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Written Submission by the BC Métis Federation

Submitted to the Expert Panel Regarding the National Energy Board Modernization Review

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Introduction

The British Columbia Métis Federation ("BC Métis Federation") is a non-profit association that works with Métis communities across British Columbia. Founded in 2011, BC Métis Federation's mandate is to advance the culture and rights of Métis people and to work with Métis communities toensure the well being of our members. We currently have 7,500 members across British Columbia.

The Crown has a constitutional obligation to consult with Métis people about proposed developments that have the potential to affect their rights. Generally speaking, consultation activities with BC Métis Federation to date have been inadequate and superficial, resulting in no real value for government or proponents and providing little meaningful voice for our members. Our members favour a balanced and responsible approach to development that is inclusive of our unique voice and perspective.

Regulatory review processes present an opportunity for BC Métis Federation to participate in the assessment of development activities that have the potential to affect our members' rights. However, we cannot support the practice of regulatory agencies or the enactment of regulatory processes and procedures that do not incorporate our views. Doing so puts our members' rights and livelihoods at risk. Involving our communities in the NEB's review processes is a necessary step in the reconciliation of our views respecting environmental issues and proposed resource development, and in the mutual obligation of ensuring that Métis rights are protected.

Background

British Columbia Métis Federation

BC Métis Federation is a non-profit association established in British Columbia in 2011. It is governed by its President, Keith Henry, and a democratically-elected board of directors.

Much of BC Métis Federation's work is focused on building and maintaining relationships with governments, industry partners and service delivery organizations throughout British Columbia. We work with these organizations to meet the needs of our members, advance their concerns, and ensure that their voice is present. The BC Métis Federation engages with regulatory agencies and other government entities in relation to issues of interest and concern to our members.

Métis Rights

Métis rights are constitutionally enshrined and protected. Our members have important knowledge about the social and economic landscape of the regions they live in, as well as about land and the natural environment. They value the integrity and beauty of the natural environment, and are committed to defending, protecting and advancing our rights. BC Métis Federation is continually engaged in research with our members to ensure the protection and advancement of, and advocacy for, their rights.

Modernization of the NEB

While regulatory review processespresent an important opportunity for our members to engage about their concerns regarding projects that have the potential to affect their rights, the NEB's existing processes are limited in their ability to protect Métis rights. One of the key limitations of the NEB's existing review processes is their failure to incorporate Métis perspectives. This is a matter of grave concern, as decisions about whether or not proposed projects will proceed to development have the potential to significantly affect the land and our rights. BC Métis Federation's members are not able to ensure that their rights are protected in the course of resource development if they are excluded from the review and assessment of these projects.

In 2015 BC Métis Federation established a consultation office to collaborate with the Crown on issues and activities affecting our members. The purpose of our consultation office is to work with the Crown to ensure that the duty to consult and accommodate our members in respect of any project that has

the potential to affect the rights and interests of our members is fulfilled, and that consultation activities are meaningful and have lasting investment value. We have a long way to go in achieving this goal, and reform of the NEB and its review processes is an important part of the process.

In these submissions, we elaborate on our concerns about the limitations of the NEB and its current review processes. We also provide a number of recommendations to address these limitations. Each of our recommendations builds upon the understanding that our members must be involved in the review and assessment of projects that have the potential to affect their rights and interests.

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. Please note that when we refer to Indigenous people in this submission, we are also referring to Métis people and, specifically, the BC Métis Federation community.

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, BC Métis Federation 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, including the Métis,about the potential effects of proposed projects ontheir 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

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[1] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*"), at para. 20.
[2] *R. v. Sparrow*, 1990 1 S.C.R. 1075 ("*Sparrow*"), at 1110-1112; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 ("*Tsilhqot'in*"), at para. 80.
[3] *Haida*, at paras.41-42; *Tsilhqot'in*, at paras.78 and 80; *Sparrow*, at 1110-1112.

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 the jurisdiction to undertake consultation with Indigenous peoples participating in proceedings before it.[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.[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.[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.[8] This type of engagement cannot happen within the context of a hearing before the NEB.

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[4] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), at para. 106. Also, *Beckman v. Little Salmon / Carmacks First Nation*, 2010 SCC 53 (CanLII), at para. 48; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), at para. 177.

[5] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, at para. 34.

[6] National Energy Board, Factsheet: Engagement of and Participation by Aboriginal peoples, available online: https://www.neb-one.gc.ca/prtcptn/nfrmtn/brgnlpplfs-eng.html (accessed March 22 2017).

[7] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 209 BCCA 68 (CanLII) ("*Kwikwetlem*"), at para. 70.

[8] *Kwikwetlem*, at para. 68.

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.[9] This may require the Crown to modify its plans, proposed actions and policies.[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 remedial powers necessary to fulfill these requirements.[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.[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.

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

[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.

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]

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[13]Office of the Auditor General of Canada, 2015 Fall Reports of the Commissioner of the Environment and Sustainable Development, "Oversight of Federally Regulated Pipelines", available online at: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_02_e_41021.html#hd3c (last accessed March 27 2017).

[14] National Energy Board, Pipeline Regulation in Canada: A Guide for Landowners and the Public, available online: https://www.neb-one.gc.ca/prtcptn/lndwnrgd/lndwnrgdch1-eng.html (accessed March 22 2017)

[15]*Ibid.*

[16]*Sparrow,* at 1113-1119*; Tsilhqot'in*, at paras. 77 and 88.

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 peoplesare 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 extendbeyond 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.

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. 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 BC Métis Federation engage with the Crown as much as possible on issues affecting the rights of our members, including through the NEB's review processes. However, BC Métis Federation is a non-profit organization and 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 inlengthy 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, including those of BC Métis Federation's members, are properly understood and inform the review process. This will assist in adding credibility to these processes.

2. Participation in 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.

Collaborative 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. This model of decision-making would allow BC Métis Federation to be directly involved in determining whether and how a project that has the potential to affect our members' rights should proceed to development. While the form this decision-making process will take requires negotiation with the Crown, the underlying principle is to

ensure that the Métis perspectiveis integrated into decision-making about land and resources management that has the potential to affect Métis rights.

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. Traditional knowledge is contemporary knowledge.

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 are often ineffective in demonstrating the implications that development of the land may have for the exercise of our rights.

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. Cumulative Effects Assessments and Regional Strategic Environmental Assessments

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. These cumulative effects assessments must incorporate Métis perspectives about the potential effects of these projects on their ability to exercise their constitutionally-protected rights. Métis knowledge studies are an excellent source for this information, and can inform many aspects of the regulatory process.

Regional strategic environmental assessments can also 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 our Métis rights.

5. 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.[17] Appropriate funding is essential to a fair and balanced consultation process and to ensure a level playing field between First Nations and the Crown.[18] While these cases dealt specifically with First Nation consultation, the principle is equally applicable to Métis communities. The same principles also 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.

BC Métis Federation has 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. We should not be forced to fund industry's initiatives. Without access to appropriate and timely capacity funding, we will be without the means to properly engage on issues that could have long-lasting impacts on the constitutionally-protected rights of our members.

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[17] *Wabauskang First Nation v. Minister of Northern Development and Mines et al.,* 2014 ONSC 44214 (CanLII), at para. 232.

[18] *Platinex Inc. v. KitchenuhmaykoosibInninuwug First Nation*, 2007 CanLII 20790 (ON SC), at para. 27; *Enge v. Mandeville et al.,* 2013 NWTSC 33, at para. 269.