hydroelectric Generation Project

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I. Introduction

This brief is a complementary document to the documents already submitted to the Joint Review Panel and the Canadian Environmental Assessment Agency (the Agency) by the Innu of Ekuanitshit for this file and submitted to the registry.

The main positions adopted up to now are as follows:

- The environmental impact statement (EIS) cannot be deemed admissible until the consultation of the Innu of Ekuanitshit, required from the proponent under the *Guidelines* has been completed¹.
- Moreover, given the absence of a study on the direct and indirect effects on the lac Joseph herd, the EIS does not comply with the *Guidelines* regarding large mammals in general, caribou specifically, as well as the cumulative environmental effects².
- The Ekuanitshit Innu Council has neither the technical resources nor the financial means required to provide the Review Panel with a study on the use, by the Innu, of the land and resources affected by the project, and the potential negative impacts of the project on these activities³.
- Rather, it is the proponent's duty, pursuant to Section 4.8 of the *Guidelines*, to demonstrate its understanding of the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues of the Innu of Ekuanitshit and "show how these aspects will be taken into account when planning and carrying out the project⁴."
- The absence of a study from the Innu of Ekuanitshit stems from the inadequate means offered by the proponent to complete it, said offer following its statement to the effect that, in any case, there was no indicator of their historic or contemporary use on the project's land area⁵.
- On another matter, the true scope of the project is not the one specified by the proponent, because, in reality, the project is now formed of the Muskrat Falls generating facility and

¹CEAR 07-05-26178, document 413.

² Document 290.

³ Documents 273, 332, 542.

⁴ Documents 290, 560.

⁵ Document 517.



Labrador–Island transmission link, upon which the generating facility will depend entirely.

- As such, the ongoing assessment contravenes section 15 of the *Canadian Environmental Assessment Act* (the Act), which requires the assessment of any operation forming a project related to a physical work if the project is “likely to be carried out in relation to that physical work⁶.”

II. The interest of the Innu of Ekuanitshit in the project

The interest of the Innu of Ekuanitshit in this project has not been established because the *Environmental Impact Statement (EIS) Guidelines* that were set out by both the federal and provincial governments require the proponent to take the interests, values and concerns of the community into account, as well as the contemporary and historic activities of its members.

Nonetheless, it is important to recall certain undeniable facts regarding the occupation, by the Innu of Ekuanitshit, of the land targeted by the project.

- The proponent’s searches on historical and archaeological resources brought to light an intense use of the region by the Innu of Mingan in the 19th century⁷.
- Hydro-Québec recognized, during another environmental assessment, that the “land used by the Innu of Ekuanitshit in the 20th century...in depth, ...went all the way to the Churchill River in Labrador⁸.”
- This use in the 20th century has been documented in the autobiography of Mathieu Mestokosho—an Innu of Ekuanitshit who was born close to 1885 and who passed away in 1980—which details how, for the biggest part of his life, he and a great many other members of the community would leave in August and go towards the lands of Labrador up to Northwest-River, coming back to Mingan only at the end of spring⁹.
- In 1979, the Government of Canada accepted the occupation and use of the land in Labrador, as claimed by the Innu of Ekuanitshit, as a basis for negotiations to come to an agreement, when it accepted to negotiate with the Atikamekw and Montagnais Council.

⁶ Documents 560, 688.

⁷ *Cultural Heritage Resources*, Report 4, *Historic Resources Overview Assessment 1998-2000*, Volume 1, p. 27.

⁸ Hydro-Québec, *Romaine Complex; Environmental Impact Assessment* (December 2006), vol. 6, p. 38-8. (French only)

⁹ See Appendix B for excerpts from: Serge Bouchard, *Caribou Hunter: A Song of a Vanished Innu Life* (Vancouver, Greystone Books, 2006).



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(In 1994, the AMC ceased its operations, and the Mamu Pakatatau Mamit Assembly took over the file on behalf of the communities of the lower North Shore, including the Ekuanitshit.)

- Since 2000, the Government of Newfoundland and Labrador, who has refused to negotiate the comprehensive claims of the “Innu from Quebec”—under the pretext that it must first settle the situation with Innu Nation¹⁰—has stated that the Innu from Quebec were or must be involved in the conservation efforts for the caribou¹¹ and more specifically in its woodland caribou recovery strategy¹².
- Since 2009, the continuation of caribou hunting activities in Labrador by the Innu of Ekuanitshit has been funded by the Innu Aitun Fund, created by the Inuit Impact and Benefit Agreement reached with Hydro-Québec, within the framework of the Romaine River Complex¹³.

During the public hearing, members of the community, both elders and elected officials, testified on their contemporary and traditional occupation of the land targeted by the project.

III. The “consultation” of the Innu of Ekuanitshit required from the proponent

A. The proponent’s legal obligation

The proponent is the one who is required to show in the EIS that it has studied the important issues of the Innu of Ekuanitshit, among other Aboriginal communities.

Such an exercise requires, on the one hand, the study of the contemporary occupation and traditional uses of the land and, on the other hand, an exchange between the proponent and the Innu, with a view to establishing the expected impacts of the project. This process has been described as a “consultation” in Section 4.8 of the *Guidelines*.

¹⁰ “Ministerial Statement - Coastal link road”, April 29, 1999, www.releases.gov.nl.ca/releases/1999/wst/0429n03.htm (“Our priority has been, and will continue to be, land claims settlement with resident Aboriginal groups in the province, namely the Labrador Innu Nation and the Labrador Inuit Association”).

¹¹ “Statement issued by Ed Byrne, Minister of Natural Resources”, April 10, 2006, <http://www.releases.gov.nl.ca/releases/2006/nr/0410n02.htm>

¹² Newfoundland and Labrador Department of Environment and Conservation, *Recovery strategy for three woodland caribou herds (Rangifer tarandus caribou; boreal population) in Labrador* (2004), table 1; “Newfoundland and Labrador Government Calls on Quebec Innu to Respect Conservation Principles”, February 21, 2010, <http://www.releases.gov.nl.ca/releases/2010/nr/0221n01.htm>

¹³ Appendix B to the brief: Société Ishpitenitamun, “Gestion du Fonds Innu Aitun : ERA Ekuanitshit, Comité Innu Aitun Ekuanitshit”, July 8, 2010.



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B. The offer for consultation made by the proponent was clearly inadequate

The Innu of Ekuanitshit refused the proponent's offer to sponsor an underfunded, hastily made assessment. They were able to ascertain the offer's inadequacy because of their previous experience with a similar project and proponent: the Romaine Complex proposed by Hydro-Québec.

As specified in greater detail in another proposal, the EIS submitted by Hydro-Québec for the Romaine project included several assessments on the occupation and use of the land by the Innu of Ekuanitshit. These assessments had been prepared by consultants hired by Hydro-Québec, but whose mandate had received the approval of the community and whose work benefited from its contribution¹⁴. In addition, other assessments had also been made by Hydro-Québec to report on the impacts of the project on said occupation of the land by the Innu, which represented a separate endeavour from the community assessments.

For this project, the proponent alleges that it has fulfilled its obligations to the Innu of Ekuanitshit by offering the Council an amount of \$87,500, with which the community was going to conduct by itself an assessment within a timeframe of four months¹⁵.

Moreover, the assessment was to cover all the aspects specified in Section 4.8 of the *Guidelines*, i.e., not only "the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues" for them, but also "show how these aspects will be taken into account when planning and carrying out the project"

However, the proponent was forced to admit, in March of 2011, that Innu Nation had received for its part, approximately \$12 million for the assessments of the project and its impacts on Sheshatshiu and Natuashish¹⁶. The funding for the consultation process for these two communities goes back to 1998, even before the project had been defined¹⁷, and the assessments continued until at least July 2010¹⁸.

¹⁴ Document 517, "Comments of the Innu of Ekuanitshit on the Consultation Assessment Report submitted as Additional document for Information Request No. 151", October 25, 2010.

¹⁵ Response to Information Request No. CEC.151, Attachment 1, "Community Consultation Agreement Template", May 2010.

¹⁶ "Court begins hearing arguments into Aboriginal objection to Lower Churchill", Canadian Press, March 16, 2011, <http://www.thestar.com/news/canada/article/954723--court-begins-hearing-arguments-into-Aboriginal-objection-to-lower-churchill>

¹⁷ EIA, §8.3.1.5

¹⁸ Additional document for Information Request No. CEC.151, pp. 3-14, 3-17, 3-32, 3-35 to 3-37.



While the proponent is free to make different offers to different Aboriginal communities in accordance with its evaluation of their needs, the disproportion between the \$12 million over 12 years granted to Innu Nation and the \$87,500 over four months granted to the Innu of Ekuanitshit is so great that they have a right to question the proponent's good faith¹⁹.

C. The role of the Innu of Ekuanitshit

The obligation to prepare the assessments required under the *Guidelines* is first and foremost the responsibility of the proponent and, to this end, it must offer Aboriginal communities the appropriate means to achieve this objective.

An Aboriginal community like the Ekuanitshit is not obligated to agree to an inadequate impact assessment by accepting any and all consultation processes that the proponent is willing to offer it. That is why the Innu declined the offer that the proponent made to them.

When the Panel Review decided to go ahead with the public hearings in spite of the shortcomings in the EIS raised by several Aboriginal communities, including the Innu of Ekuanitshit, it presumed that the deficiencies of the EIS could be rectified by the communities themselves through their own submissions²⁰.

However, the Ekuanitshit Innu Council has neither the technical resources nor the financial means required to offset the absence of an assessment on them by the proponent. Chief Jean-Charles Piétacho addressed this topic during the hearings.

The last scientific assessment on the occupation of the land in question goes back to 1983, when the report entitled "Occupation et utilisation du territoire par les Montagnais de Mingan" was prepared by Robert Comtois for the Atikamekw and Montagnais Council²¹.

Moreover, the Innu of Ekuanitshit were forced to concentrate their efforts on the land claimed in Quebec following the refusal of the Government of Newfoundland to negotiate with them on their claims for Labrador, which explains the absence of other assessments.

Lastly, the description itself of the use of the land would only constitute the first part of the assessment required by the *Guidelines* regarding the Innu of Ekuanitshit, as the project's impacts on them still have to be ascertained. The assessment of the pros and cons of the project for the community (required by Part 4.5.1 of the *Guidelines*) requires scientific and technical expertise

¹⁹ Response to Information Request No. CEC.151, p. 6.

²⁰ We are referring to the letters of the Panel Review to Chief Jean-Charles Piétacho dated December 3, 2010 and February 11, 2011

²¹ See Appendix A in this brief.



in civil engineering, hydrology or biology, which the personnel of the Ekuanitshit Innu Council themselves do not have, and which they do not have the financial means to hire.

IV. The Review Panel is not addressing the true scope of the project

A. The problem

The scope of the project, as defined in the assessment submitted to the Review Panel, is not in compliance with section 15 of the Act, which requires that the scope include the entire project.

The proponent did not include the Labrador–Island transmission link in the project’s description. Rather, it is limited to the “Lower Churchill Hydroelectric Generation Project”. The proponent submitted the description of a “Labrador–Island Transmission Link” project separately on January 29, 2009.

However, when considered as a whole, the project before the Review Panel includes the Labrador–Island Transmission Link, that the proponent has defined as being a separate project. However, splitting up the transmission link from the power plants is illegal, for the reasons defined below.

B. The requirements of the *Canadian Environmental Assessment Act*

In a recent judgment, the Supreme Court of Canada explained how to establish the scoping of a project, pursuant to section 15 of the Act:

[39]Regardless of the assessment track, the RA or Minister’s discretion to scope a project and to scope the environmental assessment is outlined in s. 15. Section 15(1) grants the discretion to scope to either the Minister, in the case of mediation or a review panel, or the RA. However, the exercise of this discretion is limited by s. 15(3). Section 15(3) provides that an environmental assessment of a physical work shall be conducted in respect of every “construction, operation, modification, decommissioning, abandonment or other undertaking” in relation to the project. Consistent with the view that the “project as proposed by the proponent” is to apply in the absence of text or context to the contrary, the scoping of the project performed by the RA or Minister under s. 15(1) is subject to s. 15(3). In other words, the minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project. The RA or Minister is also granted further discretion by s. 15(2) to combine related proposed projects into a single



project for the purposes of assessment. In sum, while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances.

[40]It follows, then, that the scoping discretion under s. 15(2) and (3) acts as an exception to the general proposition that the level of assessment is determined solely based on the project as proposed by the proponent. The Act assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. However, as noted by the government, a proponent could engage in “project splitting” by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations (see government factum, at para. 73).[...]²²

C. Splitting up of the project by the proponent

1. The history of the project demonstrates the relation between the link and the generating facilities

In the EIS, the proponent mentioned that the “Lower Churchill” project had already undergone a comprehensive environmental assessment in 1979–1980²³. What it failed to mention was that in the review done by the environmental assessment panel at the time, the transmission link from Labrador to Newfoundland and the generating facilities at Gull Island and Muskrat Falls were reviewed jointly, as part of one single project.

According to the Panel’s report, submitted in December of 1980, the project comprised the following:

²²MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6

²³EIA, p. 1-17.



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1.1 Introduction

The Lower Churchill hydroelectric project consists in building generating facilities on the lower portion of the Churchill and high voltage transmission lines linking Churchill Falls to St. John's (Newfoundland), across the Strait of Belle Isle²⁴.

Moreover, the project had first been split up into two parts for the purposes of the assessment: a generation project at Gull Island and a transmission link project from Labrador to Newfoundland.

However, when the Lower Churchill Development Corporation decided to also build a generating facility at Muskrat Falls, the government at that time decided to fuse both processes together:

When the LCDC was created, the project was modified to include a generating facility at Muskrat Falls. When a review for this was requested under the Environmental Assessment and Review Process (EARP) at the federal level, the Review Panels established previously were fused into one single Review Panel, responsible for reviewing the comprehensive Lower Churchill Hydroelectric Generation Project²⁵.

If, under the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, the two generating facilities and the transmission link formed only one project, then there is no reason for which the same project could be split up for the purposes of an assessment under the Act.

Moreover, the 1980 decision to merge both processes, even a few years after they had begun, should serve as precedent for this assessment and allow the Review Panel to assess both components of what is in reality a single project.

2. The objectives of the provincial government show the relation between the transmission link and the generating facilities

Newfoundland-and-Labrador's *Energy Plan*, issued in 2007, describes the Lower Churchill project as follows:

²⁴Appendix F to the Brief: Lower Churchill Hydroelectric Generation Project, Environmental Assessment Panel Report (Ottawa, Supply and Services Canada Department, 1980), p. 7.

²⁵*Id.*, p. 9.



[...] Currently, about 85 per cent of our electricity capacity comes from clean, stable and competitively priced hydro power. On the Island, however, approximately 65 per cent of electricity capacity comes from hydro power, while 35 per cent comes from thermal-fired generation that is subject to price volatility and emits GHGs and other pollutants. In Labrador, most electricity is hydroelectric, with the exception of a small amount of isolated diesel and gas turbine generating capacity.

Both electrical systems in the province have adequate generation to meet the demand of existing customers. This demand is forecast to grow at a fairly steady, moderate pace over the next several years. This would result in a need for new sources of supply on the Island prior to 2015, and later in Labrador. As a result, we plan to develop the Lower Churchill project, which will include a transmission link between Labrador and the Island. This major initiative is discussed in detail in the following section²⁶.

The primary goal of the project, according to the Government of Newfoundland and Labrador, who is the only shareholder of the proponent, is to transmit the power generated in Labrador to the Island. Since the start of this environmental assessment process, the Government has therefore defined the project as two generating facilities and one transmission link between Labrador and the Island.

3. Recent changes demonstrate the relation between the link and the generating facilities

a) The provincial government's decision in October of 2010

The description of the role of the Lower Churchill project in the provincial government's energy plan should be sufficient on its own to demonstrate that there is only one single project, rather than two separate projects, as submitted by the proponent for assessment.

Furthermore, the changes to the project announced by the Government of Newfoundland and Labrador in the fall of 2010 have removed all doubts on this subject.

On October 18, 2010, the Government of Newfoundland and Labrador made the following statement:

²⁶ Government of Newfoundland and Labrador, *Energy Plan: Focusing our energy* (2007), pp. 31, 32 <http://www.nr.gov.nl.ca/energyplan/energyreport.pdf>



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Signalling the commencement of the long-awaited Lower Churchill River hydroelectric development, the Government of Newfoundland and Labrador today announced a partnership between Nalcor Energy and Emera Inc. This arrangement complements the partnership already in place between Nalcor and the Innu Nation. The Nalcor/Emera deal will result in the development of Muskrat Falls, with power being transmitted from Labrador across the Strait of Belle Isle for use on the Island of Newfoundland. Power will be available for recall use for industrial development in Labrador. Nalcor will then transmit surplus power from the Island to Nova Scotia Power, a subsidiary of Emera, across the Cabot Strait into Lingan, Nova Scotia.

[...]

Newfoundland and Labrador Hydro, a subsidiary of Nalcor Energy, is mandated to forecast electricity requirements in the province and bring forward the least cost, long-term option for meeting these requirements. As a result of growing provincial demand for electricity, Hydro evaluated alternatives to develop new generation sources. Hydro assessed alternatives and found the Muskrat Falls project with a transmission link to the Island to be the least cost alternative. The Muskrat Falls option is also more environmentally acceptable than maintaining an “isolated” island power system, which would retain Holyrood in operation as a major source of greenhouse gas emissions. Once the Muskrat Falls development is operational, the energy price structure in the province will be stable and lower cost for consumers over the long term and the province will avoid the volatility associated with the price of oil²⁷.

First and foremost, let us note that the government emphasized the “commencement” of the project, even though the proponent had submitted the description of the project to the relevant authorities almost four year ago.

Second, the government underscored the fact that this project will have the effect of linking Labrador with Newfoundland Island and provide the Island with a renewable source of power.

Third, the government has added a new aspect to the description of the project: a maritime transmission link from the Island of Newfoundland to Nova Scotia.

²⁷ Government of Newfoundland and Labrador, “News Release: Lower Churchill Project to Become a Reality; Province Signs Partnership with Emera Inc. for Development of Muskrat Falls” (November 18, 2010), available online at: <http://www.gov.nl.ca/lowerchurchillproject/release.htm>



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The agreement between the Government of Newfoundland and Labrador and the Government of Nova Scotia signalled a change in the approach for the project. Since the signing of this agreement, at the very least, the transmission link is “a project ...in relation to” the generating facilities as per subsection 15(3) of the Act.

b) All power generated by the Muskrat Falls generating facility will be transmitted by the link between Labrador and the Island

The proponent recently admitted that all the power generated by the Muskrat Falls facility will be transmitted by the link from Labrador to the Island, i.e., after the proponent had changed its approach to the implementation of the project.

In its EIS, the proponent had specified three export approaches for the power generated by his project:

The proponent has three approaches to access export electricity markets:

- transmission services offered by transmission providers via the interconnection with Churchill Falls, in accordance with open access transmission tariffs (OATTs), including the services of Hydro-Québec TransÉnergie, as well as the development of upgraded interconnection capacity into the Quebec system.
- development of a HVdc transmission link from Labrador to the Island of Newfoundland (the Labrador–Island Transmission Link).
- an extension of the Labrador–Island Transmission Link to the Maritime Provinces.²⁸

However, on May 11, 2010, the *Régie de l'énergie du Québec*²⁹ rejected certain claims submitted by the proponent against Hydro-Québec TransÉnergie³⁰ (HQT). The proponent alleged that HQT had underestimated the transmission capacity of the Churchill Falls lines by 450 megawatts³¹, a capacity it wanted in order to export the power to be generated by a future generating facility in lower Churchill. The capacity was deemed to be 1120 megawatts in winter and 1339 megawatts in summer³².

²⁸ Information Request No. CEC.5 (July 3, 2009), p. 8.

²⁹ *Newfoundland and Labrador Hydro v. Hydro-Québec*, Régie de l'énergie, Ruling No. D-2010-053 (May 11, 2010)

³⁰ Hydro-Québec TransÉnergie is the division of Hydro-Québec that is in charge of transmitting power in Quebec.

³¹ Décision de la Régie, *supra* note 16 at par. 33.

³² *Id.* at par. 109.



Nonetheless, the *Régie de l'énergie* supported HQT regarding its calculation of the capacity of the Churchill Falls lines. According to the proponent, because the Muskrat Falls plant will have a capacity of 824 megawatts³³, if HQT had correctly determined the capacity of the Churchill Falls lines to be 670 megawatts in summer and 889 megawatts in winter, the proponent will need another link to export his power.

This is why, a few months after the *Régie de l'énergie* had rendered its decision, the Government of Newfoundland and Labrador announced its new transmission approach for the power generated by the facilities: via the Labrador–Island transmission link and a maritime transmission link from the Island of Newfoundland to Nova Scotia.

With this change of approach to the project, the proponent is showing that it no longer expects to use the Churchill Falls lines to export the power generated by Muskrat Falls. In a letter it recently sent to the Review Panel, the proponent specified that only the Gull Island power plant will use the HQT transmission links.

As for the only generating facility that the proponent expects to build in the near future, access to export markets for the power generated by Muskrat Falls will depend on the transmission links to Newfoundland and a future underwater cable to Nova Scotia.

Muskrat Falls

Capital Cost:	As per latest available cost estimate (\$2.5 billion 2010\$)
Schedule:	In service in 2017 (construction start late 2011)
Debt/Equity:	59/41
Interest Rate:	7.3%
Revenue:	Newfoundland and Labrador domestic market, Nova Scotia, New Brunswick and New England markets Weighted average market price shown in Figure 2
Market Access:	<u>via Labrador–Island Transmission Link, Maritime Transmission Link, NSPI/Emera transmission system and rights</u>
Energy Sold:	Average production from Muskrat Falls accounted for (4.9 TWh/yr) ³⁴ .

³³ EIA, p. 1-8.

³⁴ Document 1148, Nalcor, letter to the Joint Review Panel dated April 1, 2011, pp. 4 to 5, available online at: <http://www.ceaa-acee.gc.ca/050/documents/49310/49310F.pdf>



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The Labrador–Island transmission link is now the essential condition required to fulfill the power plant project’s main goals: providing power to the province and exporting power to third parties. As such, the transmission link is therefore “a project ...in relation to” the other aspects and it must be included in any and all assessments of the project under subsection 15(3) of the Act.

In other words, if for whatever reason the Labrador–Island transmission link project is not approved, then the power generated by Muskrat Falls will be of no use whatsoever.

c) Changes to the transmission link project description since the provincial government’s decision

On November 29, 2010, the Department of Environment and Conservation of Newfoundland and Labrador announced that the proponent had revised the project description for the transmission link:

Nalcor Energy has identified refinements to their project development concept and additional design options. Those changes include the use of “shore electrodes” at locations along the Labrador shore of the Strait of Belle Isle area and Conception Bay South. The option of placing sea electrodes in Lake Melville or Holyrood Bay is no longer proposed. In addition, as a result of recent decisions and announcements regarding the sequencing of the various components of the Lower Churchill Hydroelectric Generation Project (i.e. developing Muskrat Falls first), Nalcor Energy is exploring the option of locating the Labrador converter station at or near the Muskrat Falls site³⁵.

However, the first version of the project’s description specified that the transmission link started at the Gull Island power plant³⁶.

This change made to the transmission link project shows, once again, that this project and the one of the Muskrat Falls facility cannot exist one without the other.

³⁵ Newfoundland and Labrador Environment and Conservation, *Environmental Assessment Bulletin* (November 29, 2010)

³⁶ Nalcor, *Labrador–Island Transmission Link: Environmental Assessment Registration and Project Description* (January 2009, revised September 2009), p. 16.



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d) The generating facilities have no reason for existing without the link to Newfoundland

In the first version of its environmental assessment, submitted in February of 2009, the proponent had described the necessity of the project as follows:

2.2 Need for the project

The project is needed to:

- 1) address the future demand for hydroelectric generation in the Province;
- 2) provide an electric energy supply for sale to third parties; and
- 3) develop the Province's natural resource assets for the benefit of the Province and its people³⁷.

Regarding the purpose of the project, the proponent had specified that meeting the current and future energy needs of the province was the main priority of the project:

2.4.2.1 Provincial Needs

Meeting the current and future energy needs of the Province is the first priority for the power from the lower Churchill River. The Proponent will meet these needs with renewable hydroelectric power from the lower Churchill River³⁸.

The proponent admits, however, that the largest part of the province's energy demand (73 %) stems from Newfoundland Island³⁹. Moreover, almost all of Labrador's demand is already met by Churchill Falls⁴⁰: the existing plant could meet the demand at least until 2025⁴¹.

The needs of the province that will be met by the project will therefore be those of Newfoundland, while the scope of the project brought before the Review Panel does not include any way of transmitting power to it.

³⁷ EIA, Volume I, Part A (February 2009), p. 2-1.

³⁸ *Id.*, at p. 2-3.

³⁹ *Id.*, at p. 2-11.

⁴⁰ *Id.*

⁴¹ *Id.*, at p. 2-12.



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The proponent has also stated numerous times that part of the project's rationale and purpose is also to replace the Holyrood thermal generating station⁴². When the Review Panel asked the proponent to support its claims regarding greenhouse gases (GHG) reduction resulting from the project, he explained the following:

Since the Government of Newfoundland and Labrador has committed in the *Energy Plan* to retire Holyrood in the event that the Project is sanctioned, the displacement of these GHGs is very likely⁴³.

The relation between the project and the transmission link is clear, as the Holyrood station is on Newfoundland Island.

In short, if the proponent uses future provincial demand as a rationale to build the Muskrat Falls and Gull Island facilities, then it is obvious that the generating facilities will not be able to meet this demand without the transmission link, which will be part and parcel of the project.

4. Applying criteria established by the Canadian Environmental Assessment Agency to facts about the project

Under section 16 of the Act, an environmental assessment that is being reviewed by a review panel must examine the need and purpose of the project.

The Canadian Environmental Assessment Agency (the Agency) defines these terms as follows:

The “need” for the project is defined as the problem the project aims to solve or an opportunity to be seized. As such, the “need” establishes the rationale required for the project.

The “purpose” of the project is defined as the goal to be attained by carrying out the project⁴⁴.

Let us recall the criteria established by the Agency to determine the scope of a project, as set out in its *Operational Policy Statement*:

In determining whether a project scope should be expanded beyond the project as proposed by the proponent, responsible authorities should consider

⁴² EIA, Volume I, Part A, p. 2-12; Response to the Information Request No. CEC.7S/85S.

⁴³ Response to the Information Request No. CEC.146, p. 22.

⁴⁴ Canadian Environmental Assessment Agency, *Operational Policy Statement: Questions related to the “need for the project”, “purpose”, “alternatives” and “alternative means” to carry out a project under the Canadian Environmental Assessment Act* (November 2007), on Page 2.



how the additional components are linked to the project as proposed by the proponent. Where these components are connected actions, for instance:

- where one is automatically triggered by another;
- where one cannot proceed without the other; or
- where both are part of a larger whole and have, if considered separately, no independent utility.

The project scope should generally be expanded to include any such additional component(s)⁴⁵.

The generating facilities proposed by the proponent within the framework of this assessment, as well as the transmission link that it proposed in a separate assessment, “both are part of a larger whole” and the facilities “have, if considered separately, no independent utility.”

Firstly:

- according to the proponent, the main use of the generating facilities is to meet the current and future energy needs of the Province;
- however, the vast majority of these needs are found on Newfoundland Island; and
- moreover, the needs of Labrador will be met by the Churchill Falls facility at least until 2025.

As such, the project cannot be used to meet the needs of the Province; it therefore has no usefulness independent of the transmission link.

Secondly:

- the proponent and its shareholder are asking to move the Holyrood thermal generating station, stating it is one of the main “purposes” of the project; and
- however, the Holyrood thermal generating station is also located on Newfoundland Island.

⁴⁵ Canadian Environmental Assessment Agency, *Operational Policy Statement: Establishing the Project Scope and Assessment Type under the Canadian Environmental Assessment Act* (2010), p. 3.



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The facilities will therefore not be of any use by themselves in reducing the emissions of Holyrood without the transmission link.

Thirdly:

- according to the proponent, the secondary use of the generating facilities is to sell power to third parties; and
- however, the only link available to the proponent to sell power generated by the Muskrat Falls facility is the Labrador –Island transmission link.

Consequently, the Muskrat Falls facility will be of no use by itself as a source of revenue for the proponent and its shareholder, the provincial government, without the Labrador –Island transmission link.

Section 15 of the Act requires that the scope of the project comprise as much the generating facilities as the transmission link, as they are components that are closely related to each other.

D. Procedure suggested to the Review Panel

1. Requesting an amendment to its terms of reference

The Innu of Ekuanitshit believe that, because the true scope of the project is not before the Review Panel, it must exert the power it has under Section 4.4.8 of the *Procedures for an Assessment by a Review Panel* to seek an amendment to its terms of reference:

4.4.8 A review panel may seek an amendment to its terms of reference. For minor amendments, the President of the Agency, in consultation with the Responsible Authority, has the authority to make a change to the terms of reference. The procedure for requesting a minor amendment to a terms of reference is through a letter from the panel chairperson to the President of the Agency. Should a minor amendment be requested, the President of the Agency shall ensure a response is provided to the panel's letter within 14 days. Requests for substantive amendments must be made to the Minister, who will make every effort to respond within 14 days of the request. The review panel shall continue with the review to the extent possible while waiting for the response in order to adhere to the time lines of the original terms of reference. The review panel shall notify participants of any changes to its terms of reference.



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The Review Panel must request, without delay, an amendment to its terms of reference from the Minister of Environment Canada to include the Labrador –Island transmission link in the scope of the project to be assessed.

2. The consequences of an improperly defined project scope on future report

Should the Minister refuse to broaden the scope of its terms of reference, then the Review Panel would be unable to assess the environmental impacts of the project and the extent of these impacts.

When performing an assessment of the project, the Review Panel is required to take the aspects specified in section 16 of the Act into account, specifically:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);

Pursuant to Part II of its terms of reference, the Review Panel must also take the following aspects into account, including:

- 9. Environmental effects of the project, including the environmental effects of malfunctions, accidents or unplanned events that may occur in connection with the Project;
- 10. Any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out; and
- 11. The significance of the environmental effects as described in items 9 and 10.

The exact assessment of the environmental effect of a project requires that its scope be defined correctly. If the scope of a project is missing important and key components, as is the case for this assessment, then it will be impossible for the Review Panel to meet the requirements of section 16 of the Act and fulfill its terms of reference.



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This interpretation of section 16 and the mandate is, moreover, the only one which will enable the Review Panel to meet the true objective of the Act that paragraph 4. (1) (a) defines as “to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects.”

According to the Federal Court, “the Joint Review Panel's failure to comply with a requirement of section 16 of Act can constitute an error of law⁴⁶.”

In addition, when the Supreme Court of Canada ruled in *MiningWatch Canada v. Canada* that the goal of subsections 15(2) and 15(3) is to prevent project splitting by proponents, its decision was binding as much for the Review Panel as for the Minister of the Environment or the Agency.

In another recent ruling, the Supreme Court of Canada also explained the following:

[33] However, in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably⁴⁷.

It shall not be lawful for the Review Panel to accept a violation of the Act by nonetheless submitting a comprehensive report if the Minister of Environment Canada refuses to modify its terms of reference.

The Review Panel will not be able to submit to the Minister a report taking into account “the nature and importance of the environmental impacts that the Project could have”, without modifying the scope of the project to include the transmission link. The Review Panel must therefore refuse to report on the environmental impacts without having had the possibility of assessing the project according to its real scope.

⁴⁶*Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, quoting the ruling in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, (1996), 137 D.L.R. (4th) 177 (C.A.F.) in support of this principle.

⁴⁷*Montréal (City) v. Montreal Port Authority*, [2010] 1 S.R.C. 427, par. 33.