

**Opinion and recommendations of the KEAC
regarding double environmental assessment of Nunavik projects by the federal government
submitted to the Federal Administrator**

The Kativik Environmental Advisory Committee (hereinafter referred to as the “KEAC”) was established by and in accordance with Section 23 of the *James Bay and Northern Québec Agreement*¹ (hereinafter referred to as the “JBNQA”). Its mandate led the Committee to review and monitor enforcement of the *Canadian Environmental Assessment Act* in the territory governed by the environmental assessment regime established in law under Section 23 of the JBNQA.²

It is as a tripartite consultative body and the preferential and official forum for responsible governments that the KEAC is addressing the Federal Administrator for the purpose of informing him of its observations and recommendations regarding the manner in which the federal authorities currently enforce the environmental and social protection regime established by the JBNQA for the territory of Nunavik.³

The KEAC considers that the information gathered, the results of its review, and its observations and recommendations will be useful in developing appropriate practices and measures for implementing the JBNQA in Nunavik.

1. Federal administration and enforcement of the environmental assessment regime established by Section 23 of the JBNQA

In June 1999, the KEAC read the Environmental and Social Impact Review Panel’s recommendation to the Federal Administrator to authorize Phase I of the

¹ JBNQA, para. 23.5.1: *An Environmental Advisory Committee (hereinafter referred to as the “Advisory Committee”), a body made up of members appointed by the Regional Government, Canada and Québec, is established.*

² JBNQA, para. 23.2.1: *The environmental and social protection regime applicable in the Region shall be established by and in accordance with the provisions of this Section.*

³ JBNQA, para. 23.5.24: *The Advisory Committee shall be a consultative body to responsible governments and as such shall be the preferential and official forum for responsible governments in the Region concerning their involvement in the formulation of laws and regulations relating to the Environmental and Social Protection Regime and as such shall oversee administration and management of the regime through the free exchange of respective views, concerns and information.*

JBNQA, para. 23.5.27: *The Advisory Committee shall examine and make recommendations respecting the Environmental and Social impact assessment and review mechanisms and procedures for the Region.*

Kangiqsualujjuaq marine infrastructure project.⁴ In its recommendation, the Review Panel (hereinafter referred to as “COFEX-North”) specified that the wharf project had been submitted to more than one environmental assessment by the federal government, i.e. under the procedure established by Section 23 of the JBNQA and under the procedure established by the *Canadian Environmental Assessment Act* (hereinafter referred to as the “CEAA”). COFEX-North thus recommended that the procedures be harmonized for the purposes of review of the next marine infrastructure project, under the authority of the bodies created by the JBNQA, given the Agreement’s precedence over the CEAA and its constitutional protection.⁵

In August 1999, following a general review of the situation, the KEAC decided to monitor federal administration and enforcement of the JBNQA regime to ensure that the two federal procedures were harmonized in keeping with the objectives and institutions arising from the JBNQA, and to then submit the results of its review, as well as its observations and recommendations.

2. Summary of the KEAC’s review

For the purposes of its review, the KEAC documented and examined the coordination trials proposed by the Canadian Environmental Assessment Agency (hereinafter referred to as the “Canadian Agency”) for the six (6) marine infrastructure projects in the villages of Kangiqsualujjuaq,⁶ Quaqaq, Umiujaq, Kangiqsujuaq, Kuujjuaq and Ivujivik, the terms of the JBNQA and CEAA, the five-year review of the CEAA and Bill C-19.

2.1 *Coordination and harmonization of the federal procedures*

The KEAC gathered its information through exchanges with COFEX-North, the Federal Administrator and the Canadian Agency and through the directives issued for the marine infrastructure projects and minutes of post mortem meetings between federal stakeholders as well as public consultations. According to this information, the Federal Administrator found no record of environmental assessment under Section 23 prior to the CEAA’s entry into force in 1995.⁷ Since then, the Section 23 procedure has been applied to the projects

⁴ Benoît Taillon, Chairman, Comité fédéral d’examen Nord – Federal Review Panel North, May 17, 1999. Letter addressed to Mr. Sid Gershberg, Federal Administrator, James Bay and Northern Québec Agreement, 2 pages with appendix: “Comité fédéral d’examen Nord – Federal Review Panel North, Report of the Federal Review Panel-North to the Federal Authority. Kangiqsualujjuaq Harbor Project. Marine infrastructure projects 99-05-14.” 10 pages.

⁵ JBNQA, para. 23.7.6: *Notwithstanding the above paragraph, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Region and in part elsewhere where an impact review process is required.*

⁶ Kangiqsualujjuaq project submitted by Makivik Corporation in November 1997.

⁷ François Boulanger, “Regional Director, CEAA”, Canadian Environmental Assessment Agency, July 18, 2001, Letter addressed to Mr. Muncy Novalinga, Chairman, Kativik Environmental Advisory Committee.

to build marine infrastructures in the northern villages. Overall, the KEAC notes that under the Canadian Agency's governance, the federal authorities involved have devoted considerable energy to harmonizing the Section 23 and CEAA procedures and coordinating the various federal players so as to reduce the delays and constraints related to application of the CEAA, improve the projects and decrease their environmental impacts. The KEAC also notes that the Canadian Agency did not submit its proposed application of the CEAA to the Inuit party, or get its approval before submitting the projects to two assessment procedures.

2.2 *Precedence of the JBNQA and its environmental assessment regime*

The KEAC examined the relevant provisions of the JBNQA and CEAA. The federal *James Bay and Northern Quebec Native Claims Settlement Act* (S.C. 1976-77, c. 32) and the JBNQA, which was signed by the Government of Canada, established and implemented an environmental and social protection regime for the territory of Nunavik. As signatories to the JBNQA, the Inuit participated in the negotiation and drafting of both the Agreement and its environmental and social protection regime. The purpose and aim of that regime is to acknowledge the Inuit's special rights in matters of development in Nunavik.

Section 23, entitled *Environment and Future Development North of the 55th Parallel*, acknowledges the right of the Nunavik Inuit to a special environmental and social protection regime. It:

- establishes a comprehensive regime that provides for an environmental and social impact assessment and review procedure to minimize the negative environmental and social impact of development on the Inuit and the wildlife resources of Nunavik⁸ (para. 23.2.2 b)). The scope and probative force of this regime is clear. In fact, the Federal Court of Appeal ruled that:

*The Agreement makes detailed and exhaustive provision for the nature and extent of the environmental studies to which the parties agreed that development projects undertaken in Agreement Territory would be subject. The regime that was established represents the expression of the specific consensus reached by the parties, and the parties expressly intended that one complex, Le Complexe La Grande (1975), would be exempt from the application of this regime, just as they intended, in subsection 2.5, that the provincial and federal legislation which was to give effect to the Agreement would both provide that where other legislation is inconsistent with the provisions of the Agreement, the Agreement will prevail.*⁹

- grants a special status and involvement for the Inuit and other inhabitants of the Region over and above that provided for in procedures involving the general public of

"Object: Coordination of the JBNQA and CEAA Processes Regarding the Marine Infrastructure Program in Nunavik (1999-2001)." 2 pages plus enclosures (11 pages).

⁸ JBNQA, para. 23.2.1: *The environmental and social protection regime applicable in the Region shall be established by and in accordance with the provisions of this Section.*

⁹ *Eastmain Band v. Canada*, [1993] 1 F.C. 501, 532-533.

Québec and Canada through consultation or representative mechanisms (para. 23.2.2 c));

- provides for the protection of the Inuit, their economy, their hunting, fishing and trapping rights and the wildlife resources upon which they depend (para. 23.3.3 d) and e));
- provides for the participation of the Inuit on the multipartite bodies established to oversee implementation and development of the environmental and social protection regime (Sub-Section 23.3), namely the Environmental Quality Commission (para. 23.3.1), the Screening Committee (para. 23.4.2), the Review Panel (para. 23.4.12) and the Environmental Advisory Committee (para. 23.5.1);
- stipulates that the provisions of Section 23 cannot be amended, either directly or indirectly, without the consent of the Inuit party:

para. 23.7.10: The provisions of this Section can only be amended with the consent of Canada and the interested Native party, in matters of federal jurisdiction, and with the consent of Québec and the interested Native party, in matters of provincial jurisdiction.

A comparative review of the environmental assessment regimes established by the JBNQA and the CEAA shows several differences. For example:

- the development projects subject to environmental impact assessment and the procedure for submitting them are different. The JBNQA contemplates major development projects, and projects that fall within the “grey area” undergo impact assessment following a screening process involving the Inuit. The CEAA contemplates a larger number of projects, and the Inuit do not participate in the screening of projects to be submitted to a public consultation exercise;
- under the JBNQA, the environmental and social impact review of projects is carried out by a bipartite committee, composed of Inuit representatives, that must consider the project’s social impacts on the Inuit people (Section 23, Schedule 3); under the CEAA, the environmental effects of a project are chiefly assessed by the same federal authorities who are assigned to authorize projects, and no special consideration is given to the project’s social consequences for the Inuit (CEAA, s. 16);
- the Section 23 procedure grants a special status to the Inuit by requiring that due consideration be given to a number of guiding principles that reflect the Inuit reality with regard to development and by granting the Inuit the right to be consulted in a manner over and above that normally provided for for the general public;
- the decision-makers are not the same: under the JBNQA, the Federal Administrator is the sole decision-maker, whereas under the CEAA, the various administrative units of the federal government participate in decision-making according to their power to authorize the project. The involvement of so many federal authorities results in a longer approval process and the risk of having to contend with inconsistent or conflicting decisions.

The differences between the two environmental assessment regimes are substantial enough that enforcement of the CEAA in the territory of Nunavik changes the assessment system provided for under the JBNQA. The contracting parties are not free to modify the obligations and rights agreed to in the JBNQA simply by favouring the application of another regime or by asserting an optional clause in order to temper their consent to the content of the JBNQA. Such power would have had to be spelled out in the Agreement, or changes to the environmental assessment regime would have had to be provided for in an agreement between the contracting parties. But the JBNQA does not provide for such power, and no such agreement was entered into with the Inuit party.

According to the federal legislation and the JBNQA, the JBNQA and its institutions and provisions override regular acts of Parliament, including the *Canadian Environmental Assessment Act*:

*Where there is any inconsistency or conflict between this Act and the provisions of any other law applying to the Territory, this Act prevails to the extent of the inconsistency or conflict.*¹⁰

*Canada and Québec acknowledge that the rights and benefits of the Indians and Inuit of the Territory shall be as set forth in the Agreement (...)*¹¹

Furthermore, the JBNQA and Section 23 of the Agreement are guaranteed and protected by section 35 of the *Constitution Act, 1982*.

2.3 *Five-year review of the CEAA*

The KEAC studied the briefs submitted by a number of Inuit organizations for the five-year review of the CEAA.¹² The Inuit Tapirisat of Canada, the James Bay Advisory Committee on the Environment (JBACE) and Makivik Corporation all concluded that the environmental assessment regime established by the territorial agreement entered into with the Inuit prevails over other regimes. Consequently, they recommended that the CEAA be amended to acknowledge the paramount nature of the JBNQA and ensure that the federal authorities implement the regime negotiated with the Inuit.

In the same vein and during the same review process, the federal Regulatory Advisory Committee recommended to the Minister of the Environment that “a new section of the Act should be created (or amendments), which would allow, where aboriginal peoples

¹⁰ James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32, s. 8.

¹¹ JBNQA, Sub-Section 2.5.

¹² Inuit Tapirisat of Canada, “Inuit Rights Under Land Claims Agreements and the Five-Year Review of the Canadian Environmental Assessment Act,” March 31, 2000; Makivik Corporation, “Environmental and Social Impact Assessment and Review Under Section 23 of the James Bay and Northern Quebec Agreement,” March 31, 2000; and the Comité consultatif pour l’environnement de la Baie-James (CCEBJ)/James Bay Advisory Committee on the Environment (JBACE), “Commentaires du CCEBJ soumis au ministre de l’Environnement du Canada,” March 2000.

have an environmental assessment process established in law (e.g. under a Land Claim Agreement and related implementation legislation), to recognize those powers.”¹³

Environment Canada’s report on the CEAA review does not integrate the recommendations made by the Inuit organizations, nor does it take a clear stand on the paramount nature of the environmental assessment regimes previously negotiated with the Inuit. The intention is more to ensure broad application of the CEAA, better incorporate Aboriginal issues, “expand opportunities for public participation” and adopt “special approaches to consultation to involve Aboriginal people where their communities and traditional lands may be affected.”¹⁴

The KEAC also read Bill C-19¹⁵ amending the *Canadian Environmental Assessment Act*. The bill introduces no major changes to the coordination mechanisms already provided for in the existing legislation.¹⁶ One of those mechanisms, namely substitution, allows the Environment Minister to approve the substitution of the CEAA process by the environmental assessment process under Section 23 of the JBNQA, and thereby avoid two assessment procedures for projects in Nunavik. This mechanism was not used for the marine infrastructure projects reviewed by COFEX-North.

3. Opinion, conclusions and recommendations

After examining the documents and data relating to double environmental assessment of Nunavik projects by the federal authorities, the KEAC believes that implementing the *Canadian Environmental Assessment Act* in the territory of Nunavik alters the environmental assessment regime already established by the JBNQA. This alteration breaches the terms of the JBNQA and its precedence over the CEAA, and infringes the rights it grants to the Nunavik Inuit. More specifically, it is the KEAC’s opinion that:

- since the *Canadian Environmental Assessment Act*’s entry into force, the Canadian Environmental Assessment Agency has applied the assessment procedure provided for under the Act in the territory of Nunavik already governed by the environmental assessment procedure established by Section 23 of the JBNQA;

¹³ “Report to the Minister of the Environment from the Regulatory Advisory Committee (RAC). Five-Year Review of the *Canadian Environmental Assessment Act*.” Regulatory Advisory Committee (RAC), May 8, 2000, text and appendices (35 pages): Recommendation 37.4.

¹⁴ “Strengthening Environmental Assessment for Canadians. Report of the Minister of the Environment to the Parliament of Canada on the Review of the *Canadian Environmental Assessment Act*.” Environment Canada, March 2001, (28 pages): page 25.

¹⁵ Bill C-19, *An Act to amend the Canadian Environmental Assessment Act*, tabled for first reading on March 20, 2001.

¹⁶ CEAA: coordination (s. 12), delegation (s. 17), agreement for joint review panel (s. 40 to 42) and substitution (s. 43 to 45). Bill C-19 introduces section 9.1, which allows an authority that is not a federal authority but that is prescribed by a regulation to ensure the assessment of the environmental effects of a project (s. 9.1, para. 59(k.3) and 59 (k.4)).

- following the double assessment of Phase I of the Kangiqsualujjuaq wharf project (May 17, 1999), the Canadian Agency attempted to harmonize the Section 23 and CEAA environmental assessment procedures by coordinating the federal authorities concerned, preparing joint directives, decreasing delays and constraints associated with application of the CEAA, etc.;
- the environmental assessment process provided for in the CEAA is predicated on considerably different purposes, institutions and rules for submitting development projects to assessment from those in Section 23 of the JBNQA, which provides for a special status and involvement for the Inuit people and special consideration for their social environment;
- the differences between the JBNQA and CEAA regimes have such considerable consequences for the objectives and implementation of the JBNQA that empowerment of the federal authorities to change the JBNQA assessment regime without the Inuit party's consent would have had to be clearly provided for. But the JBNQA makes no such provision. Furthermore, a system that enables the Federal Administrator to unilaterally change the terms of the Agreement would seriously minimize the Inuit's role and reduce the Agreement's effectiveness as a constitutional instrument;
- the JBNQA clearly prohibits the federal authorities from submitting a project to more than one procedure:

para. 23.7.6: Notwithstanding the above paragraph, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Region and in part elsewhere where an impact review process is required.
- the JBNQA sets out its own environmental and social protection regime for Nunavik, as well as the rules governing the submitting of projects to more than one environmental assessment procedure;¹⁷
- Section 23 of the JBNQA does not otherwise authorize the bodies it establishes to formulate and enter into agreements with the Canadian Environmental Assessment Agency to modify the rules of the JBNQA;
- the JBNQA and the federal legislation acknowledge that the rights in favour of the Inuit are as set forth in the Agreement and stipulate that the JBNQA prevails in the event of inconsistency or conflict;
- the Inuit authorities empowered to amend the terms of the JBNQA have not signed any agreement with the responsible federal authorities authorizing changes to the Section 23 regime or authorizing the federal government, on an ad hoc basis, to submit a project to more than one environmental assessment procedure.

¹⁷ JBNQA, para. 23.4.1; 23.7.3; 23.7.5; 23.7.6; 23.7.7.

The federal authorities' implementation of a different environmental assessment regime than that provided for in Section 23 of the JBNQA infringes the rights of the Inuit authorities to negotiate any changes to the environmental and social impact assessment procedure established by Section 23 of the JBNQA.

It is the KEAC's opinion that the Federal Administrator, the federal government, the federal Environment Minister and the Canadian Environmental Assessment Agency must respect the terms and paramount nature of the environmental assessment regime established by the JBNQA:

- by giving full effect to the mechanisms and institutions provided for in Section 23;
- by amending the CEAA to clearly acknowledge the paramount nature of Section 23 of the JBNQA;
- by negotiating any changes to the environmental assessment regime applicable in Nunavik with the responsible Inuit authorities.

Presented by Paule Halley, L.L.D.

Passed unanimously, in Québec City, on March 21, 2002.

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