



Comments on;

**JOINT REVIEW PANEL
IR#s JRP.151**

CEAA REFERENCE NO.07-05-26178

October, 2010

1.0 Executive Summary

The NunatuKavut Community Council (NCC) has reviewed the Information responses issued to the JRP by Nalcor and distributed to all parties on September 30, 2010 and as amended on October 13, 2010 and prepared the following comments. The comments are presented in the following text and are organized according to the JRP listings. These comments build upon the EIS-specific commentary provided to the JRP by NunatuKavut (CEAA Document 477).

2.0 Background

The Inuit ancestors of the Labrador Metis have lived in the land now known as Newfoundland and Labrador since time immemorial. European fishermen began arriving in the area in the middle of the eighteenth century. They mingled and traded with Inuit and sometimes married Inuit women. The descendents of these two cultures, now called the Labrador Metis, now live along the southern coastal and interior waterways of Labrador from Lake Melville south to the Strait of Belle Isle. There are approximately 6,000 Inuit-Metis now living in Labrador. There is a large Inuit-Metis population in the community of Happy Valley-Goose Bay and in the smaller communities of Black Tickle, Cartwright, Charlottetown, Lodge Bay, Mary's Harbour, Mud Lake, Norman Bay, North West River, Paradise River, Pinsent's Arm, Port Hope Simpson, St. Lewis, and Williams Harbour. The Inuit-Metis have also lived, and continue to live, in other parts of Labrador, as well

The map below depicts the current Inuit-Metis communities in Labrador.



The Inuit-Metis are represented by the NunatuKavut Community Counsel. The organization was first formed in 1985 as the Labrador Metis Association but changed its name to the Labrador Metis Nation in 1998. The Lands of the Labrador Metis Nation has

since been renamed NunatuKavut. NunatuKavut represents the interests of Inuit-Metis people living south of lands claimed by the Labrador Inuit Association.

The objective upon which the NunatuKavut Community Council (NCC) was established was for the protection, maintenance and development of hunting, fishing, trapping and land use rights; and the provision of guidance and protection for the legal, constitutional and aboriginal rights of its members and communities.

3.0 Comments on Nalcor's Supplemental Response to IR JRP.151.

Lands Claim of NunatuKavut

The NCC feels we that Nalcor has failed to properly acknowledge that, in accordance with the JRP Guidelines, the asserted Aboriginal and Treaty rights and titles of the NCC be properly described, the impacts assessed in consultation with the NCC, and that accommodations for those impacts or infringements of the rights concerned proposed. Instead, Nalcor has unilaterally determined – without consultation with the NCC – its own understanding of its obligations in respect of NCC's asserted rights, namely:

Consultation has been undertaken by Nalcor in compliance with the Guidelines and at a level commensurate with Nalcor's understanding of NunatuKavut's interest in the Project area. (Supplemental Response, p. 4-32).

In light of the continuing failure of Nalcor to adequately comply with what the Guidelines require, and in accordance with a reasonable and prudent obligation on the proponent in relation to NCC rights' assertions, NCC recommends that the Panel disclose its own understanding of what consultation and accommodation requirements face the Proponent in order to allow it to meet the Guidelines.

Comparative Redress

Section 3.4 of the Supplemental Response provides information on the Proponent's response to concerns expressed by the Innu Nation. It indicates that Nalcor has provided redress in relation to the Upper Churchill development in the "New Dawn" Agreement, and provided further impact – benefit terms concerning the Lower Churchill development. It further cites as evidence of progress and or responsiveness to a range of special studies of Innu contemporary land use studies and the existence of ongoing land claims negotiations.

The NCC assertion of rights is, in law, no different and potentially more established than that of the Innu Nation. Both claims are asserted (as opposed to established) claims. The

fact that the NCC claim has yet to be responded to by the Federal government does not in any way colour the legal nature of that asserted right in relation to the obligation of Crown agents to consult and accommodate those rights. The provincial government has refused to date to enter into any consultations, or accommodations. Similarly, the proponent has taken a unilateral and unwarrantedly narrow view of NunatuKavut's interests in the Project area. It has rebuffed efforts and proposals by the NCC to conduct contemporary use and occupancy studies specific to NunatuKavut – something the JRP Guidelines clearly require. Whether solely or in conjunction with the province, Nalcor should have extended commensurate consideration to consultation and accommodation in relation to asserted rights – particularly as their own research reports on historic use and occupancy indicate a more significant Inuit/Metis usage of the Project area than Innu.

In short, Nalcor wrongly asserts or implies that a land claim accepted for negotiation by the federal government and participated in by the province provides some major source of differentiation in relation to the duty to consult and accommodate NunatuKavut interests as opposed to those of the Innu Nation. The Supreme Court of Canada's position and rulings regarding NunatuKavut by the Appeal Court of Newfoundland and Labrador state otherwise. There is no legal difference in relation to the nature of the Innu and NunatuKavut claims. Therefore the Panel should reject as entirely unacceptable the refusal by Nalcor to extend comparable efforts and achieve what the Guidelines specifically require: a full assessment of asserted rights by NunatuKavut and proposals to accommodate any infringements or interference, including appropriate impact benefit arrangements.

The absence of any offer from Nalcor to accommodate NunatuKavut interests, such as through financial accommodation, impact-benefit agreements or royalty arrangements) should lead the JRP to require Nalcor to further consult with NunatuKavut (with or without provincial participation) with a view to achieving such accommodations as a condition of the issuance of any permits or licences to proceed with the project. Ideally, such accommodation discussions should be concluded prior to the holding of public hearings on the project.

There is one area of accommodation alluded to by Nalcor in its Supplemental Response, at p. 4-24, where it asserts that Nalcor has addressed the issue of wood harvesting in inundated areas. NunatuKavut knows of no such accommodation, and has confirmed with the Forestry Department of the province that no harvesting plan has yet been submitted by Nalcor. Needless to say, there has also been no consultation with NunatuKavut on the matter.

Similarly, in respect of Project GHG emissions and offsets, Nalcor's response (at p. 4-28) that the issue has been resolved cannot be credibly accepted. There is no outline or plan regarding Carbon offsets and there have been no consultations with NunatuKavut on sharing of Carbon offset revenues in relation to NunatuKavut interests.

Land Use in the Project footprint

Nalcor asserts in section 4.3 of their aboriginal consultation report that NCC members did not and/or do not hunt within the project footprint area and that trapping “does not appear to be within the project area”. Fishing is actively reported in the project area, but Nalcor regards the impacts of the project as marginal or insignificant so as not to merit accommodation specific to NunatuKavut. Plant harvest concerns expressed by NunatuKavut are discounted as the source document did not “spatially separate different type of plant harvesting” (Nalcor, p.4-10). Nalcor goes on to assert that hunting of big and small game by NunatuKavut does not occur within the project area, and cites 6 Figures prepared by NunatuKavut, all of which fall outside of the project area. Of note here is the assertion by NALCOR (at page 4-10 of its Report) that a mitigation proposal has been provided to NunatuKavut trappers in the Lower Churchill. NunatuKavut is entirely innocent of any such proposal having been made to it. Less innocent is the characteristic refusal (or denial) of NALCOR to recognize harvesting activities by NunatuKavut members, historical and current, as demonstrated clearly at Figure 4.3 supplied to NALCOR by NunatuKavut, and to the Panel, as part of its 2010 supplemental Land Claims submission to Canada “Unveiling NunatuKavut”. The Panel is referred to page 4-11 specifically, where the unbelievable assertion is made in reference to Use of Territory that “No locations appear to be within the Project footprint (see Figures 4-4, 4-5, 4-6 4-7, 4-8 and 4-9)”. This is not merely wrong, it is studiously deceitful. The only use and occupancy map of relevance to the Generation project is Figure 4-3, which clearly shows NunatuKavut harvesting activity (including big game, small game, trapping, fishing and cabins/tilts) in the Project area. Therefore NALCOR has, to be blunt, deliberately misled the Panel in its Submission.

Similarly, NALCOR is being deceitful in respect of simple facts. At page 4-10/11, the assertion is tendered that “no locations appear to be within the Project footprint” for Canadian Yew, an important traditional medicine for our people. Bizarrely, NALCOR’s citation is to Figure 4-8, which is a map of cabin and tilt locations on the south-central coast, exclusive of Upper Lake Melville. As should be known to the Proponent, and as would be known if it had bothered to consult with NunatuKavut on the matter, there is a stand of Canadian Yew on an island immediately adjacent to Muskrat Falls.

In short, Nalcor’s Supplemental Response to JRP.151 is very misleading. Our people have used this area for hundreds of years. The lower Churchill River valley area is more than a place to hunt or trap for our people: it is home.

Nature of Consultation

In addition, of course, because NALCOR dismisses any assertion of rights or titles or interests in the Project footprint area by NunatuKavut, regardless of available knowledge, it fails to see the need to provide any substantive accommodation to those interests and rights.

NALCOR has asserted to the JRP in its supplemental report, and in the EIS, that it has consulted with NunatuKavut. This is a highly torturous usage of the term “consult”. In fact, NALCOR has only ever had a four-month long agreement with NunatuKavut for what was clearly a preliminary and “first phase” of consultative efforts. These

consultations were valued by NunatuKuvut as positive, and as yielding the basis for a more extensive set of research and discussions on accommodations.

However, there has been no second phase of consultations. As the Panel is fully aware from the correspondence between NALCOR and NunatuKavut since June, 2010, there has been no effective consultations since the last teleconference discussion held on May 19, 2010, which was addressing a draft “Phase II” consultation agreement in which NALCOR was insisting upon full and complete project control over NunatuKavut personnel involved in the coordination of community consultations, and thereby effectively attempting to make NunatuKavut an agent of NALCOR, which in turn would make NunatuKavut an agent of the Provincial Crown. That strips the term “consultation” of all meaning.

In June, NunatuKavut responded to this untoward attempt at manipulation with a two-part proposal:

- A research undertaking to properly document NunatuKavut rights and interests, including contemporary use and occupancy data in the project area (a matter that has only ever received indirect attention by NALCOR and its predecessors, since their major focus has been on Innu use and occupancy); and
- A six-month community consultation process over the Summer and early Fall months.

NALCOR has attempted to assert that NunatuKavut has made the community consultation process conditional upon acceptance of the first proposed set of studies. This is a falsehood, as is plainly shown in the correspondence from NunatuKavut to NALCOR lodged with the JRP.

The reality is simple: NALCOR has chosen to entirely ignore any asserted NunatuKavut rights and interests, or to simply assert, with little evidence and even more limited consultations, to that any impacts will be minimal. It thereby has failed to comply with the Guidelines set for the Environmental Assessment, since it cannot possibly be compliant as long as it refuses to accept what the Appeal Court of Newfoundland and Labrador, in a decision undisturbed by the Supreme Court of Canada, has held to be an assertion of rights by NunatuKavut with a high likelihood of being upheld in substantive trial on the matter. NALCOR has not only failed to respect the reasonable presumption of asserted rights by NunatuKavut, but it has also refused to give any consideration to exploring the nature, depth or scope of such rights or interests in consultation with NunatuKavut beyond the holding of nominal information meetings at the community level. NALCOR has also refused to consider any accommodations to the asserted rights or interests.

Evidence of the consequences of Nalcor’s failure to reasonably consult with NunatuKavut is to be found in a series of its so-called responses to NunatuKavut concerns:

- At 4-29, Nalcor asserts that the need for the Proponent and/or the Crown to provide information on the impacts of the project on NunatuKavut rights and interests is “beyond the ability of Nalcor to address”. This implies that the proponent is to be released from all monitoring, updating and ongoing impact assessment in relation to asserted rights, and should be rejected as entirely unsatisfactory by the Panel;
- At 4-31, Nalcor responds to NunatuKavut’s VEC concerns that funding was provided to NunatuKavut in this respect. This is misleading. The sole level of funding provided was for a preliminary round of community engagement sessions. Nalcor has refused NunatuKavut’s proposal for a second round of consultations requiring more specific research into VECs and associated use and occupancy;
- At 4-32, Nalcor simply asserts that NunatuKavut’s request for information on the determination of how mitigation measures are determined to be adequate has “been addressed”. This is not the case. The JRP should clearly require Nalcor to provide detailed analysis on mitigation measures specifically in light of NunatuKavut use and occupancy in the project area, as well as in respect of down-stream impacts; and
- At 4-32, Nalcor asserts that archeological data of historic use has been adequately studied in its 2006 Historical Resources Overview and Archaeological Studies. As noted in response to that study and in our review of the EIS materials, those studies were entirely Innu specific, and thus fail to address the NunatuKavut specific assessment required by the Guidelines.

Ethnologically Misleading Assessment

The Supplemental Report, at section 4, bears all the hallmarks of outdated science and quasi-science. Far outdated academic works are cited (e.g., Tanner, 1977) by way of fixing the ethnological nature of historic and/or continuing use and occupancy in the project footprint as “Settler”. The people of NunatuKavut are Inuit by predominant descent and cultural orientation, and this should be respected by the Proponent. Instead, NALCOR has chosen, by slight of ethnological mis-direction, attempted to cover up the fact that is lodged in its own research data base and has been confirmed in discussions with its own experts: that the vast majority of historic archeological sites in the project area are of Inuit origin, reflecting NunatuKavut use and occupancy as the dominant cultural presence for at least the lower 50 miles of what was originally called the Eskimo River. This historic reality has been acknowledged for almost a century, as the following map by Speck records¹:

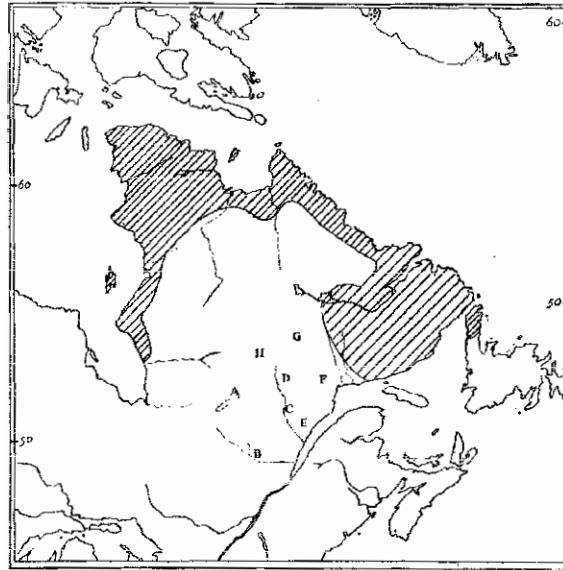
¹ Frank Speck (1931) “Montagnais-Naskapi Bands And Early Eskimo Distribution In The Labrador Peninsula” American Anthropology, N.S. 33, p. 560.

560

AMERICAN ANTHROPOLOGIST

[N. S., 33, 1931]

the Oumouqui, which, through a little jugglery with orthography, can be coordinated with the Oumamiois of Albanel, since both names are placed in the same localities by both authorities. And for the identity of the present Mistassini people with the Mistassini of the Jesuit explorers we also have evidence.



Map 1. Approximate distribution of Eskimo (shaded area) in the Labrador peninsula and on the coasts in the seventeenth and eighteenth centuries, based upon early sources, and approximate recorded distribution of Montagnais-Naskapi groups as referred to at the same period. A-Mistassini; B-Piquagami or Kakouchaes (Cacouchaqui); C-Betsiamis (Betsiamites); D-Papinachois (Oupapinachouet); E-Oumamiwek (Oumouqui); F-Chisedec (Chichedek); G-Ouchestigouetch (Ouchestigouek); H-Nitchikirinouets (Nitchequon).

Several additional names applied to groups of Indians in the seventeenth and eighteenth century maps and in the Jesuit Relations still remain to be discussed later. They are Ouchestigouek, Chisedec, and Nitchikirinouek met with in varied but related forms. (See page 566.)

It should be of some interest to the Joint Review Panel that NALCOR avoided any reference to the preceding map and Speck's detailed report on the inland Inuit of Upper Lake Melville while it chose, in section 6 of the Supplemental Report (page 6-3), to provide a copy of Speck's second map from the same article, which also illustrates the Lower Churchill area as being ethnologically Inuit as of 1850, but with a more extensive use by the relatively recently relocated North West River Band (attracted to the Hudson's Bay post after it's establishment in 1836). Why NALCOR did not disclose, let alone assess, Speck's first map should give the Panel considerable concern, as it does NunatuKavut.

Distribution of Benefits

Nalcor Energy (Nalcor) has provided justification for the Lower Churchill Hydroelectric Generation Project (Project) in energy and economic terms in the Environmental Impact Statement (EIS) and in previous responses to IRs. Nalcor has also provided additional information in relation to both energy and economic terms, with an emphasis on the methodologies and assumptions used in the analysis. This information is contained in the attached "*Supplemental Report on the Need, Purpose, and Rationale*" (Nalcor July 2010). This report provides information in relation to power needs on the Island and other parts of Canada. Through all this research and reporting Nalcor still fails to address the need for power on the coast of Labrador. Also the NCC would like to see areas where interested parties could tap into an AC grid with alternative energy sources. *i.e* Wind Power along coast.

Port Hope Simpson 2010 – "If we don't get Power from this project our communities out here cannot survive.."

The NCC continues to ask why Nalcor makes no plans to provide power from this project to our coastal communities. Nalcor continues to ignore this topic, meanwhile they want to run Lower Churchill Power over the heads of our people.

Charlottetown 2010 – "Business here pays 3 or 4 times as much for power as companies in other parts of Newfoundland and Labrador"

Nalcor states in its aboriginal consultation report that "This Issue has been addressed" and that it is outside the scope of this project. The NCC contests this statement made by Nalcor and feel we need more discussion and accommodation on this topic.

Downstream Effects below Muskrat Falls

The NCC made the comment on December 18, 2009 "Currently there are no conclusive studies contained within the submitted Information Responses or the EIS regarding the effects this project will have on the Environment past the mouth of the Churchill River, which is indeed "Down Stream" of the proposed dam locations, Nalcor Information Response JRP.56 states:

“Northwest Hydraulic Consultants conducted a sedimentation and morphodynamics study on the lower Churchill River to determine the potential effects of the Project on future sediment transport and associated river morphology (Northwest Hydraulic Consultants 2008). They concluded sediment transported downstream from Muskrat Falls will be much reduced. This

will lead to a new equilibrium of erosion and deposition being established within the river below Muskrat Falls. The reach above Muskrat Falls supplies 60% of the total sediment inflow which would be trapped by Muskrat Falls Dam. The remaining 40% of the total sediment inflow enters the river downstream of Muskrat Falls as a result of erosion of terrace and bank sediments along the channel. A sediment deficit downstream, will lead to general downstream bed degradation as there was no evidence of appreciable quantities of coarser gravel sized sediments for armoring”.

The NCC is concerned with this change in sediment flow below Muskrat Falls and how this lack of sediment will affect the Bridge/Causeway constructed for the TLH just downstream of Muskrat Falls.”

Nalcor has failed to address these concerns in this information response. Nalcor states:

“...The Churchill River is regulated by the Churchill Falls facility and the flows downstream of Muskrat Falls will remain at current levels. Considering this, and the limited nature and extent of effects downstream of Muskrat Falls (i.e., no adverse effects predicted below Muskrat Falls)”

The NCC feels that water flows remaining the same but subtracting 60% of the sediment from the river will have significant effects of the environment downstream from Muskrat Falls as opposed to no adverse effects such as Nalcor is proposing.

Nalcor has also failed to answer the NCC’s question in relation to Seepage of the Cofferdams and length of time the Cofferdams will be in place have to be taken into consideration. Also where Cofferdams are erected on soils that are pervious, the flow of water into the cofferdam cannot be completely stopped this can lead to an extended TSS issue during the construction phase. Will water seep below the Cofferdams ? If so at what rate and what adverse effect will this have downstream?

It is the NCC’s position that our concerns with TSS and Downstream effects on this project have not been adequately addressed and furthermore the statement “[s]everal river systems throughout Canada have healthy fish populations despite natural TSS concentrations exceeding projections of this study” is misleading and does not apply nor relate to the Ecosystem of the Lower Churchill River. The continued refusal by the Proponent to acknowledge downstream effects or meaningful discussion regarding the current Project Boundary (Supplemental Information to IR JRP.151, page 4-24). Ecological and biophysical parameters continue to operate outside the “Project Footprint” outlines by Nalcor.

Cumulative Effects

Nalcor states; *“The latest, largest remediation project was not included in the EIS because it was hypothetical at the time of EIS preparation. In July of 2009, following submission of the EIS for the Project, the Government of Canada announced that \$300 million in funding for the remediation project under the Federal Contaminated Sites. Action Plan had been approved. An Environmental Screening of the remediation project pursuant to CEAA was submitted in February 2010 (AMEC Earth and Environmental 2010) and the decision has recently been made that the project can proceed with appropriate mitigation in place. While this project was therefore not included within the CEA, Nalcor is confident that the inclusion of this project in the CEA for the Project would not alter any of the effects conclusions, as described below.”*

The environmental assessment for the remediation project (AMEC 2010) considered the potential for cumulative effects with the Project. While there is no apparent overlap in the physical footprints of the two projects, the environmental assessment (AMEC 2010) identifies the following potential cumulative biophysical environmental effects: short-term/temporary increases in heavy vehicle traffic which could result in increased noise and dust levels and possible effects on fish and fish habitat.

The NCC feels that this statement is somewhat misleading. Known contaminant in the South escarpment area and Stillwater's are located in very close proximity to the Lower Churchill River. Altering or decreasing the flow of water in the Churchill River will cause these contaminants to migrate. The NCC feels that if these contaminants are still present during flooding of the dams that there could be significant and damaging effects to the ecosystem. Nalcor has not responded to this concern raised by the NCC

4.0 Closing

It is the position of the NunatuKavut Community Council that this project is not in the best interest of its members, or for Labradoreans as a whole as it is submitted. The NCC has some major concerns in relation to the Aboriginal Consultation process for this project. While the quantity of documents made available through Information Requests is high, the Nunatsiavut Government remains concerned with the quality, accuracy and thoroughness of the responses to date. The concerns of NCC members don't seem to be heard or acknowledged by the Proponent throughout this EIS process.

Lack of Consultation and participation with the NCC on this project has deeply concerned our membership. We urge the Panel to consider our concerns, and make the appropriate decisions in protecting our environment and our people. Our ancestors have used this land for hundreds of years. It is our home, our land, our legacy and our future. The NCC and other Aboriginal groups have posed comments to the Panel relating to topics that will affect our people and our aboriginal rights and the large majority of these comments have been addressed by Nalcor as “Beyond the Ability of Nalcor to Address”

or “This Issue has been addressed”. The NCC feels that these responses are inadequate for a project with such far reaching and adverse affects as the Lower Churchill Generating Project.