Introduction

Stswecem’c Xgat’tem First Nation (“SXFN”) holds unextinguished Aboriginal rights and title over its territory in the vicinity of Dog Creek, British Columbia. SXFN’s rights include the Crown-recognized right to fish for food, social and ceremonial purposes, and the court-recognized right to hunt. The Crown holds constitutional obligations in respect of SXFN’s rights, including the obligation to consult and accommodate SXFN about decisions which have the potential to impact their rights and to justify any infringement of recognized SXFN rights.

SXFN currently faces pressure from the Crown and industry proponents to use and develop the lands and resources in our territory. While we recognize that development has the potential to benefit our community, we remain committed to carrying out our role as the stewards of our lands and to fulfilling our responsibilities to ensure that our lands are healthy and protected for our future generations.

SXFN expects that it will play a central role in any review, assessment or decision-making about proposed development projects that could affect our rights, our communities or our lands and resources. The NEB and its current review processes are limited in their ability to meet our objectives in this regard.

In these submissions, we provide a critique of the NEB and its existing review processes, highlighting certain of the major deficiencies SXFN has experienced with these processes. We also provide recommendations to address these deficiencies. These recommendations are built upon the understanding that SXFN must play a central role in the assessment of any activity that could affect our rights or impact our lands and resources, and that such assessments must proceed in a manner that is respectful of SXFN’s rights, laws and stewardship responsibilities and that is consistent with the Crown’s constitutional obligations and the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).
Background

**Stswecem’c Xgat’tem First Nation**

SXFN has approximately 745 members, and is located in a semi-remote area on the east side of the Fraser River, approximately 85 kilometres southwest of Williams Lake in northern British Columbia.

SXFN is part of the Secwepemc Nation, and one of four politically allied bands forming the North Shuswap Tribal Council.

Our traditional territory is dramatic, consisting of expansive plateaus, deep valleys and stretches of green and arid land. SXFN is committed to protecting this territory and its resources, and to promoting a healthy and safe community for our members.

**SXFN’s Rights**

SXFN holds constitutionally-protected rights, including the court-recognized right to hunt and the Crown-recognized right to fish for food, social and ceremonial purposes. We also hold Aboriginal title to our territory. SXFN has never ceded or surrendered its rights or its title, and these rights have never been extinguished. We are committed to protecting and advancing our rights and title.

Our members exercise their rights on a daily basis, whether by hunting, fishing and camping out on the land or by picking berries and gathering medicinal plants. Our members, especially our children, learn from the land. This is a part of who we are and helps to preserve and promote our culture and traditions.

We are currently participating in the BC treaty process. While the process has been slow and often frustrating, we are negotiating incremental treaty agreements for early land transfers which we expect to occur in 2017. As part of the treaty process, SXFN is committed to ensuring that our negotiations with government are carried out in a manner that respects and protects our Aboriginal rights and title and inherent jurisdiction, and that incorporates consent-based decision-making.

**Protection of SXFN Rights and Modernization of the NEB**

**Prosperity Mine and New Prosperity Mine**

While SXFN has not participated in a hearing before the NEB, we have had much experience with environmental assessments, including in connection with the Prosperity Mine and New Prosperity Mine proposed by Taseko Mines Limited (“Taseko”).
In 2010, Taseko proposed to develop the Prosperity Gold-Copper Mine project. The project was to include the construction and operation of a large open pit mine, and a 125-kilometre power line that would cross SXFN traditional territory.

In November of 2010, a federal review panel appointed to conduct the environmental assessment for Prosperity Mine (the “2010 Review Panel”) concluded that the project would result in significant adverse environmental effects and could not be justified. In particular, the 2010 Review Panel concluded that, because the transmission line associated with the mine was to be located in areas under negotiation between SXFN and BC as part of the BC treaty process, the transmission line would reduce the availability of land for selection during the treaty process and would have a direct effect on SXFN’s Aboriginal title claim. The transmission line would also adversely affect SXFN’s right to hunt and harvest plants.

In 2011, Taseko submitted a revised project plan for the New Prosperity Mine. This was Taseko’s second attempt to get federal environmental approval for the mine. A second federal review panel was appointed to conduct the review of the New Prosperity Mine in 2012 (the “2012 Review Panel”). In October of 2013, the 2012 Review Panel issued its report concluding that the New Prosperity Mine would result in several significant adverse environmental effects, including effects on the current use of lands and resources by SXFN and on the asserted rights and title of SXFN. In 2014, the federal government announced that it would not issue the federal authorizations necessary for the New Prosperity Mine to proceed.

In the meantime, in January of 2010, the Government of British Columbia issued an environmental assessment certificate for the original Prosperity Mine project.

When the 2010 Review Panel was appointed to review the Prosperity Mine, SXFN nominated one of the panel's three members. This was extremely important for SXFN because it allowed us to feel like we were directly involved in the planning process for the environmental assessment. As part of the review process, the 2010 Review Panel travelled to our community to hear directly from our people their concerns about the proposed mine. This went a long way to assuring our members of the independence and credibility of the review process and that SXFN concerns would be heard.

There was a stark contrast between the federal environmental assessment process for the Prosperity Mine and the provincial environmental assessment process. SXFN found the provincial process extremely lacking. The political focus in British Columbia on advancing mining projects made us feel as if the whole review process favoured industry and did not provide us with a fair opportunity to have our concerns heard.

SXFN’s distinct experiences with the federal and provincial environmental reviews of the Prosperity Mine highlight the importance of ensuring that SXFN plays a central role in any assessment of a project that has the potential to affect our lands and our rights. SXFN has never surrendered our jurisdiction and authority to make decisions on matters that have the potential to affect our rights. In fact, we are currently working with the
Crown to give recognition to our jurisdiction through the treaty process. Given the importance of our Aboriginal rights and title, and the potential for these rights to be affected by development within our territory, the review and assessment of these projects must ensure a central role for SXFN. This principle underlies each of the recommendations that we have put forward in these submissions for reform and modernization of the NEB and its processes.
Appendix “A”

MODERNIZATION OF THE NATIONAL ENERGY BOARD
AND ITS REGULATORY PROCESSES

Introduction

The following is a summary of the deficiencies we have observed with the National Energy Board (the “NEB”) and its regulatory review processes, as mandated by the existing National Energy Board Act, and recommendations for addressing these shortcomings. Our recommendations would, if implemented, improve existing NEB review processes by ensuring that Indigenous peoples are meaningfully involved in the review of projects that could affect their territory and their Aboriginal title and rights.

However, such regulatory review processes by their nature are inappropriate to meet the Crown’s constitutional obligations to Indigenous peoples. As such, for the reasons set out below, SXFN expects direct engagement with the Crown separate and in addition to any NEB review process.

The Crown has a constitutional duty to consult and accommodate Indigenous peoples about the potential effects of proposed projects on their Aboriginal rights and title,1 and to attempt to justify the potential infringement of these rights.2 These obligations flow from the rights guaranteed to Indigenous peoples pursuant to section 35(1) of the Constitution Act, 1982 and the Crowns’ duty to act honourably in its dealings with Indigenous peoples. To meet its constitutional obligations, the Crown must engage in meaningful consultation with Indigenous peoples, seek to accommodate their concerns and attempt to justify potential infringements.3

The NEB is a quasi-judicial tribunal, whose jurisdiction and mandate is set out in its enabling statute, the National Energy Board Act. The Crown’s obligations to Indigenous peoples are distinct from the NEB’s legislative obligations in the context of regulatory review processes. These obligations lie upstream of legislative requirements and the statutory mandate of decision makers, and statutory decision makers must respect the legal and constitutional limits they impose.4

The NEB is not an agent of the Crown, and the mandate of the NEB does not grant it

---

3 Haida, at paras. 41-42; Tsilhqot’in, at paras. 78 and 80; Sparrow, at 1110-1112.
the jurisdiction to undertake consultation with Indigenous groups participating in proceedings before it.\textsuperscript{5} Rather, the role of the NEB is to gather evidence necessary to inform the recommendation that it will ultimately make about the proposed project to the Minister.

Because of the NEB’s limited jurisdiction, it relies almost exclusively on project proponents, not the Crown, to engage with Indigenous peoples as part of its review process.\textsuperscript{6} In many cases, the Crown has only dealt with outstanding issues that remain after the NEB hearing is complete. As a result, when the NEB makes its recommendation about the proposed project to the Minister, it does so based solely on engagement that has taken place between the proponent and Indigenous peoples.

Consultation with Indigenous peoples must take place early, when the project is being defined, and should continue until the project’s completion.\textsuperscript{7} This ensures that concerns about a proposed project are addressed and integrated at the earliest stage of government decision-making, before irrevocable decisions about the proposed project are made. The NEB is not the appropriate forum to fulfill the Crown’s obligations because these obligations are often triggered prior to the commencement of the NEB’ involvement in the review of a project.

For Indigenous concerns to be properly addressed, an iterative engagement process is required. This process must include opportunities for Indigenous peoples to identify concerns about a proposed activity and provide information about the potential impacts of the proposed activity on their rights. The Crown must then take steps to accommodate these concerns and attempt to justify infringements of Aboriginal title and rights.\textsuperscript{8} This type of engagement cannot happen within the context of a hearing before the NEB.

To be effective, accommodation measures should be determined on a project-by-project basis and in collaboration with Indigenous peoples. The Crown must demonstrate a willingness to consider and address Indigenous interests.\textsuperscript{9} This may require the Crown to modify its plans, proposed actions and policies.\textsuperscript{10} The Crown and Indigenous peoples may negotiate alternative solutions to ensure that both of their interests are addressed. As a quasi-judicial tribunal with limited jurisdiction, the NEB does not possess the

\textsuperscript{5} Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc., 2009 FCA 308, at para. 34.
\textsuperscript{7} Kwikwetlem First Nation v. British Columbia (Utilities Commission), 209 BCCA 68 (CanLII) (“Kwikwetlem”), at para. 70.
\textsuperscript{8} Kwikwetlem, at para. 68.
\textsuperscript{9} Haida, at para. 42.
\textsuperscript{10} Kwikwetlem, at para. 68.
remedial powers necessary to fulfill these requirements.\textsuperscript{11}

We make the recommendations for modernization of the NEB and its processes without prejudice to the above position and the understanding that the Crown alone is responsible for fulfilling its constitutional obligations to Indigenous peoples.\textsuperscript{12}

**Concerns Regarding the NEB and its Processes**

*Concern No. 1: The NEB cannot adequately address a project’s potential effects on Aboriginal title and rights.*

A significant limitation often encountered with existing regulatory review processes, including those undertaken by the NEB, is their inability to adequately assess the potential effects of a proposed project on Aboriginal title and rights.

As noted above, the NEB’s role is to gather evidence that will inform the recommendation that it ultimately makes to the Minister about a proposed project. In fulfilling this role, the NEB considers the economic, environmental and societal effects of the proposed project. These broad categories do not provide for specific consideration of Indigenous concerns. For example, the NEB is not required to assess the impacts of a proposed project on the exercise of our Indigenous governance and jurisdiction, including the right to decide the uses to which the land and water will be put. This right is integral to the exercise of our Aboriginal title and rights.

The compliance conditions proposed by the NEB with its recommendation that a project be approved may include specific requirements aimed at addressing Indigenous concerns with the project. However, the lack of oversight provided by the NEB in ensuring that these conditions are implemented render them largely ineffective.\textsuperscript{13}

The Crown often relies on the information gathered by the NEB to fulfill its consultation obligations to Indigenous peoples. However, existing NEB review processes do not properly consider the perspectives, interests and concerns of Indigenous peoples. If the Crown is to continue to rely on the NEB in this way improvements to the NEB’s information gathering processes are required. These

\textsuperscript{11} In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, the Supreme Court of Canada at para. 60 stated that, “The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.”

\textsuperscript{12} *Haida*, at para. 53.

improvements are necessary to ensure that the NEB obtains accurate information about Indigenous peoples’ concerns.

**Concern No. 2:** The NEB’s mandate requires that it engage in a balancing of interests which are different from the Indigenous interests the Crown must consider in fulfilling its constitutional obligations.

When undertaking its review of a proposed project, the NEB will consider matters of public interest. The NEB “estimates the overall public good a project may create and its potential negative aspects, weighs its various impacts, and makes a decision.”

According to the NEB’s policy document, the public interest “refers to a balance of economic, environmental, and social interests”. In this way, the NEB may conclude that a project’s serious environmental effects are justified based on the project’s potential socio-economic benefits.

Projects that have the potential to infringe Aboriginal title and rights cannot be justified simply because they are in the public interest. The Crown has a constitutional obligation to justify the potential infringement of Aboriginal title and rights and can only do so by demonstrating that the project contributes a compelling and substantial objective consistent with its fiduciary duty to Indigenous peoples. The project must be necessary, it must be designed to minimally affect Aboriginal title and rights, and the adverse effects on Indigenous peoples cannot outweigh the benefits for the general public.

The Crown’s constitutional obligations also require it to consult and, when necessary, accommodate Aboriginal rights potentially affected by proposed development. The implications associated with a project’s potential effects will not disappear with the termination of its environmental assessment and a determination that the project’s environmental effects are outweighed by the public interest in having the project proceed. Proper accommodation measures must be put in place. If not, once a project has been approved Indigenous peoples are often left wondering what they can do to ensure their rights are protected and preserved in light of government’s decision.

**Concern No. 3:** Current regulatory review processes are limited in their ability to consider the cumulative effects of projects.

The potential impacts of a pipeline or power line are far reaching, and extend beyond their immediate project-specific effects. Despite this, current environmental assessment processes, including those undertaken by the NEB, focus on how a project should be

---

15 Ibid.
16 Sparrow, at 1113-1119; Tsilhqot’in, at paras. 77 and 88.
built without questioning whether the project should proceed at all. The National Energy Board Act is limited in its ability to consider the cumulative effects of these projects.

A number of resource development projects have been proposed within SXFN territory. The assessment of a project cannot take place in a vacuum and should not be treated as separate from other projects operating within or planned for the same area. The assessment of these proposed projects must consider the cumulative effects of all of these projects potentially operating within the same area.

Regional strategic environmental assessments can serve as an important tool in deciding whether a proposed project should proceed. The intention of these assessments is to assess the environmental effects, including cumulative effects, of strategic policy, plan and program alternatives for a region. This approach takes into consideration a wider range of potential effects posed by a project, and should be undertaken before project-specific assessments. This will help to better understand the full and cumulative impact of a proposed project, including its potential effects on the exercise of Aboriginal title and rights.

**Concern No. 4:** *The timelines allocated in the National Energy Board Act for the NEB’s reviews are short and the review processes are often rushed.*

The tight timelines provided for in the National Energy Board Act often result in review processes that are hurried. As a result, Indigenous peoples are not given the time necessary to fully consider the potential effects of a proposed project on their Aboriginal title and rights.

Indigenous perspectives must inform regulatory review processes about the potential effects of the proposed project on Aboriginal title and rights. One way to accomplish this is through the preparation of project-specific traditional land use information. The current timelines contained within the National Energy Board Act, however, do not provide Indigenous peoples with adequate time to pull together and present this information.

Addressing Indigenous peoples’ concerns about the potential effects of proposed development on their title and rights should not be arbitrarily limited by legislative timelines. They should be developed in collaboration with Indigenous peoples.

**Concern No. 5:** *Indigenous peoples are often not provided with adequate capacity funding to fully participate in regulatory processes before the NEB.*

It is extremely important that SXFN engage with the Crown as much as possible on issues affecting our territory and our title and rights, including through the NEB’s review processes. However, our ability to participate in these processes is severely restricted by our limited internal capacity.
The funding provided to Indigenous peoples is often insufficient to allow them to meaningfully participate in such processes. As a result, they are often forced to bear the burden of studying the potential effects of a project on their land and resource use. To undertake this work, financial and human resources must be diverted away from other important government programs and services. As well, many Indigenous peoples end up having to engage in lengthy negotiations with proponents to try to negotiate capacity funding to assess the potential impacts of the project on their rights.

**Recommendations for Modernization of the NEB**

To address the shortcomings we have identified with the NEB and its existing processes, we recommend the following:

1. **Indigenous-driven regulatory review processes**

The main deficiencies with the NEB’s existing processes are rooted in their inability to fully and appropriately engage Indigenous peoples and address their concerns about development activities that have the potential to affect their territory and rights. The assessment of a project’s potential effects on Aboriginal title and rights must be conducted from the Indigenous perspective, and Indigenous peoples must have input into the factors used to assess the significance of these effects.

Indigenous-driven regulatory review processes provide a meaningful way to address the gaps in current NEB review processes and ensure that Indigenous laws, knowledge, perspectives, culture and traditions are incorporated into the review process. The intention is to involve Indigenous peoples in the development of these review processes. In this way, the review process can be structured to ensure it addresses the specific concerns and interests of affected Indigenous peoples.

Indigenous-driven processes enable the assessment of a project’s tangible impacts, including its impacts on the physical environment, and its intangible impacts on Aboriginal title and rights. This is key if an assessment of the effects of a proposed project on Aboriginal title and rights is to be accurate and complete. This is also important for determining how to address Indigenous peoples’ concerns and accommodate potential impacts on their title and rights.

While Indigenous-driven regulatory review processes may differ from one nation or community to the next, the underlying principle is to ensure that Indigenous perspectives and concerns are properly understood and used to inform the review process. This will assist in adding credibility to these processes.
2. Consent-based decision-making

The federal government’s decision to adopt the principles of UNDRIP and the Supreme Court of Canada’s decision in Tsilhqot’in have important implications for regulatory review processes like those undertaken by the NEB. Both UNDRIP and Tsilhqot’in confirm the importance of engaging in consent-based decision-making with Indigenous peoples in respect of matters that have the potential to affect their rights.

Article 18 of UNDRIP confirms the rights of Indigenous peoples to participate in decision-making respecting matters that would affect their rights and to maintain and develop their own decision-making institutions. Article 32 requires government to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent about any project affecting their lands and other resources.

In Tsilhqot’in, the Supreme Court of Canada confirmed the importance of obtaining the consent of Indigenous peoples potentially affected by resource development activities as a way of providing greater predictability for the activities. One obvious way for government to secure the consent of Indigenous peoples is through collaborative decision-making processes.

Aboriginal title gives Indigenous peoples the right to use and control the land and enjoy its benefits. SXFN has never surrendered our Aboriginal title. We retain the jurisdiction and authority to make decisions on matters that have the potential to affect our rights and our territory. With this comes the right to develop our own Indigenous decision-making institutions and to determine whether and how the lands and resources should be developed. It is not enough for Indigenous peoples to be involved in the review of proposed development projects. We must also have a say in whether and how these projects will be developed. This includes final decision-making about whether we will consent to an activity and, if so, what mitigation, accommodation and / or justification measures will be required.

Consent-based decision-making provides an alternative to government’s current policy of unilaterally imposing and seeking to fit Indigenous peoples into the NEB’s existing processes that better reflects the nation-to-nation relationship between Indigenous peoples and the Crown. This model of decision-making allows for variation from one group to another to fit with their specific circumstances and priorities. For some Indigenous peoples, this may take the form of ensuring that an Indigenous representative from the affected community is included on the NEB panel undertaking the review of the project. This is consistent with the approach we took for the environmental assessment of the Prosperity Mine. For others, a review process that is entirely community-based may be more appropriate. The underlying principle is ensuring that Indigenous laws and perspectives are integrated into decision-making about land and resources management.

---

17 Tsilhqot’in, at paras. 18 and 75-76.
3. **Traditional knowledge**

A key component of Indigenous-driven regulatory review processes is their emphasis on Indigenous laws, knowledge, perspectives, culture and traditions. While western scientific information is important and should inform the review of a proposed project, equal weight should be given to the traditional knowledge of Indigenous peoples.

SXFN members are intimately connected to and familiar with our lands and the resources on these lands. We are stewards of the land. As such, we offer valuable insight into the potential development of a project.

To date, reliance on traditional knowledge within the context of the NEB’s review process has usually been limited to the traditional use studies commissioned by proponents. These studies are driven by the proponent’s particular project agenda, and often seek to identify specific areas that might be of concern to Indigenous peoples. They rarely take into consideration the interconnectedness of the resources and the sweeping implications that development of the land may have for the exercise of Aboriginal title and spiritual and cultural practices and the preservation of the land for future generations. These are a project’s “intangible impacts”.

Indigenous-driven regulatory review processes support the inclusion of available traditional knowledge to fully assess a project’s tangible and intangible impacts. For the assessment of a project to be complete, it must rely on traditional knowledge in conjunction with available western scientific knowledge.

4. **Nation building**

SXFN is committed to achieving a nation-to-nation relationship with the Crown that is based on respect and recognition of our Aboriginal title and rights, and Indigenous laws and values. This nation-to-nation relationship, and the recognition of Aboriginal title and rights and jurisdiction, must underlie any Indigenous-driven environmental assessment and decision-making process.

To advance this goal, Indigenous groups must first implement and exercise their Aboriginal title and jurisdiction. They must develop their own governance, legislative and decision-making institutions, processes and structures, and ensure that they have the systems in place to sustain the renewed relationship. This type of nation building requires the support and active involvement of the Crown working in collaboration with Indigenous peoples. While this process is ongoing, SXFN expects that the NEB’s review processes will be consistent with the federal government’s overall commitment to achieving respect and recognition of Aboriginal title and rights and building partnerships with Indigenous peoples.
5. **Regional land use planning**

The Supreme Court of Canada in *Tsilhqot’in* confirmed that Aboriginal title exists on a territorial basis, extending to tracts of land that were regularly used by Indigenous peoples and over which the group exercised effective control. *UNDRIP* confirms the right of Indigenous peoples to determine priorities and strategies for the development or use of Indigenous lands, territories and other resources. These principles should also inform the NEB’s review processes.

Many Indigenous groups have put in place land use policies and protocols that identify their expectations about the way in which the land and resources will be managed and the role they will play in their management. Such regional land use planning allows Indigenous peoples to identify areas within their territory where potential development may take place and where development will not be possible due to the existence of important cultural, traditional, archaeological, heritage or other interests.

Effective regional land use plans can also help to address existing gaps relating to cumulative effects and regional strategic environmental assessments. By identifying existing areas where development has taken place, Indigenous peoples and government will be better able to assess the increased pressure that could be introduced if new projects were to be developed in these same areas. These assessments must take place at the stage of strategic planning, before any decisions about the project’s feasibility are made.

Government must invest the resources necessary to allow Indigenous peoples to undertake regional land use planning initiatives. Once complete, the valuable information contained within these land use plans will help inform the assessment of potential development activities within Canada, including those undertaken by the NEB.

6. **Adequate capacity funding**

Indigenous peoples cannot meaningfully participate in regulatory review processes or determine whether they can consent to a proposed project without the funding required to assess the potential impacts of the project on the land and resources and their rights.

Canadian courts have expressly endorsed the provision of funding for First Nations to participate in consultation processes.\(^\text{18}\) Appropriate funding is essential to a fair and balanced consultation process and to ensure a level playing field between First Nations and the Crown.\(^\text{19}\) These same principles apply in the context of regulatory review processes.

---

\(^\text{18}\) *Wabauskang First Nation v. Minister of Northern Development and Mines et al.}*\(^\text{, 2014 ONSC 44214 (CanLII)*, at para. 232.}

It is also important to ensure that funding is provided to Indigenous peoples to support their participation in these processes on a timely basis. There must be adequate time for them to review any information that has been provided about the proposed activity and to provide their input.

Indigenous peoples have limited resources to participate in the NEB’s reviews and related consultation processes that are meant to support resource development initiatives being proposed within their territory. They should not be forced to fund industry’s initiatives. Without access to appropriate and timely capacity funding, they will be without the means to properly engage on issues that could have long-lasting impacts on their communities, lands and constitutionally-protected rights.