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Chair

Mr. Leon Benoit

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● (1530)

[*English*]

The Vice-Chair (Mr. Claude Gravelle (Nickel Belt, NDP)): I'm going to call the meeting to order.

Before we get started, I want to advise the committee members that there's a delegation from the Parliamentary and Political Party Strengthening Project in Pakistan, Phase II, that would like to meet us Friday morning. Most of us are not available Friday morning, so if anybody's interested in meeting with this delegation Friday morning, please tell the clerk. He'll make the necessary arrangements.

At this time, I'd like to thank the witnesses for coming. We have, from the Canadian Environmental Assessment Agency, Helen Cutts, vice-president, policy and development sector, and John McCauley, director of legislative and regulatory affairs.

The floor is all yours for the next ten minutes.

Ms. Helen Cutts (Vice-President, Policy Development Sector, Canadian Environmental Assessment Agency): I am pleased to be here. My understanding is that as you embark on your work on the north, it would be useful for you to have a briefing on how environmental assessment works. My purpose is go to over a deck; I don't have any prepared remarks. I will review the deck, which explains the Canadian Environmental Assessment Act and how it works, and I'll be very happy to answer your questions.

Turning to slide one, you can see that environmental assessment has been in place in one way or another since 1974. It was a very thin cabinet directive at that time. It wasn't until 1995 that we brought the Canadian Environmental Assessment Act into force. Since then, we've had one round of parliamentary review, and we brought in amendments by 2003. We had a small round of amendments in July 2010. That was part of the jobs and economic growth package that came with the budget that year.

Before I get into slide three, I want to emphasize that environmental assessment is a planning tool. It's a way for the government to work with companies such that before a shovel goes into the ground there is a discussion of what the environmental impacts are and how to mitigate them. This is beneficial for proponents because they get to see early on what changes in design they might need to make or what adjustments to their strategy might be needed before they invest a great deal of money.

The act itself applies to federal authorities. It asks those federal authorities to carry out assessments. These are departments and agencies, typically. There are a number of limited conditions under which those authorities are asked to carry out an environmental assessment having to do with whether a decision is required from them on a project. If they are the project proponent or if that department or agency is offering some sort of financial assistance, then they need an environmental assessment—or if they are a source of land, or if they are a regulator.

The regulation is a very common one. A company that needs to get a permit related to fish would then go to DFO and would indicate that they believe they need an environmental assessment.

We have three types of environmental assessments. Those are screenings, comprehensive studies, and review panels. I'll briefly go over each of these three types.

Most of them are screenings; these are required for any project. Our act works such that any project requires an environmental assessment, and then we have a tier that says a subset of the projects we will name requires a more comprehensive approach. Those will need comprehensive studies.

The vast majority of our environmental assessments are screenings, about 6,000 a year. The responsible authority, the one with the decision to make, is the one that carries this out. We end up with 40 or 50 different agencies involved across the board. They make a decision about what type of opportunity they want to give for public participation, they determine whether to require a follow-up program of the proponent, they make the final decision, and they're also responsible for the implementation of the mitigation measures and follow-up.

Just as an aside, I'll explain what follow-up is. Follow-up means that somebody needs to verify that the particular mitigation measures that were set out in the environmental assessment are doing what they were expected to do. This is a little different from enforcement. If we felt there was some concern about the habitat and said the company needed to make an adjustment, needed to build a ditch to ensure that the water flow was in the right direction and beneficial to the fish or other habitat that use the stream, then you would want to make sure that building the ditch did indeed divert the water and create the level of water that you expected to be sufficient when you set out those plans.

● (1535)

A comprehensive study, as I mentioned, is a more intensive and generally thicker document that looks at environment assessment. It meets the same types of criteria as a screening, but it has a few additional elements; for example, it would be required that you look at alternative means of carrying out the project.

The agency to which I belong is responsible for most of the comprehensive studies. The only exceptions are the ones that involve the Nuclear Safety Commission or the National Energy Board.

With comprehensive studies, one thing that is different from screenings is that we have a participant funding program; therefore, if an aboriginal group or an environmental group or a citizen would like to participate in some way and needed some funding for some research or to collect the views of their members, they can apply to us for participant funding. That's an important element of our comprehensive study program.

At the end of a comprehensive study, it is the Minister of the Environment who has to make a decision, deciding whether or not there are significant adverse environmental effects from the project. That decision would be based on the project as modified; it would not be based on the original project but on the project as described in the comprehensive study, taking into account any design changes and any mitigation plans.

Though the Minister of the Environment has that responsibility, it would still be a particular department that would be responsible for ensuring that those mitigation measures were taken. Often, as I say, it might be the Department of Fisheries and Oceans because the issue at hand was an issue surrounding fish habitat, for example. The follow-up programs under a comprehensive study are mandatory.

The third way we do environmental assessments involves situations in which the Minister of the Environment appoints independent experts, who will do research, call upon witnesses, hold hearings, and make recommendations to the government. This is another case in which we offer participant funding. The role of the agency in this particular case is limited to being a secretariat for that panel.

In the end, the responsible authority, the one with the decision to make, makes the final decision, with the approval of the Governor in Council. Again, the responsible authority checks to make sure that the mitigation measures are undertaken and that follow-up is done to ensure that mitigation is working as planned.

The last element I would like to flag to you today is on federal-provincial cooperation. The environment is really a shared responsibility between the federal government and the provinces. Many of you will already know that the provinces have their own environmental assessment processes.

This situation has the potential to create overlap and duplication. It is difficult for proponents if they have to respond to two sets of requirements. What we try to do is work with the provinces to run a process that is as seamless as possible. In order to facilitate that process, we have bilateral agreements with a number of provinces that set out how we would run a particular project when we are working together.

● (1540)

When we get into these cooperative arrangements, it's usually the provinces that take the lead and we participate actively.

That is simply the nuts and bolts of the Canadian Environmental Assessment Act, and I'd be pleased to answer any of your questions.

The Vice-Chair (Mr. Claude Gravelle): Thank you very much.

Leading off the first round will be Mr. Allen.

Mr. Mike Allen (Tobique—Mactaquac, CPC): Thank you very much, Mr. Chair.

I want to thank our witnesses for being here today. I really appreciate that.

Do you have any accountability responsibility or jurisdiction over north of 60 in the northern area, or is most of your work done in consultation with the provinces?

Ms. Helen Cutts: There's virtually no involvement in the north. The reason is that in the north, north of 60, the environmental assessment regimes are dependent on the particular arrangements through comprehensive claims. In those land claims, a board will be established. For example, in the Yukon there was an agreement between the federal government and 14 Yukon first nations. Based on the land claims there, they set up what they called the Yukon Environmental Socio-Economic Assessment Act, and there is a board associated with that that carries out all those environmental assessments.

In the Northwest Territories, the Yukon, and Nunavut, any of those arrangements in the north do have the option of referring a project to the Minister of the Environment, and they would be asking the minister whether he'd set up a review panel. When they would typically do that would be if there were transboundary effects. If the effects of a project in the Yukon, Nunavut, or Northwest Territories are limited to that region, those individual boards would look after things.

Mr. Mike Allen: Okay. You have led me into my next question. You said there are about 6,000 of these screenings. Going up the ladder, how many of those would ultimately end up going through a comprehensive study and then a review process? What are some of the criteria that would indicate or dictate that this should go to a review panel, and is that requested?

I'll put it into context. Let's say, for example, you have an agreement with the province to do an environmental impact assessment, which I think you do with New Brunswick. What would be the driver in you escalating that up to a review panel? Is that requested by the province? Could it be requested by any group or organization? Exactly how would that process happen?

● (1545)

Ms. Helen Cutts: First of all, of the 6,000 that we would do in a year, only 1% of them would end up either as a comprehensive study or as a review panel. Technically, according to the act, something that starts as a screening could receive a request to be elevated to a review panel, or a comprehensive study could be requested to go to a review panel. The request could come from a provincial government, an environmental association, or a proponent. It could be something that our own agency would consider.

One of the reasons why we would look to a review panel is if the environmental effects were expected to be significant. And if there were significant public concerns about the project, then we would use those as criteria to say yes, the public will be better served by having a review panel; they will feel comfortable knowing that there is an independent group of panellists considering the issue.

Mr. Mike Allen: Then you could in fact overrule a process that would happen through a province. If I understand correctly, if the environmental impact assessment process was started and it was deemed that there would be an implication for DFO in the process because it was a mine, and we're doing a lot of mining.... Let's say, for example, a tailings pond was going to impact a brook or something of that nature. DFO would obviously be involved in that. So you have this caveat that some group could simply write you, express a concern, and you could override that process and turn it into a review panel. Is that what you're saying?

Ms. Helen Cutts: We could decide to take something to a review panel that the province was not doing, but our practice would always be to work with the province and to get an agreement with the province on what the best way is to deal with the issue. We know that we are better served if we can work with the province. That would be a factor that would enter into our decision.

There is no automatic rubber stamp that says if we get a request for a review panel we will always go to one. We always want to ensure that we are as aligned as possible with the province.

Mr. Mike Allen: Can you comment on whether the major projects management office has helped the process in its early stages? Are you seeing a change in some of the duplication that might have been in the process before?

Ms. Helen Cutts: I've been very impressed with what the major projects management office has been able to accomplish. They've helped set up project agreements with timelines. That's the first thing. We have a tracker that is available to the public so they can watch what is happening on any given project and what the key milestones are. I believe that when transparency is emphasized it puts the onus on public servants to ensure that things get done in an efficient way.

The major projects office has played a key role just by shining a light on the slower timelines we had five years ago and the more rapid ones we have right now. The major projects management office has also ensured that the integration among government departments is stronger, that there is less time spent trying to decide which is going to be the lead department, so the projects get going faster.

The Vice-Chair (Mr. Claude Gravelle): We're going to have to move to the next round. Thank you very much.

Monsieur Lapointe.

[*Translation*]

Mr. François Lapointe (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, NDP): Thank you, Ms. Cutts.

Very shortly, your services are going to be reduced by 43% by the current government. But I see that you still have a major role: you do 6,000 assessments.

With cuts like those, can you foresee a plan that will allow you to continue such a huge job? Can you imagine being able to carry on?

● (1550)

[*English*]

Ms. Helen Cutts: At this stage, the possibility of a 43% cut still remains a possibility. What we do in the agency is carry out our duties to the best of our ability. Right now the agency is not doing all 6,000 of those. You have to remember that these 6,000 projects are carried out across 40 different agencies. The existing work we do we will continue to do with whatever resources we are given.

[*Translation*]

Mr. François Lapointe: Do you have a plan that leads you to believe that it is possible to keep your service and your studies at the same level of quality, even with a reduction of more than 40%? Can you see that happening?

[*English*]

Ms. Helen Cutts: We are waiting to hear about the evaluation of the projects management office, and when we hear about that evaluation and the results in terms of a cabinet decision about what will happen to our funding, we will put in place whatever plans we need to put in place.

[*Translation*]

Mr. François Lapointe: So we do not know whether it will be possible to maintain the same quality and any plan still depends on decisions that have not yet been made. But those decisions could involve reductions of up to 43%. So, in a nutshell, we know nothing about the quality of the assessments that Canadians will be getting in a few short months.

[*English*]

Ms. Helen Cutts: In the coming months we see no reason for the quality of environmental protection to suffer. This government has a commitment to environmental assessment quality, and we will wait and see what the decision is on budget cuts.

[*Translation*]

Mr. François Lapointe: Do you have a plan for what one might call

[*English*]

worst-case scenario

[*Translation*]

if, very shortly, more than 40% of your budget has to disappear?

[*English*]

Ms. Helen Cutts: I think the question you're asking is very political and it's very difficult for me as a public servant to talk about what the political plans of the government are.

[*Translation*]

Mr. François Lapointe: I get it, Ms. Cutts.

In a recent report, Scott Vaughan, the Commissioner of the Environment and Sustainable Development, wrote, of the environmental effects of the oil sands, that data are at best incomplete and at worst mediocre or non-existent, and make it impossible to conduct a proper assessment.

To what extent was your organization involved in those assessments? Do you agree with the commissioner's conclusions to any extent?

[*English*]

Ms. Helen Cutts: Yes, we agree with his assessment. It is necessary for us to look at the methods to assess cumulative effects better. What he's asked is that when we have some information from the cumulative effects assessment in one particular assessment to use it in future ones.

The particular projects that he examined were projects from a few years ago. Before his report was out we had already started taking into account that the results of one cumulative assessment have to go into the next one. So we are learning and already adapting.

The other area the commissioner mentioned was that the guidance materials need to be up to date. Now, the commissioner did not examine the guidance materials per se. He did not criticize our guidance materials but said we should examine them to see that they include the latest information on how to access cumulative effects.

● (1555)

[*Translation*]

Mr. François Lapointe: You say that the data he examined were from a few years ago. Can you tell me if we are talking about two years, three years, four, five, seven, eight years? Were the data he examined current as of 2008, 2006, 2002 or 2010?

[*English*]

Ms. Helen Cutts: The projects were from five years ago.

Mr. John McCauley (Director, Legislative and Regulatory Affairs, Canadian Environmental Assessment Agency): The commissioner looked at environmental assessments of oil sands projects that have occurred in the past that went back to, I believe, roughly 1999.

Mr. François Lapointe: Up to...?

Mr. John McCauley: Up to 2009, I believe.

[*Translation*]

Mr. François Lapointe: That's not so long ago; 2009 is quite recent.

Mr. John McCauley: True.

Mr. François Lapointe: We have talked about the way in which the Canadian Environmental Assessment Agency operates in Yukon, in Nunavut and so on. What agreements are in place for the little section of Quebec that is north of 60? How does that work?

[*English*]

Ms. Helen Cutts: In northern Quebec there is a James Bay agreement based on a land claim. There is a federal coordinator, and we work with the organization in the north to do environmental assessments. Our organization has a headquarters base and it has offices in Quebec, and our Quebec folks work to achieve those objectives.

[*Translation*]

Mr. François Lapointe: Thank you for those clarifications.

[*English*]

The Vice-Chair (Mr. Claude Gravelle): Thank you, M. Lapointe.

It's now time for Ms. Murray.

Ms. Joyce Murray (Vancouver Quadra, Lib.): Thank you.

Thanks for your testimony today. I'd like to ask a few questions to better understand the review panel process and some of the distinctions between that and the comprehensive study. I'm going to use the example of a specific panel, and that's the Northern Gateway Pipelines panel that's happening right now. Who's the responsible authority for that project?

Ms. Helen Cutts: It's the National Energy Board.

Mr. John McCauley: There is a number of them. The National Energy Board is one of the responsible authorities. The Department of Fisheries and Oceans and Transport Canada are also involved.

Ms. Joyce Murray: So the primary one is the National Energy Board.

Mr. John McCauley: That's correct.

Ms. Joyce Murray: I understand that panellists for a review panel are selected by the Minister of the Environment. In this case, are they selected by the National Energy Board?

Mr. John McCauley: This is a joint review panel, so it's established jointly with the National Energy Board. There's an agreement that describes the relative responsibilities for appointing members. I believe in this case the minister appointed one member, the National Energy Board appointed the second member, and they both appointed the chair.

Ms. Joyce Murray: I was taken by the comment that these review panels have an independent group of panellists. But in this case we have three and the minister had a hand in two of them, so it's kind of a political appointment.

Mr. John McCauley: The act requires that panellists be free of bias and have a background relative to the environmental effects that are expected from the project. So they have to have expertise relative to the project.

Ms. Joyce Murray: In how many cases has a review panel initiated by the National Energy Board actually recommended against a project as opposed to approving it?

Ms. Helen Cutts: I don't have those statistics with me. I can say that—

Mr. David Anderson (Cypress Hills—Grasslands, CPC): I have a point of order.

These folks are not from the National Energy Board. We're going to have them in later, and a question specific to them should probably be kept until that time. We can't expect these folks to answer questions about the National Energy Board.

The Vice-Chair (Mr. Claude Gravelle): Well, if the member from the Liberal Party wants to ask those questions, all the witnesses have to say is that they can't answer them.

Ms. Joyce Murray: The witnesses are from CEAA, which is a partner in this joint review panel, so I think it's a reasonable question.

My understanding is that something like 98% of the studies or the panel projects have been approved, but I haven't verified that number. I wonder if you could let the committee know what the number is when you've researched it.

I'm also interested in the comprehensive study. When you talk about a “thick document”, it sounds as if there's quite a bit of research going into it. There may be several annual cycles of wildlife impacts. With a panel, however, it seems to be more the public involvement that's expressed. Does a review panel have a similar level of scientific assessment of the potential impacts of a project, in comparison with a comprehensive study?

● (1600)

Mr. John McCauley: The factors that go into the environmental assessment are exactly the same in a comprehensive study and a review panel. Each would involve the same level of scientific analysis.

Ms. Helen Cutts: The same scientists would be participating in both occasions. For example, if there was information required about migratory birds, then the experts at Environment Canada would be feeding it into the comprehensive study process. If it was an independent panel that was carrying out the work, in their panel hearings they would ask the Environment Canada scientists to appear.

Ms. Joyce Murray: Is it the panellists who determine just how much research is needed to reach a conclusion?

Mr. John McCauley: When the panel's established, there is an agreement, and attached to the agreement are terms of reference for the panel, which lay out the factors the panel needs to consider in their evaluation.

Ms. Joyce Murray: Who sets the terms of reference?

Mr. John McCauley: It's the minister along with, in a case like that—

Ms. Joyce Murray: So the minister can decide how big it should be through the terms of reference set for the panel.

Ms. Helen Cutts: Yes, subject to the requirements of the act.

Ms. Joyce Murray: So whether it's a large set or a narrow set, the scope of it is determined by the minister.

Mr. John McCauley: The panel has to satisfy itself that it has received sufficient information to be able to proceed.

Ms. Joyce Murray: Yes, but the scope is set by the minister essentially and the panellists are chosen by the minister.

In the material it talks about the responsible authority being the one that would ensure implementation of any mitigation and follow-up. In that case would it be the National Energy Board?

Mr. John McCauley: In the case of the Northern Gateway project, it would be the National Energy Board, along with the other responsible authorities, Fisheries and Oceans and Transport Canada. Together they would decide who would be responsible for ensuring which mitigation measures....

Ms. Joyce Murray: Okay.

I come from a British Columbia provincial government background. When an agency is responsible for monitoring mitigation or follow-up, that ministry is not implicated but it has an economic responsibility. The environment ministry audits or monitors the data of that party. Is that the case here? Does the ministry of the environment or CEAA have any oversight or any monitoring of the responsible authority that they are actually doing their job to the level that's been expected?

Mr. John McCauley: No. The model in the act is based on the department that takes the decision to be responsible. We do—

The Vice-Chair (Mr. Claude Gravelle): Thank you.

We're going to have to cut it off. It's been seven minutes.

Mr. Calkins, you're up next.

Mr. Blaine Calkins (Wetaskiwin, CPC): Thank you, Chair. You're doing a great job.

The Vice-Chair (Mr. Claude Gravelle): This is the easiest job around the table.

Mr. Blaine Calkins: Thank you for being here.

My colleague Ms. Murray and I were on the environment committee in the last Parliament. Of course, we had some fairly intense discussions about various things.

Could you tell me, is the Canadian Environmental Assessment Act up for review right now? Is it one of the acts that has a required statutory review?

Ms. Helen Cutts: Yes, it is up for review. The review is expected to start in October.

Mr. Blaine Calkins: Have we heard yet who's conducting the review? Has it been delegated to anybody yet? Does the act prescribe who does the statutory review?

Ms. Helen Cutts: The Standing Committee on Environment and Sustainable Development.

● (1605)

Mr. Blaine Calkins: Well, that's good. I'm glad I'm on the natural resources committee. I'm sure the folks on the environment committee are looking forward to that.

I have a couple of questions for you about the screenings and the comprehensive studies. You say you get about 6,000 of these assessments per year. We know what the triggers are. You clearly outline what the triggers are: if there's federal money involved, if the Government of Canada is a project proponent—whatever the case might be. Does that number stay fairly consistent?

Ms. Helen Cutts: It does, in part, because one half of them are related to moneys that are given by the Business Development Bank and the Farm Credit Corporation. So when they're lending money, every loan requires that they have this environmental assessment done.

Mr. Blaine Calkins: Does that extend to loans backstopped through private banks or just to those financial institutions like Farm Credit and the Business Development Bank of Canada?

Ms. Helen Cutts: Just those two.

Mr. Blaine Calkins: That's good to know.

You mentioned that you have these three different levels. You have the screenings and so on. Each of these has different costs associated with them. I think the most cost-effective one is the screening.

In the last couple of years we had Canada's economic action plan. You touched on it briefly. There were some changes made to the Canadian Environmental Assessment Act in Budget 2009, I believe it was, which actually changed some of the requirements that would trigger a Canadian Environmental Assessment Act.... Were those sunset clauses or were those permanent changes to the Canadian Environmental Assessment Act, and what did they apply to? They simply applied to municipal infrastructure projects, did they not? They wouldn't have applied to any of these private sector projects. Is that correct?

Ms. Helen Cutts: The exception was boxed in very tightly so that the government could move forward in an efficient way on the municipal infrastructure projects. In the 2010 amendments that clause was removed.

Mr. John McCauley: We scheduled to the act, actually, the projects that were excluded by virtue of—

Mr. Blaine Calkins: Okay, so we know what those were. It was there for a short term and it was there to implement economic stimulus, but those have since been closed back off after the stimulus program was ended. Do I understand that correctly?

Ms. Helen Cutts: Yes, that's my understanding.

Mr. Blaine Calkins: Okay, that's good. And none of that would have applied to any of these other types of private sector projects. Those were strictly just municipal infrastructure projects. Is that right?

Ms. Helen Cutts: That's right.

Mr. Blaine Calkins: The gist of our study now is obviously about resource development and some of the factors that are facing us in the north. At the last committee meeting I asked the department officials who were here from Natural Resources about how long a project proponent might take from a concept right through to getting a shovel in the ground, and they said up to five years. These things change based on the complexity of the application and so on. And I have to tell you, as a member of Parliament, I had lots of phone calls from municipalities and so on when we went through the economic action plan, that things were sitting on somebody's desk somewhere in Ottawa waiting to be approved.

Can you tell me at what point the Canadian Environmental Assessment Act is involved? In that anywhere from a three- to five- or a three- to seven-year average on a five-year project? About how much time does this have to spend on the desks in front of folks administering the Canadian Environmental Assessment Act? Is it a large portion of that five years, a short portion? Does it change? Is it a dynamic thing based on the level or the nature of the application?

Ms. Helen Cutts: In the past year our emphasis has been on ensuring that the whole process that is public servant time is 365 days, from—

The Vice-Chair (Mr. Claude Gravelle): I'm afraid I'm going to have to interrupt because our time is up.

Mr. Blaine Calkins: Okay. I withdraw my comment about your doing a good job, Mr. Chair.

Voices: Oh, oh!

The Vice-Chair (Mr. Claude Gravelle): Mr. Trost.

Mr. Brad Trost (Saskatoon—Humboldt, CPC): Thank you for this. I was just wondering about one thing. As these things are done, I wouldn't want this to add more cost to it, but that is one of the things. What is the cost of when these things are done? Is there ever any sort of economic question or economic criteria applied when there are any of these screenings or assessments as it goes up the ladder? Or is purely the impact to the environment the only criterion applied to every element under the act?

● (1610)

Ms. Helen Cutts: Under the act we apply only an environmental lens. However, we do look at indirect effects on socio-economic conditions, and by "indirect" I mean if the project causes an environmental effect and that environmental effect in turn brings about a socio-economic effect, we would look at it.

So if a river or stream or lake was going to be destroyed and an aboriginal group was dependent for its income and its livelihood on fishing in that area, then that would be an economic effect that followed from the environmental effect, but we would not look directly at the economics of the development.

Mr. Brad Trost: So if I'm understanding you correctly, then, you would look at potential damage, but you wouldn't, say, look at the potential for growth or opportunity. If we put in a mine someplace in northern Saskatchewan, what that could do to change the socio-economics of the northern community, that positive element, wouldn't necessarily be looked at. It would only be what—

Ms. Helen Cutts: I wouldn't say it's only the negative side that's looked at; I would say that it's the indirect side. So if the environmental impact on a particular group or individual was positive, that would factor in as well. It could be a positive or a negative effect from the environmental effect.

Mr. Brad Trost: Okay.

Now, economic impacts are often fairly subjective, so I'm assuming that wouldn't necessarily be at the screening level. That would be more at the comprehensive level. This would be something that you would then give up the line to the minister and he would have to make a judgment call on this. Am I understanding that correctly? Or is it broader in how it's interpreted?

Ms. Helen Cutts: According to the act, we want to look at all the environmental effects. So we would look at the environmental effects in terms of loss of habitat, loss of ability to hunt, for people who want to hunt in that region. The comprehensive study would be structured with headers for all these different effects, and the minister would not be briefed separately on any of the socio-economic ones. He would read the whole report as a whole and would make a judgment as to whether there are overall adverse environmental effects from that project.

Mr. Brad Trost: He would see the recommendations, but he would not be bound by anything. He could make a decision subjectively at that point?

Ms. Helen Cutts: I'm cautious about saying that the decision is subjective, because the decision is based on a huge amount of research and science. He receives a recommendation that says on the basis of the information that has been collected from all of the stakeholders, there are or are not adverse environmental effects.

Mr. Brad Trost: But he could, if he wanted to, choose to interpret it in such a way that may not be what everyone else would interpret from reading the evidence. Would that be a way to put it? He's not necessarily bound by the recommendations of the evidence presented to him.

Ms. Helen Cutts: I would say he would have that freedom, but he's bound also by the court of public opinion. He would have to be able to justify a decision, to explain whatever he was calling for.

You may be interested in a circumstance. If the responsible authority thought that there were significant adverse environmental effects, they could take it to cabinet.

The Vice-Chair (Mr. Claude Gravelle): Thank you, but we're going to have to stop here and go to our next set of questions, from Mr. Saganash.

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, NDP): Thank you, Mr. Chair, and thank you to both witnesses for being here today.

I have a couple of questions, but I'm going to start with the federal-provincial cooperation that you talked about earlier, and how that works out in reality on the ground. I want to take an example from Quebec, for instance, where there is a hydroelectric development project being proposed. I know that Quebec has often taken the position in the past that a hydroelectric development is a provincial project and should be subject only to provincial assessment.

On the other hand, I know that any hydroelectric development has impacts on federal jurisdictions—navigable waters, migratory birds, fisheries, lands reserved for Indians, and so on. There are provincial jurisdictions that are affected by provincial projects.

How has CEAA assessed and dealt with these situations in the past? I know there have been harmonization agreements in the past, but, for instance, in northern Quebec, which you briefly mentioned, there is a treaty and there are environmental assessments and review processes that are applied for under the James Bay and Northern Quebec Agreement. How do we deal with those kinds of situations?

● (1615)

Ms. Helen Cutts: We have a good working relationship with our provincial colleagues in Quebec, and the legislation of each order of government is something that each government respects. Our Quebec colleagues understand that if there is something in our act that calls on us to be at the table doing an environmental assessment, even if they have views that maybe hydroelectric is really within their domain, if it's in our comprehensive study list that we need to assess it, they understand that we're in the game. It's in their interests and ours to work together. That has been our practice as much as possible.

Our ability to work with the provinces has been augmented in the last couple of years in part because of the MiningWatch decision. Very briefly, this was a Supreme Court decision that clarified the scoping of a project. Prior to that decision, there were delays in scoping the project among federal officials, and often a provincial process was ready to begin and the province didn't want to hold up its own development and could not wait for the federal government to sort out its scoping issues. Now, with the scoping issue resolved, we're ready to start our work at the same time as the province, and it's working quite well.

[*Translation*]

Mr. Romeo Saganash: I would like to ask our two witnesses another question. In Canada today, there is a constitutional aspect to deal with; it is called the “duty to consult with aboriginal groups“.

I would like to know, from your point of view, how that constitutional aspect has been accommodated now that it is a legal reality today everywhere in Canada. How are you including that constitutional aspect in the process of assessing and studying the projects that you have to undertake? Is it just by having aboriginals come as witnesses to proceedings that are already under way, or can they play a real role in the process as panel members? How has your department included the constitutional requirement that is in effect today?

The Vice-Chair (Mr. Claude Gravelle): I am sorry, but you will not have time to answer that question. Your five minutes are up.

Mr. Lizon.

● (1620)

[*English*]

Mr. Wladyslaw Lizon (Mississauga East—Cooksville, CPC): Thank you.

I have a question regarding public participation in environmental assessments. How does the CEAA support this participation and how does it work?

Ms. Helen Cutts: We have a funding envelope for public participation. We have two elements of the envelope. One is for aboriginal participation and one is more general.

We have an application process that essentially asks people to write in and describe why they need participant funding. They will describe the types of areas for which they need money. They might need money to travel to a hearing. They might need money for some expert advice and for time to consult with their members. A committee that is partly external to our agency and has a variety of players on it then makes the determination on how much of the funding element should go to this applicant versus that applicant.

Mr. Wladyslaw Lizon: Is there a requirement that certain projects include public participation or is it up to the panel to decide?

Ms. Helen Cutts: Everything that is for a panel or for a comprehensive study is eligible for participant funding. There is no judgment on our part that some of them are more worthy or not. As long as it's a comprehensive study or a review panel, it's eligible.

Mr. John McCauley: Maybe I could add that the act identifies for comprehensive studies certain requirements for public participation at certain points in the process. Similarly, for review panels, the entire process is a public process. For screenings, though, it is at the discretion of the responsible authority to decide whether and how to consult the public.

Mr. Wladyslaw Lizon: Next, if there is any work on the environmental assessment that overlaps at the provincial and federal levels, how do you ensure that it is coordinated and harmonized so the same work is not done twice?

Ms. Helen Cutts: We have bilateral agreements with the provinces to say generally how we're going to work together, but then when we go in on a particular project, we set out a particular project agreement. We'll say, "All right, in your province you have a public hearing 30 days after this benchmark, and we typically have it 60 days after this benchmark, so let's agree that we're going to hold our public hearing at this point."

We set out every timeline practically day by day. When we have to give guidance to the proponents on what information we need from them, we say, "Let's work together." We say we're going to spend a period of time deciding between our two levels of government what questions we are going to ask of the proponents, so they're getting one public hearing instead of two and they're getting one set of requirements. Then we work together in looking at those requirements. If we have further questions, we go out as one voice to clarify. That's how we try to make two processes into one.

Mr. Wladyslaw Lizon: Thank you.

The Vice-Chair (Mr. Claude Gravelle): We'll go to Madam Day.

[*Translation*]

Mrs. Anne-Marie Day (Charlesbourg—Haute-Saint-Charles, NDP): Thank you.

Could you tell me how aboriginal communities are going to be made part of the process; are they included in working groups, are they invited?

[*English*]

Ms. Helen Cutts: The constitutional duty to consult aboriginals is independent of the act. What we do is integrate aboriginal participation right into our environmental assessment process. At various stages we go out and consult with aboriginal groups. We consult with them at the very early stages when we are first getting in a project proposal. I think there about four different occasions—

● (1625)

Mr. John McCauley: At least.

Ms. Helen Cutts: —when we ask aboriginal groups to state their views. The agency itself works as the crown consultation coordinator for the whole of government. Instead of having a process that is very distributed—having somebody at DFO and somebody at Transport and somebody at NRCan, each individually going out and consulting with aboriginal groups—CEAA plays a coordinating role so that we can listen to what the aboriginal people are saying about the environmental effects. We don't ask them only how it is affecting them right now; we ask them about their traditional knowledge and how best to mitigate the potential effects. We see them as experts in areas that are going to help us get to a better environmental outcome.

We also work very closely with the Department of Aboriginal Affairs and Northern Development to ensure that on any project we are reaching out to all the aboriginal groups that could be affected by that project, whether they have a land claim that is asserted or is final.

[*Translation*]

Mrs. Anne-Marie Day: In terms of environmental decisions, you mentioned that mitigation measures are taken into account. When there are mitigation measures after an environmental study, how are they received by the promoters? Can you give us some examples?

[*English*]

Ms. Helen Cutts: Do you want to know the exact types of mitigation a proponent would be asked to carry out? I'm not very good with my examples. You have worked in this a bit more.

Mr. John McCauley: Essentially, as part of the environmental impact statement the proponent would prepare, they commit themselves to a series of measures. While the impact statement is being reviewed by expert departments, they may suggest additional measures, and those would be agreed to by the proponent. At the end of the process, there may be additional measures identified that are necessary to reduce impacts to non-significant levels, and those would be, again, communicated to the proponent. The expectation would be that the proponent would be implementing those measures.

Ms. Helen Cutts: I thought of a concrete example. The types of mitigation are really of two types. Some of them are during the construction phase and some of them are permanent. During the construction phase, there could be a concern that nesting birds are going to be disturbed. The scientists would tell you at what stage the birds are nesting and then would require the proponent to commit to not carrying out any construction activities during that period, say May 1 to June 30.

Mitigation measures can be very specific to a specific time in the year. They can be about how to replace a stream that's been damaged or about how to provide alternative habitat.

[*Translation*]

Mrs. Anne-Marie Day: As a project of such a huge scope as the oil sands was being developed, environmental studies were conducted. The project has negative consequences. There is a lot of talk about them these days.

The Vice-Chair (Mr. Claude Gravelle): Thank you, Ms. Day. You have used your five minutes already.

[*English*]

I'm curious about this. You said that you have bilateral agreements with six of the ten provinces. Is Ontario one of those provinces?

Ms. Helen Cutts: Yes.

The Vice-Chair (Mr. Claude Gravelle): All right. Thank you.

Mr. Anderson, you're next.

Mr. David Anderson: Thank you, Mr. Chair.

I see we're almost at the end of our hour.

Mr. Calkins asked you a couple of questions about timelines. What timelines would proponents expect if they're doing a screening, if they're doing the study, and if they're doing the full review? What are the average timelines for each of those? Do you know?

Mr. John McCauley: There's no legislative or regulatory requirement for a timeline on screening. I don't know what the practice has been. For the 6,000 projects, it can range from fairly simple developments to more complex ones.

We have a regulation for comprehensive studies that requires our agency to complete its work within 365 days. It does not include the time the proponent may be carrying out its study. Our clock would stop while the proponent is carrying out its analysis.

In the context of our review panel, there are no timelines in the legislation. The agreement that usually sets out the panel would identify for the panel the timelines it must respect when it carries out its work.

● (1630)

Mr. David Anderson: What would be the usual average?

Mr. John McCauley: It's typically 12 months to 14 months.

Mr. David Anderson: The reviews typically don't take much longer than the studies.

Mr. John McCauley: No, we're in the same ballpark.

Mr. David Anderson: The screenings could range from somebody signing off to say the land is clean in terms of a loan from FCC to something that might be much longer.

Mr. John McCauley: The act has a requirement for a pause of 30 days once there's a notice of commencement. We have an Internet site registry where all projects are identified and which the public can access. There's a 30-day period between a notice of commencement and a decision. The shortest timeframe would be 30 days.

Mr. David Anderson: What's the average?

The Vice-Chair (Mr. Claude Gravelle): Mr. Anderson, it's 4:30.

If the committee wants to, we can let you finish and add five minutes at the end of the meeting. It's up to the committee to decide if they want to go for an extra five minutes at the end of the day.

Mr. David Anderson: It doesn't matter. I think you had suggested that the witnesses may stay at the table. We can change over and move on.

The Vice-Chair (Mr. Claude Gravelle): All right.

We're going to take a one-minute break. It is the interest of the committee that if the two witnesses would like to remain for the other presentation, they may certainly do so. We'll take a one-minute break and give Mr. Hudson time to set up.

Thank you.

● (1630)

(Pause)

● (1630)

The Vice-Chair (Mr. Claude Gravelle): Mr. Hudson, would you like to start your presentation? I understand you don't have hard copies for us, but that's fine.

Mr. Michael Hudson (Deputy Assistant Deputy Attorney General, Department of Justice): I understand you wanted to have a brief presentation on the duty to consult as a legal duty. I will spend a few moments on that.

When everyone thinks of natural resources in this country, your mind will automatically go to aboriginal peoples and the connection they may have to those resources. That is not a surprising feature because the place of aboriginal people in Canada has been a defining feature of this country for over 500 years. Nearly from the beginning, consultation between the crown and aboriginal peoples has been a hallmark of that relationship. From the making of treaties in the 18th century, from the surrenders of traditional lands by treaty to the use of Indian lands under the Indian Act, and more recently on section 35 and the justifications for infringements on traditional harvesting rights, consultation has been a key tool for the crown to justify its actions.

It was not surprising about seven years ago that the Supreme Court of Canada, in a series of landmark decisions, articulated a legal duty to consult on the part of the crown in order to justify its decisions that could have adverse effects on aboriginal peoples. Those decisions were the Haida Nation decision, Mikisew Cree, and the Taku River. What they articulated was a duty on the part of crown decision-makers to be informed of the implications of their actions on aboriginal people and their interests before they make decisions. This, as I say, was not a totally unique or new development, but it raised the stakes considerably for decision-makers. At its heart was a desire by the courts to ensure those decisions were well-founded, well-justified, and respectful of that relationship.

In practical terms, there was a period of some time after the court articulated that legal duty when there was some uncertainty among regulators as to what exactly they had to do. On the one hand, you had some who were fearful that this meant a complete rewriting of the regulatory regime of Canada. On the other hand, there was an extreme of people who thought it meant nothing, that it would simply be one more factor that would really have no consequence. In reality, what the court was calling for was a meaningful consultation with aboriginal people where decision-makers would pause and take into account what the issues at stake were, what the adverse impacts could be of their decisions, and then to make accommodations before a final decision was made.

The government's response was articulated in 2007 with its action plan on how the duty would be integrated into decision-making across the government. Those interim consultation guidelines were updated earlier this year, in March 2011.

I would like to pause now to run through the major steps the courts apply in terms of how the duty to consult is defined and then fulfilled by government decision-makers. It is important to stress that this is a legal duty; this is not discretionary. That is not to say that it is an impediment to either decision-making or to efficient and timely decision-making. I have often said to clients that meaningful consultation doesn't need to be a process without a time limit or something that provides a veto to an aboriginal party. It is being able to justify to a third party—in this case, the courts—that you have made an honest, reasonable effort in light of the stakes for the aboriginal party and the risk of the adverse impact of your decision to factor that into your decision-making process.

● (1635)

There are three key elements that need to be considered: crown conduct, potential or established aboriginal treaty rights, and potential for adverse impacts.

As for crown conduct that could trigger the duty, there are literally tens of thousands of actions by government officials at the federal level that could theoretically have an impact on aboriginal people. But in reality what the court is looking for are those actions that will have a true impact. These include land disposals, for example, which could affect aboriginal interest in lands; regulatory activity, such as assessments, which could lead to approvals or permitting, which would permit activities that could have an adverse effect on the aboriginal people.

The second element is the potential or established aboriginal rights or treaty rights. Here again, it could be that an aboriginal group with an interest in a project or in the treatment of land or a resource will articulate its opposition to the project. So the regulator or the decision-maker inside the government has to ask themselves whether there is truly an interest at stake here that relates back to section 35 of the Constitution Act, protecting aboriginal and treaty rights, which in short are mostly the traditional harvesting rights that one would expect to see as centrepieces of aboriginal culture in the past and into the present. So that second element isn't simply that an aboriginal party has an interest but that the interest relates back to section 35 and traditional activities.

The third element is potential adverse impacts. Not every decision that is made is necessarily going to have an adverse impact on the interests of the aboriginal party, but many will. So, for example, a decision to permit the construction of a pipeline that would cross an area in which traditional activity such as harvesting of caribou takes place should cause the decision-maker to ask themselves whether this is a situation in which there is a duty to consult. Changes in regulations that could change land use would be another example, as would decisions about pollution that could affect flora or animal populations.

When you add up those three elements, though, a spectrum is created. Consultation is a very generic word. At one end of that spectrum there could be a relatively weak claim by an aboriginal group. Interest might not be particularly tied to a type of fish or a type of animal to be hunted or an activity on land. The average impact is going to be very weak as well and might simply be sharing information, posting information, or sending a mail-out.

At the other end of the spectrum there could be a very strong claim if, for example, a court had recognized an aboriginal title right to land and there was going to be a decision that would permit a very destructive activity on that land. One would expect there to be a strong, meaningful consultation process. It wouldn't be a veto, but there would be an expectation of accommodation measures that would be commensurate with the negative impact on the interest.

Thank you, Mr. Chair.

● (1640)

The Vice-Chair (Mr. Claude Gravelle): Thank you very much. Before we proceed to questions, I'd like to take the time to thank Mr. Hudson and Ms. Kellerman for being here today.

Thank you very much.

Mr. Anderson.

Mr. David Anderson: Thank you, folks, for coming out. This is of interest to us as the committee is doing its study on resource development in the north.

From what you're saying, I'm thinking there is no set structure to the consultations. It depends on the situation. Is that accurate?

Mr. Michael Hudson: It is highly dependent on the facts of the situation: who is the group, what are they claiming, what activity is being entertained by the government in terms of their approval, and what would be the likelihood of an adverse outcome?

● (1645)

Mr. David Anderson: Is that lack of set structure then seen to be affected by both the proponents and the aboriginal communities, do you think?

One of the objectives of the committee is to try to get the information, but also then to make recommendations about how things could be done better in terms of resource development. I'm interested in your answer.

Mr. Michael Hudson: I'll have to give my impression based on communication with outside parties.

My own observation, from having spoken with both aboriginal groups and industry, is that it's far from perfect, in the sense that it would be great to have a code to simply pick up and follow all the rules. The nature of the consultation duty and the fact that it is often very case specific doesn't lend itself well to a code.

Having said that, I think the government has been very successful in recent years in using the interim guidelines to lay out in a great deal of detail for both project proponents and aboriginal peoples how information that each of them provide will be integrated into the decision-making within the government.

I also take some heart by looking at the fact that right after the decisions came out of the Supreme Court in 2005 there was great uncertainty on both sides as to what this would look like. We're six years into it, and most sophisticated resource companies that I see have invested a lot of effort and have incorporated this into the way they do business. I would say probably not.

Mr. David Anderson: We just heard that EAs are tiered. You've got the screenings, the studies, and the reviews. Has there been any thought...or do you think it would be a model for a duty to consult to have, if you want to call them, tiers or levels of requirements in terms of consultation, or are you saying that would be beyond people's expectations?

Mr. Michael Hudson: I'm speculating. Theoretically, it could be constructed that way.

The interim guidelines that were issued in March of this year do a fairly good job of setting out that spectrum in terms of what would necessarily be recorded in any stage. I suspect when proponents and aboriginal groups look at that document they would have a good sense of where they fit and how to proceed.

Mr. David Anderson: I had a chance to tour some northern communities a few years ago in my role as a parliamentary secretary, and one of the things we were told by one person we met with is that when it comes to projects in terms of the EAs, they have a stack of paper this high. They need to work their way through, and when it comes to duty to consult, they have this much. I don't really understand where we need to go with it.

They suggested there could be a better balance of the two. Is that an accurate reflection of the situation?

Mr. Michael Hudson: To be honest, I don't know. Much of the same information would be relevant in both.

Mr. David Anderson: You talked about adverse impacts. We had the question in the last hour. Do you consider positive impacts when you're doing duty to consult or a requirement to duty to consult? Are positive impacts considered in the same light as adverse impacts?

Mr. Michael Hudson: The duty to consult as articulated by the courts isn't articulated that way, because of course the courts were concerned with activities that would have a negative impact on the aboriginal community.

The way I see client departments approaching the issue, I would say with some confidence that they're well aware that a minister or a decision-maker has to take into account many factors to make the best possible decision.

The opportunities and the positives, I would think, should be given at least as much weight in decision-making as a potential adverse effect.

Mr. David Anderson: What role does the Department of Justice then play in the duty to consult? Is this left to the proponents who are going into a community to sit down with the communities and consult with them?

What other departments do you interact with, and how do you interact with them in terms of the duty to consult?

Mr. Michael Hudson: We provide legal services to all federal departments and agencies. In terms of the duty to consult, our approach is really no different. They will come to us with specific questions.

Since the decisions came out from the Supreme Court, we've invested quite a bit of effort to train other departments, to have them better equipped to understand their obligations, but also not to be afraid of them, not to paralyze regulatory processes. They are then better equipped to make the best possible decisions that will withstand challenges in the courts in the future.

They will come to us occasionally for assistance on things like strength of claim, like how strong is the case that could be presented by an aboriginal party, to help us decide how significant the consultation process should be.

I don't know if that answers your question.

● (1650)

Mr. David Anderson: I think it does to some extent.

If it's a private project, do you get involved in that as well? Do you provide resources for folks? Do you direct the process, or are the private partners and the communities able to make their own agreements?

Mr. Michael Hudson: My department would not get involved in that.

Mr. David Anderson: So you're only involved if the federal government is involved in the process itself.

Mr. Michael Hudson: That's right.

Mr. David Anderson: What's the average timeline for one?

Mr. Michael Hudson: For a process? I'm not in a position to answer that.

Ms. Joanne Kellerman (General Counsel, Legal Services, Department of Natural Resources): It would normally be integrated into the other review processes for a project, so the comments you had concerning the overall environmental assessment period would include duty to consult activities and parallel—

Mr. David Anderson: Would you find yourselves, then, participating more at the study level and the review level, or do environmental screenings bring in duty to consult in any big fashion?

The Vice-Chair (Mr. Claude Gravelle): Sorry, Mr. Anderson, I'm going to have to interrupt you.

Mr. Saganash.

Mr. Romeo Saganash: Thank you, Mr. Chair.

I participated for 23 years at the United Nations during the discussions on the UN Declaration on the Rights of Indigenous Peoples, which are now international norms. The issue of duty to consult was also involved in that process, but I'll come back to that.

I would like know how the principle of the crown's duty to consult is applied to different federal departments. Are there general principles that each department has to apply whenever issues of duty to consult are involved?

Mr. Michael Hudson: It's the same Constitution, it's the same section 35, it's the same legal duty to consult that applies across the entire crown, as manifested through individual departments. So to answer your question, it's the same everywhere.

I refer to the interim guidelines on the duty to consult. It is designed to be a horizontal mechanism to inform decision-making in all government departments. At the same time, some departments have taken these and developed their own departmental codes on how best to guide decision-making to fulfill the duties of consultation. But it all springs from exactly the same legal duty.

Mr. Romeo Saganash: I know the government has taken a position with respect to the UN Declaration on the Rights of Indigenous Peoples. One of the principles that we find under this UN declaration is the concept of free, prior, and informed consent of aboriginal peoples whenever development takes place on their lands or territories. Is that a concept that your department will also include in this constitutional obligation to consult and accommodate?

Mr. Michael Hudson: The government's position is fairly well-known. The support that was acknowledged for the UN Declaration for the Rights of Indigenous Peoples was carefully worded to recall the concerns that Canada put on the record in 2007 at the United Nations about several of the terms in the declaration, including the one you're mentioning on free, prior, and informed consent.

The wording of the UN declaration comes pretty close to articulating a veto power for indigenous peoples in development projects. That is not at all where the law of Canada is. From 2007 forward, the government has repeatedly articulated that the conduct of public affairs in this country is under the law of this country, our Constitution, section 35, including the duty to consult. The UN declaration is not a legally binding document, so the “free, prior, and informed consent” provision that you refer to is of interest, but in practical terms, how section 35 is implemented in this country is much more significant.

● (1655)

[*Translation*]

Mr. Romeo Saganash: Do I have any time left?

The Vice-Chair (Mr. Claude Gravelle): Yes.

Mr. Romeo Saganash: Given that courts and judges are supposed to be impartial in this country, do you think that they should take counsel from the United Nations Declaration on the Rights of Indigenous Peoples as they interpret rights here in our country?

Mr. Michael Hudson: It would be no more than speculation on my part to say what judges in Canada should do. It would come as no surprise if they did consult international documents. We have a long tradition of documenting human rights too. They are actually all handled in the same way. That helps when interpreting situations here in our country. Referring to the declaration does not mean that judges are going to change their approach to section 35 in any fundamental way. But, as I have already said, this is nothing but speculation.

Mr. Romeo Saganash: In several provinces, human rights commissions are already referring to that declaration in order to interpret certain aboriginal rights. I think that the Supreme Court has also done so, on two occasions.

Could you tell me how the Crown's duty to consult with aboriginals can be made an integral part of environmental assessments?

Mr. Michael Hudson: I feel that we are already doing that. As my colleagues have mentioned, environmental questions and questions that affect aboriginal interests overlap considerably. It makes a lot of sense to use the processes that we already have, in this case the environmental assessment process, just as a matter of efficiency. Given the number of cases that have been brought before the courts and with my seven years of experience, I have a relatively good reason to hope that the decision will be to use existing processes to address aboriginal matters.

The Vice-Chair (Mr. Claude Gravelle): Thank you.

Ms. Murray.

Ms. Joyce Murray: Thank you for helping us to understand these things.

The Supreme Court decisions in the Delgamuukw, Haida and Taku cases are not just about the duty to consult aboriginal groups. The actual point is to consult them and accommodate their demands, is it not?

[*English*]

I was a bit surprised to hear you continually talking about it as a duty to consult. That might be the federal way of framing it. In British Columbia, we always use those two words together; it's consult and accommodate. So I am trying to understand more what that means, and I know you've been wrestling with explaining to us, so I'm going to go back to my specific example, and that's the review panel of the Northern Gateway Pipelines project.

I would guess it has a strength of claim in terms of the numbers of aboriginal peoples' territories that this line will cross and that the transport of oil in the waters will impact. The interest is strong, and I think there could be an argument that the risk of adverse impact is strong. Can you just paint for us the picture of what might be adequate consultation and accommodation in a case like that?

● (1700)

Mr. Michael Hudson: I hesitate to speculate about a project that is currently in process. If you permit me, I'll maybe use a slightly different example, the Mackenzie gas pipeline. There you have a very major project running through an area with many aboriginal people with not even claimed rights; they were real rights in the sense that they had been recognized and defined through land claim settlement agreements, with some groups not yet in that stage but with very strong claims.

The consultation process there was very deep. It was extensive information sharing at virtually every stage of decision-making. There was extensive information, considerable efforts by a number of departments to go out physically to visit communities to ensure that they had the information and understood it, and had money to hire experts so they were well informed when they provided their input back. And when the information started to come back, there was tremendous effort to collate it, understand it, and a sincere effort made to integrate it into the decision-making.

Then at the other end, the accommodation.... You're correct, I may be short-handing it to tell you about the right, the duty of consultation. I'm also from British Columbia, so I do appreciate that that's the way they articulate it there. But the accommodation is a second stage in the process. Once you have the consultation, once you truly understand what's at stake and have reflected upon what it means in your decision-making process, then you're better informed to consider what will be the accommodation that matches the issue, the interests at stake, and the adverse impact that I as a decision-maker may have on it.

Accommodation could be as simple as providing more information. It could be delaying a decision in order to provide more opportunity for input. It could be when you're getting up to the end of the spectrum where there's a significant physical impact on an interest, like a hunting and fishing right. It could be something like changing the route of a pipeline, giving directions on how it's to be constructed.

Ms. Joyce Murray: I have a couple more questions. I'm very interested in your response, and I'm not cutting that off because I'm not....

Is it possible that a decision could be appealed on the basis that the timeline given for a panel review—I think it's 18 months for this particular project—is simply not adequate to consult in a way that's appropriate to the strength of those elements of impact, interest, and claim?

Mr. Michael Hudson: It could, but I stress the “could”, because the courts are actually quite deferential to decision-makers.

Ms. Joyce Murray: Okay. I have another question about it.

Is it possible that the decision could be appealed on the basis of the fact that the Government of Canada has preceded the panel's work and the consultation by coming out in open support of this project prior to this constitutionally required consultation and accommodation and is the same government that has determined the scope of the review and the members of the review panel? Could that prior support for this project actually be a cause for appealing the panel's decision, if it's a decision that goes against what the first nations are asking for?

Mr. Michael Hudson: I wouldn't want to be accused of providing legal advice to the committee because of course that's not my position.

Ms. Joyce Murray: This is hypothetical.

Mr. Michael Hudson: As I was saying in response to your first question, the courts are actually fairly deferential to what they see as rigorous decision-making that makes an honest effort to take into account all the factors that are meaningful to Canadians. These are decision-making processes designed to make the best possible decisions for all Canadians, not for any particular group within the Canadian population. Hence there is a need for a lot of factors to be taken into account.

I would simply note that it's not unusual at all for governments to acknowledge the value of a particular project for something like the economic development of Canada. That doesn't stand in the way of decision-makers putting aside extraneous considerations in order to make a well-founded decision on the information before them. The courts generally know that and respect it.

As I said in response to Mr. Saganash, I take some confidence that in the last seven years we have not seen a tsunami of cases before the courts, and, even more importantly, we have not seen a lot of instances where the courts have struck down—

● (1705)

The Vice-Chair (Mr. Claude Gravelle): Thank you, Mr. Hudson. We're going to have to move on.

Mr. Allen.

Mr. Mike Allen: Thank you very much, Mr. Chair.

Thank you to our witnesses for coming here today.

I have a few questions, one of which, I guess, was left off when Mr. Anderson was questioning a while ago.

Are there triggers at each level—at the screening, the study, the review panel—where we trigger in a duty to consult process in all three? Or are there some where you don't have to do that?

I'd just like to understand what the trigger is, at each of those levels, where a duty to consult would kick in.

Mr. Michael Hudson: The short answer is no, there is no stage in any process where there would be no trigger. But a decision-maker needs to ask, at each stage in the process, what is the likelihood that my decision will have an actual impact on an aboriginal interest?

At many stages, particularly the planning stages, it's hard to imagine where the impact will be. As you're getting closer and closer to the final decision, such as emitting permits or making decisions that will authorize interference with physical things—land, water, resources—then yes, you're going to be more concerned about it.

Mr. Mike Allen: Okay, because that leads me to my next question. We have a mine project potentially getting started in New Brunswick. It received the terms of reference to start their EIA process, and it will take a year for them to get together and put in their report.

I have a couple of questions, maybe to each of our folks who are here.

Number one, Ms. Cutts, in the terms of reference for a joint provincial-federal project like that, where potentially DFO would be involved, would your group be involved in the development of the terms of reference for that EIA?

I would ask the same question of you, Mr. Hudson. Would there have been any consultation on duty to consult in the development of that terms of reference?

It just makes me wonder, if terms of reference are going to start and a company's going to start to build the EIA, whether that's going to be a moving target for them over the next year.

Ms. Helen Cutts: First of all, if there is a joint process with New Brunswick and the Government of Canada, then yes, we would definitely be involved in setting the terms of reference and working with our provincial colleagues. The terms of reference would say that you should seek out information from aboriginal groups so as to respect the crown's duty to consult.

Mr. Michael Hudson: I would second that approach.

As I said at the very beginning, if you're seriously looking at any natural resource project in this country that you can reasonably anticipate will have a physical effect on the environment, then it would be striking not to have factored in from the very beginning who the aboriginal groups are, what their interests might be, and what impacts there might be with regard to the various stages along the decision-making process.

Again, my observation is that most of industry has already incorporated that into their processes for anticipating regulatory approvals.

Mr. Mike Allen: I was involved in a highway project in New Brunswick a few years ago. On the front end of it, they engaged some of the first nations communities where the highway was going through in a traditional ecological knowledge study. That was done for the whole route of the highway. I guess in some of our federal-provincial projects...and that one would have been, because it would have been federal money going into the project.

Do you find, as part of your process, that doing some of these studies where they cross traditional lands suffice in the duty to consult, or do you find that maybe sometimes they trigger a lot more issues? What I'm thinking about is whether you'd have conflicts in the timelines because of things you might find during these traditional ecological knowledge studies.

● (1710)

Ms. Helen Cutts: Maybe I could comment on the timelines.

The timelines are legally binding on us. That doesn't mean we would rush through something in order to get the check mark that we met our 365 days. What would happen is if in the course of doing our consultations with aboriginal groups we found that the issues were very complicated and taking a long time, we would just continue the work beyond the 365 days.

The Vice-Chair (Mr. Claude Gravelle): Mr. Trost, you're up next.

Mr. Brad Trost: There's one thing that I'm curious about and that I don't totally understand, and that is how duty to consult is or is not affected when you have situations where there have been settlements and negotiations already done. I could see that under some of the very early treaties, which were done a considerable length of time ago, this wouldn't have been thought through quite as thoroughly.

With some of the more recent settlements that will have happened around the country—and we're particularly thinking of northern Canada—would there have been elements of organized duty to consult in their settlement packages and so forth? Could you give me a bit of background in explaining how this has or has not had an impact, and what would be important, particularly north of 60?

Mr. Michael Hudson: Well, the good news is that, yes, most of the north is covered by modern land claim settlements, and most of them—in fact, all of them—do contain provisions that anticipate the need to consult with aboriginal groups in decision-making, particularly around environmental assessment processes.

The less ideal news is that those provisions were negotiated before the Supreme Court of Canada had articulated this new common law duty to consult. There was in fact litigation. There was a decision last year from the Supreme Court of Canada—it was called Little Salmon—that addressed the question of what is the interplay between the common law duty and these established settlements.

In fact, the Yukon government—because it was in the Yukon—took the position that the treaty, the modern agreement, completely trumped the common law duty, so that you just looked at the foursquare of the agreement and had no other concerns. The Supreme Court of Canada disagreed. They did say that governments should be able to rely on the terms of the agreement to the extent that it overlaps with what the common law duty to consult involved. In many cases, that will be in fact sufficient, but it isn't completely a guarantee that you would never have to turn your mind to the duty to consult.

I'm fairly confident that the sophistication of the environmental assessment regimes under most of the modern treaties will be sufficient to address duty to consult as a common law duty, but it's a step that decision-makers have to think through.

Mr. Brad Trost: So to summarize for the non-lawyer here, basically it should be sufficient, but you still have to check to make sure that all the steps have been gone through.

Now, would that in any way be impacted for settlements that were made after the court decision? Or does the principle still go forward? Because after the court decision, that would be an element of the negotiations and the settlement, and they would work in this duty to consult as a definitive element—at least, I would think so.

Mr. Michael Hudson: Well, as I say, Little Salmon was only decided last year, so it's still a bit fresh, but the dispute itself had arisen a number of years ago with the Yukon government, and as soon as the dispute arose, people who were negotiating modern land claim settlements were much more attuned to the importance of articulating in the document itself, as much as possible, what exactly all the players had to do for consultation.

● (1715)

Mr. Brad Trost: Thank you. I'm done with my questions.

[*Translation*]

The Vice-Chair (Mr. Claude Gravelle): Thank you.

Your turn, Mr. Lapointe.

Mr. François Lapointe: On several occasions, our colleagues opposite have mentioned timelines. In your view, should we be concerned about the timelines or should we rather be making sure that the entire process is socially acceptable to the aboriginal groups?

Is it better to rush in and come up with development that could possibly lead to social unrest, or to take the time to bring everything to a satisfactory conclusion? Where do we draw that line?

Do you think that we should rush to stick to the timelines or should we do things properly?

Mr. Michael Hudson: I think it is important to make sure we get quality decisions. That is the goal. That is a decision-making process that gives results acceptable to all parties, to everyone with an interest in the outcome.

The time that an agency or a minister needs is one factor, but it is not the only one. A good decision can be made in a minute when those making it have all the facts before them.

Mr. François Lapointe: If we had to take six months, one year, or 14 months, would that be satisfactory as well?

Mr. Michael Hudson: If that were to result in the right decision, yes, it would.

As I told you, it can take a day or a year. The important thing is the quality of the process for gathering the necessary information that allows the decision to be made. That is more important than the time it may take.

Mr. François Lapointe: Ms. Cutts, correct me if you like, but I think it was said that aboriginal people are partners mostly in the joint approach to minimizing the negative impacts, but not at the time of the feasibility study.

[*English*]

Ms. Helen Cutts: Can you just rephrase it again, please?

[*Translation*]

Mr. François Lapointe: If I correctly understood the way in which we operate with aboriginal peoples, we treat them as partners and we try to get them to work with us to find solutions that will minimize the potential negative effects. Do they participate in the feasibility studies at times, or do they have no say at that point?

[*English*]

Ms. Helen Cutts: The study would include the suggestions of aboriginal people on how to reduce the environmental effects. The final decision wouldn't rest with the aboriginal people, but their advice and their considerations would be part of the report.

[*Translation*]

Mr. François Lapointe: So we consult them when the decision has already been made. Then we have to find a way to minimize the negative effects. That is when we get them involved in the process, not beforehand, during the feasibility study.

[*English*]

Ms. Helen Cutts: Feasibility study is not really an environmental assessment term, so that's where I'm getting stuck. It's not a French-English thing; it's the language we use in environmental assessment.

There are obviously different stages a project has to go through. At the early stages, the proponent has a particular project and he's written a description that explains what he plans to do. Through the consultation with aboriginal people and others, comments will be provided and that plan will be adjusted. The proponent might willingly suggest in which areas he's going to adjust his plan, and then, even beyond that, further consultation might determine that because the effects are so significant, additional mitigation measures need to be taken. So when the final decision is made by the government, it won't just say that he has a green light and can go ahead with this project. It will say that he may go ahead with the project subject to conditions such as that the proponent refrain from construction activities between these periods or that the proponent provide additional habitat for this species at risk, to replace the part that he's used.

● (1720)

[*Translation*]

Mr. François Lapointe: Thank you, Ms. Cutts.

The Vice-Chair (Mr. Claude Gravelle): Unfortunately, your time is up, Mr. Lapointe.

Over to you, Mr. Lizon.

[*English*]

Mr. Wladyslaw Lizon: Thank you very much.

I would like hear a little bit about the number of new jobs and the increased demand for labour that the resource sector, and specifically the mining sector, will generate as exploration and development of Canada's resources continue. In your experience, what is the reaction of first nations, the communities, to projects that will create jobs in the local community? And is this at all taken into consideration during the duty to consult?

Mr. Michael Hudson: There's an indirect connection. Again, my observation is that industry proponents for projects, anticipating the value of having support from aboriginal communities, put a great deal of effort into negotiating what we call interim benefit agreements, which are essentially documents to improve relationships with the aboriginal peoples in a particular area. There are many elements to the investments that companies are prepared to make in order to improve that relationship.

Now, it's not a way to avoid the crown decision-maker having to fulfill its duty to consult, but having aboriginal groups fully supportive of a project, for whatever reason—including, perhaps, that they see the value of economic development in that area—is an important consideration for a decision-maker. The nature of duty to consult is that if an aboriginal group does not agree with the project, they will have many stages at which they can voice that opposition, including, ultimately, bringing challenges in the courts against the decision that's being made by the government agency or minister. So an industry proponent would be well placed to identify the value of jobs associated with a project, and aboriginal communities themselves have to make the decision about whether they support or don't support a particular project.

I don't know if that answers your question.

Mr. Wladyslaw Lizon: It does. If I understand it correctly, even if such an agreement is in place with a proponent and a first nations group, the final decision may not necessarily be in favour of the project. Do I understand it correctly?

Mr. Michael Hudson: It's a factor that is of interest, of course, because it signals that the aboriginal community sees some value in the project. If I were a decision-maker, I wouldn't need to rely on the fact or absence of an interim benefit agreement because I would have the benefit of the views expressed by the aboriginal community itself, because they would be expressing it to me as a decision-maker.

Mr. Wladyslaw Lizon: Thank you very much.

The Vice-Chair (Mr. Claude Gravelle): You still have a minute and a half.

You'll take it? Okay.

Mr. David Anderson: I just wanted to ask both of you at the table, for our report, is there a difference in the way both the EA process and the duty to consult are done in the various territories and provinces? Do you find different ways of dealing with those two things, depending on where they're taking place?

Mr. Michael Hudson: Maybe I'll start.

In the early period after the decisions came out from the Supreme Court, there was actually a fair bit of variation amongst provinces, and between the provinces and the federal government. As time has gone on and more experience has been gained, there's a striking similarity and convergence of both the process and the criteria that we apply and the stages at which consultation will be worked out. There's been a natural migration to a common ground without any necessarily overt action by federal or provincial governments to say, "This is a common policy that we have."

Mr. John McCauley: I agree.

Mr. David Anderson: Thank you.

● (1725)

[*Translation*]

The Vice-Chair (Mr. Claude Gravelle): Ms. Day.

Mrs. Anne-Marie Day: The land is so big and the people are often several hundred kilometres from the places where a project is going to be established or a study is going to be done. How does the duty to consult work when the people are so far away?

Mr. Michael Hudson: I am sorry; I did not hear.

Mrs. Anne-Marie Day: You have a duty to consult aboriginal people. Sometimes, they are nomadic, or they live a long way from the site or the development. How does the duty work then? Do you consult the closest ones?

Mr. Michael Hudson: No, not necessarily. But I have to say that the distance between the community and a project would be a factor to consider. In a real sense, the fact that a community is a very long way from the site can imply that it is not intended to be involved in the consultations.

I am also thinking about a project in the north, in the Mackenzie Valley. In many cases, communities were not in their villages, especially during hunting season. They were out conducting their traditional activities. I feel that federal agencies have learned a lot from that experience. It has allowed them to find ways to communicate with the communities, first by going to them, then by choosing a time of year when most of the people are back in the villages. I believe that federal agencies have made serious efforts to engage in real dialogue with communities that are particularly affected by a decision.

Mrs. Anne-Marie Day: My second question is for Ms. Cutts.

Mr. Lapointe has asked you several times about the possible cuts. Of course, it will be difficult for you to answer, since everything is still hypothetical at the moment. But could we say that, in terms of project assessments, if cuts eventually come, they could result in additional delay or a reduction in the number of projects you can study?

[*English*]

Ms. Helen Cutts: I don't think I'm in any better position than anyone else to speculate on what cuts would mean. When we see what happens with our financial situation, we'll manage with whatever resources we have.

[*Translation*]

Mrs. Anne-Marie Day: My last question is for Mr. Hudson.

What would be the priority for improving the consultation process?

Mr. Michael Hudson: That is a huge question, but I would say that, for the departments, the best way to improve the consultation process would be experience, by which I mean getting to know aboriginal peoples, listening to their concerns and understanding the impact of the decisions that affect them.

Mr. François Lapointe: Mr. Hudson, you used very strong words, like meaningful, for example. So you are referring to significant, viable consultations. From what I gather from your remarks, that is an absolute priority.

What procedure do we use to work with aboriginal people and to ensure that the work has been significant and viable, as they perceive it? How, and when in the process, is that checked?

Mr. Michael Hudson: That is an important point. We have to be able to convince a third party, a judge actually, that the process was viable and that the effort made to consult the aboriginal people was significant. That is not a veto. Working with aboriginal people is not in itself necessary to make the decision a good one. Another test is in play. It must be shown that the process was bona fide and that it allowed the proper decision to be made.

● (1730)

The Vice-Chair (Mr. Claude Gravelle): Thank you, Mr. Hudson.

If the Conservatives have no further questions, we will have time for one quick question and a quick answer.

Mr. Romeo Saganash: I just want to clarify something with you. You say that there is a duty to consult when a project is going on near a community. Of course there is. But in some parts of the Côte-Nord, where the Innu live, for example, some projects affect their rights and their interests even if they are not going on directly in their territory.

Does the duty also extend to cases like that?

Mr. Michael Hudson: Yes.

[*English*]

The Vice-Chair (Mr. Claude Gravelle): *Merci*.

Thank you, witnesses, for coming out today.

I would like to remind the committee members that you must have your prioritized witness list in by the end of today, and that our next meeting is probably going to be on October 17.

Mr. David Anderson: We might have received a request to extend the deadline for witnesses until Friday. No? Okay.

The Vice-Chair (Mr. Claude Gravelle): Rick might have asked. Somebody might have asked.

Mr. David Anderson: It's fine with us if someone needs the extension, but that would be up to—

The Vice-Chair (Mr. Claude Gravelle): We'll give them the extension if they need it.

Thank you.

The meeting is adjourned.

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