Introduction

Dease River First Nation (“Dease River”) is a member of the Kaska Dena Nation. The Kaska Dena traditional territory encompasses more than 240,000 square kilometres of land, extending from the present-day southern Northwest Territories through the southeastern boundary of present-day Yukon into present-day northern British Columbia.

Dease River has been involved in a number of resource development initiatives within its traditional territory. While Dease River is committed to pursuing economic development initiatives for community members, it is also committed to preserving the lands, water and resources and protecting its rights. However, our experience with existing regulatory and environmental assessment processes to date has caused us to question the effectiveness of these processes in protecting the lands and our Aboriginal title and rights.

Dease River is committed to fully participating in and monitoring development projects proposed within our traditional territory throughout their life cycle. The goal is to manage our lands, water and resources while establishing long-term relationships with proponents and governments. The NEB’s existing review processes, however, are not conducive to achieving this goal.

In these submissions we elaborate on some of the more prominent shortcomings we have perceived with the NEB and its processes, and offer a number of recommendations to address these shortcomings. Each of our recommendations is aimed at ensuring Dease River’s involvement in the management of the lands, waters and resources within our traditional territory and the protection of our title and rights. These recommendations should guide any reform of the NEB and its processes proposed by the federal government.
Background

Dease River First Nation

Dease River is one of five members of the Kaska Dena Nation. Three of the Kaska Dena Nations are located in British Columbia and two are located in the Yukon. Dease River has 186 members and is located in Good Hope Lake, approximately 115 kilometres north of Dease Lake in northern British Columbia.

Dease River provides direction to the Dease River Development Corporation (“DRDC”). DRDC develops contracts with resource companies wishing to pursue activities within our territory and provides jobs for community members.

Kaska Dena Aboriginal Title and Rights

The Kaska Dena assert Aboriginal title and rights to the lands, water and resources within Kaska Dena traditional territory. They see their use and stewardship of the lands, water and resources within their traditional territory as integral to their identity, governance and economy.

Dease River is a member of the Kaska Dena Council, which was formed in 1981 to represent the interests of all Kaska Dena, particularly the negotiation and settlement of the Kaska Dena land claim and the promotion and protection of the land and cultural heritage of the Kaska Dena peoples.

The Kaska Dena Council has entered into an Incremental Treaty Agreement (the “ITA”) with the Province of British Columbia on behalf of the three British Columbia Kaska Dena Nations, including Dease River. The ITA is a pre-treaty agreement meant to advance our treaty-related benefits. Under the ITA, the Province has agreed to transfer 607 hectares of land to the Kaska Dena Nations for economic development purposes.

Dease River Development Corporation

For the last 10 years, DRDC has been the economic development arm of Dease River. During this time it has been involved in a number of economic development projects, including:

- the development of a small hydro project that would sell renewable energy to BC Hydro to service Good Hope Lake and Jade City;
working with JDS Mine at the Silvertip Mine Site to implement the Socio-
Economic Participation Agreement;

• a major BC Hydro remote electrification program to service Jade City and
Dease River First Nation;

• through a joint venture partnership with Arctic Construction, the
development of a transmission line that would connect generators to Jade
City and Good Hope Lake;

• negotiating with BC to obtain forest tenures to harvest the timberlands
within our traditional territory;

• various other forestry development and management initiatives; and

• the operation of a saw mill in Good Hope Lake providing lumber and
materials for local and commercial mining use.

Protection of Kaska Dena Title and Rights and Modernization of the NEB

Together with Kaska Dena, Dease River has developed a number of policies and
protocols to ensure that our lands, water and resources are protected as we pursue
economic development initiatives with government and industry. These policies and
protocols identify our expectations about the way in which our lands, water and
resources will be managed and the role we will play in their management.

The Kaska Dena have developed a Kaska Dena Land Use Framework that includes
community-based natural resource development policies, management practices and
land-use zoning. The Land Use Framework identifies Kaska protected areas, special
management areas and site-specific features and includes particular management
approaches for each of these areas. The Framework is meant to support the
collaborative management by Kaska Dena and the Crown of the lands, water and
resources in our traditional territory.

The Kaska Dena have also developed policies that set out our expectations about the
way in which governments and industry proponents will consult and accommodate us,
and that explain how we will jointly manage our lands, water and resources. The
intention of these policies is to provide detailed management practices and
recommendations as government or proponents engage with us on resource development and planning initiatives.

The Kaska Dena have also entered into a Strategic Engagement Agreement with British Columbia, the purpose of which is to provide Kaska Dena with stable funding and capacity for three years to engage more efficiently on resource development applications. This Agreement provides for the establishment of the Natural Resource Council, which is meant to provide a common table for Kaska Dena to engage with the Province and participate in shared-decision making about matters affecting the lands, water and resources within our traditional territory.

Each of the above policies, protocols and practices is based on our laws and reflects our responsibilities as stewards of the lands, water and resources within our territory. They are essential to our management of the land, and should guide and inform the NEB’s review and assessment of any project being proposed within our territory.
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, Dease River 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 title and rights,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

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3 Haida, at paras. 41-42; Tsilhqot’in, at paras. 78 and 80; Sparrow, at 1110-1112.
legal and constitutional limits they impose.\textsuperscript{4}

The NEB is not an agent of the Crown, and the mandate of the NEB does not grant it the jurisdiction to undertake consultation with Indigenous peoples 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


\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.
basis and in collaboration with Indigenous peoples. The Crown must demonstrate a willingness to consider and address Indigenous interests. This may require the Crown to modify its plans, proposed actions and policies. 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 remedial powers necessary to fulfill these requirements.

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.

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

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9 *Haida*, at para. 42.
10 *Kwikwetlem*, at para. 68.
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.”
12 *Haida*, at para. 53.
ensuring that these conditions are implemented render them largely ineffective.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 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.”14 According to the NEB’s policy document, the public interest “refers to a balance of economic, environmental, and social interests”.15 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.16

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

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15 Ibid.
16 Sparrow, at 1113-1119; Tsilhqot’in, at paras. 77 and 88.
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 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.

Dease River has been involved in several resource development projects within our 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 to development. 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 Dease River 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 the United Nations Declaration on the Rights of Indigenous Peoples (“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.\(^{17}\) Kaska Dena 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. 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.

Dease River 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

Kaska Dena 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 peoples 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, Dease River 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.

Like Dease River, 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.\textsuperscript{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.\textsuperscript{19} These same principles apply in the context of regulatory review processes.

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.

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