THE MALISEET NATIONS OF NEW BRUNSWICK

Submission to the Federal Crown on the Proposed Approach to Crown Consultation

February 24, 2017

Introduction

We, the Maliseet Nations, have decided to submit comments on Canada`s Proposed Approach to Crown Consultations for the Energy East Project ("**Proposed Approach**") in unity. The Maliseet Nations of New Brunswick consist of: Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, St. Mary's First Nation, Tobique First Nation and Woodstock First Nation. Our communities and members share a common territory, history, culture, language, as well as Aboriginal and treaty rights. We share a deep relationship with our traditional territory and have embraced the duty of protecting it and ensuring that its use is in keeping with the values and beliefs of our ancestors and in the best interest of future generations.

The Maliseet, or Wolastoqiyik (people of the Beautiful or Bountiful River), have occupied the lands and waters of what is now called New Brunswick since time immemorial. The Saint John River basin, or the Wolastoq (Beautiful or Bountiful River), specifically, has long been, and continues to be, of central significance to our people. It is a key part of our traditional homeland and culture. We are physically and culturally connected to it. Our name, Wolastoqiyik, expresses this connection at the heart of our identity: we are the people of the Beautiful River.

In New Brunswick, Peace and Friendship Treaties were entered into with the Maliseet, Mi'kmaq and Passamaquoddy prior to 1779. Their sole purpose was to end hostilities and encourage cooperation between the British and First Nations. Our Treaties did not involve or purport to involve the ceding or surrendering of our rights to lands, waters or resources that were traditionally used or occupied. As such, we retain Aboriginal title to our lands, waters and resources. These rights are constitutionally guaranteed through section 35 of the *Constitution* and

have been strengthened by the Supreme Court of Canada's decision in *Tsilhqot'in Nation v British Columbia*.[1]

But, in the past century, our lands, water and resources have been increasingly exploited to the point that they are in serious danger. We have experienced considerable loss in our livelihood through this exploitation. Our lands, waters and resources have been and continue to be heavily impacted through settlement, resource extraction such as forestry, fishing and agriculture, environmental degradation, and highly restrictive government regulations. As a result of the cumulative effects of these projects and activities in our traditional territory, there are few accessible areas remaining for traditional uses and valued resources, which has caused significant challenges to the Maliseet people, our economy and our culture. The exercise of our Aboriginal and treaty rights and our ability to sustain a strong culture, traditions and way of life into the future depends on the continued existence of an adequately healthy land and resource base that we can access. If these resource pressures continue, we will no longer be able to viably exercise our Aboriginal and treaty rights.

The proposed Energy East Pipeline Project ("**Energy East**") is major and carries very serious risks. It has the potential to cause significant socio-economic, health and environmental effects and serious impacts to Aboriginal and treaty rights, including Aboriginal title. This is particularly true in New Brunswick where Energy East would be an entirely new build in territory where rights to land, waters or resources were never ceded or surrendered and which has already experienced significant loss through cumulative effects.

Canada's approach to consultation on pipeline projects has been fundamentally deficient, as confirmed by the Federal Court of Appeal's decision setting aside Cabinet's approval for the Northern Gateway Project in *Gitxaala Nation v. Canada*.[2] Unfortunately, the federal Crown's consultations on the Kinder Morgan Pipeline Project were not much better: Canada spent a bit more time consulting on that project and was a bit more responsive to Aboriginal concerns, but ultimately that consultation process was also rushed, incomplete, lacking in transparency and meaningful accommodations, and as with Northern Gateway, Canada's plan to approve Kinder Morgan Project was apparent long before consultation ended.

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[1] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 ("***Tsilhqot'in***")
[2] 2016 FCA 187 ("***Gitxaala Nation***")

Canada's Proposed Approach is very high level and unclear on a number of critical issues. It fails to establish that the federal Crown's Energy East consultations will be any better than those that took place for the Northern Gateway and Kinder Morgan Projects. Specifically, our overarching concerns relate to:

- The prematurity of the Proposed Approach. The Proposed Approach is being put forward before the process steps of the National Energy Board ("**NEB**") environmental assessment ("**EA**") for Energy East are known and before the review of the Expert Panel on EA processes is completed. In other words, before knowing how these pertinent processes will unfold and otherwise affect consultation; and
- the lack of clarity and transparency throughout the entire Proposed Approach.

What follows are key principles that the Crown must respect in consulting with Aboriginal peoples on Energy East and that Canada's Proposed Approach, particularly in light of its recent track record, fail to adequately address.

Concerns with National Energy Board Review of the Energy East Proceeding Prior to the Conclusion of the Federal Review Processes

It is our stance that the NEB EA of Energy East should be put on hold until the review by the Expert Panel on EA processes is completed. Ideally, it should be postponed until new legislation is in place and the Energy East EA should be undertaken under the new legislation. This is appropriate given the complete lack of faith of most Aboriginal peoples and many other Canadians about the current EA process and the fact that the Energy East EA needs to start over anyway. At a minimum, the NEB EA for Energy East should be postponed until the Panel's report is delivered (at the end of March) to determine what recommendation could be made immediately. However, should it be decided that the NEB EA for Energy East should proceed before the review by the Expert Panel on EA processes is completed, then below are our issues with the Proposed Approach and how they should be addressed.

Neglected Consultation Principles in Proposed Approach

Consultation Steps Known in Advance

The Crown has been increasingly relying on regulatory bodies to fulfill portions of its constitutional duty to consult, which will occur for Energy East. As is outlined below, we have

very serious reservations about the adequacy of the NEB EA and the fact that the NEB is not an appropriate body to lead EAs or undertake any steps of consultation. Notwithstanding these reservations, if the NEB EA is going to be relied on to fulfill portions of the duty to consult, it should not be relied on to fulfill the entirety of the duty. Simply put, hearing processes are not enough—merely sending in comments to a decision-maker and making presentations is not enough to meet the high standard that is required. Frequently, and as is the case for Energy East, the Crown relies on steps taken outside of these review processes to supplement the duty to consult. These further steps in consultation are often not clear and are certainly not clear for Energy East. All that has been provided to us is a vague flow diagram and very general details provided in the Proposed Approach. There should be a requirement for all consultation steps, including those in the EA, to be outlined in advance. The consultations steps outside of the EA should be flexible and we should have a say in what form this process takes.

- ***The Crown should be required to outline all consultation steps that will be taken through the NEB EA and the consultation period following the NEB's recommendation report in advance, including those that we highlight throughout these submissions.***

Funding

The Proposed Approach indicates that funding has been set aside for participation in Crown consultation and engagement activities with the Regional Coordinator and will be complimented by the funding already provided through the NEB EA.

If the NEB EA is going to be one way in which the Crown will discharge its constitutional duty to consult, it must involve meaningful and effective participation for Aboriginal people, including adequate funding for legal and technical expertise to assist with the different stages of the review process.

Currently, funding for regulatory review processes is made available to Aboriginal people through Participant Funding Programs. The process to apply for such funding is cumbersome and the amounts awarded are typically meager and only in the context of a specific project. The funding often does not take into account in any real way the capacity limitation that most Aboriginal groups face in engaging with and responding to projects. We are facing multiple projects in Maliseet territory and the administrative burdens of just dealing with the basic

correspondence, meeting requests, etc. can be challenging. We frequently do not have the capacity to properly participate in processes.

Before the EA for Energy East even began, the NEB allowed Aboriginal intervenors to apply for participant funding in order to participate in the review. The NEB initially told participants that the review proceedings for Energy East would involve two phases, with a maximum funding amount of $80,000 per community for both phases. Relying on this information, we mapped out an approach to our participation in the NEB EA and applied for funding for the first phase of the review. The $80,000 maximum funding amount already posed challenges for us given the scale of Energy East, the kind of technical evidence that would be required, and the limited financial resources that we have. Despite this, the NEB unilaterally decided to cut participant funding in half. This decision happened after we had already submitted funding applications for the first phase without realizing that second phase funding was going to be cut and before we had even been able to see TransCanada's revised application. This means that we now have to stretch the $40,000 per community received for phase one funding to cover all the costs associated with our participation for the entire EA. A process which continues to be plagued with issues that will ultimately result in more costs, an issue that has yet to be addressed by the Crown.

The funding for the NEB EA does not take into account in any real way the capacity limitation that our Nations, and most Aboriginal nations, face in engaging with and responding to projects. This matters because the Crown has taken the position that the NEB EA is the vehicle which the Crown will use to fulfill portions of its duty to consult. Our participation is effectively meaningless without sufficient funding to enable proper consultation and a process for genuinely understanding impacts on our rights and modifying Energy East to address and minimize those impacts. The result of this will unavoidably be that we will be unable to submit much of the evidence necessary for the NEB to make informed findings due to insufficient funding for technical expertise. The Crown will thus be basing its decision on whether to approve Energy East on a grossly incomplete record. This does not meet the legal requirements of the duty to consult. It does nothing to advance reconciliation.

We should not need to expend our own scarce resources to engage on third party projects that stand to infringe or otherwise interfere with their section 35 rights. Adequate consultation funding is essential, including for legal advice.

- ***The Proposed Approach does not provide enough information about capacity funding for us to determine whether funding will be adequate, and further information and commitments are required.***
- ***We require additional funding in order to participate meaningfully in the NEB component of the Crown's consultation process***.

Consultation Must Remain Genuinely Open to Project Rejection

In our experience, regulatory processes often seem like an insignificant procedural step—that approval is an inevitable conclusion and the process is done as expediently as possible to fulfill the bare minimum legislative requirements.

Meaningful consultation requires the Crown to be open to the possibility of rejecting a project where it would have serious adverse impacts on section 35 rights that cannot be effectively addressed.

From the perspective of most Aboriginal groups, the consultations on the Northern Gateway Project and the Kinder Morgan Project fundamentally lacked legitimacy because they knew from a very early stage that the NEB would recommend in favour of those projects and that the federal government would accept that recommendation.

The NEB EA is problematic because it provides significant momentum in favour of pipeline projects. Ninety percent of the NEB's funding comes from the proponents that it regulates.[3] Its very existence depends on being generally supportive of energy development and project proponents. To our knowledge, the NEB has ***never*** rejected a pipeline project on account of adverse impacts on Aboriginal peoples.

Moreover, the NEB will be advising the federal Crown on whether Energy East is in the "public interest". This advice will be premature. Canada will not complete its direct consultation with Aboriginal peoples until *after* the NEB issues its report, and it is impossible to determine whether a project with significant impacts on the environment and section 35 rights is in the public interest before Crown-Aboriginal consultation is complete: it is only through thorough meaningful and complete consultations that the Crown can fully understand adverse impacts on rights and determine whether those impacts can be reasonably accommodated. The NEB's

[3] https://www.neb-one.gc.ca/bts/cstrcvr/index-eng.html

virtually inevitable and premature conclusion that Energy East is in the "public interest" stands to provide significant momentum for Energy East approval.

- ***Canada must expressly guard against this problem and manage the proponent's and the public's expectations by expressly acknowledging, in the Proposed Approach, that:***
  - ***an NEB determination that Energy East is in the "public interest" does not in fact resolve the question of whether section 35 rights can be reasonably accommodated;***
  - ***whether section 35 rights can be reasonably accommodated if Energy East proceeds will need to be determined through direct Crown-Aboriginal consultation; and***
  - ***in consulting with Aboriginal peoples, Canada will remain open to potentially rejecting Energy East even if the NEB concludes that it is in the "public interest."***

Canada's commitment to these principles is required by law and is essential for a legitimate Crown-Aboriginal consultation process on Energy East.

Adequate Time for Consultation

Unfortunately, it is our experience that regulatory review processes are carried out with little organization, with inadequate communication and consultation, without consideration of real and serious issues and challenges that we Nations face and in a rushed fashion.

Consultation must begin as soon as the Crown contemplates a decision that could adversely affect section 35 rights, and the Crown must not rush the consultations. The federal Crown's consultations on the Northern Gateway and Kinder Morgan Projects breached those basic consultation principles.

The Crown was in contact with Aboriginal groups during the NEB review of the Northern Gateway and Kinder Morgan Projects, but it postponed *substantive* consultations until after the NEB had completed hearings and issued its report. Once the NEB issued its report, the federal Crown dedicated less than 6 months to consultations with dozens of Aboriginal groups. To make matters worse, Canada was seriously understaffed for the post NEB consultations on both projects. As a result, Canada's consultation team had limited availability to meet with Aboriginal groups and was unable to respond to the issues that they raised in a timely fashion: the

consultation team typically took months to respond to issues raised and in some cases never responded at all. Although these problems were more acute in the Northern Gateway Project consultations, the Kinder Morgan Project consultations also started too late and were rushed and under-staffed.

Unfortunately, the Proposed Approach for Energy East does not appear to address these issues. Although the Proposed Approach states that "we will begin dialogue with you now," it provides no assurance that the Crown will begin engaging on substantive issues before the NEB issues its report. On the contrary, the Proposed Approach states that discussions at this stage will focus on "explaining the NEB process" and receiving information from Aboriginal groups about their "broader interests and priorities." Further, the Crown has indicated that more substantive consultation will take place only after the NEB's recommendation report is finalized, when a 3-6 month period of more substantive consultation will be triggered. To avoid the problems present in the Northern Gateway and Kinder Morgan Projects, Canada must begin substantive consultations with Aboriginal groups at an early stage, well before the NEB hearings are complete.

We understand that "direct" Crown-Aboriginal consultation - i.e. the consultation led by Major Projects Management Office - will not duplicate the NEB EA. We will participate in that EA notwithstanding our serious reservations about the adequacy of the process and the fact that the NEB is not an appropriate body to lead EAs for major pipeline projects. However, the NEB EA will not address all of the relevant consultation issues, and the Crown should therefore begin consulting now with Aboriginal groups on those matters that lie outside of the scope of the EA. For example, two critical issues that the NEB EA will not address are

1. the strength of section 35 rights claims, which in the case of the Maliseet include Aboriginal title and other Aboriginal rights, and established Peace and Friendship Treaty harvesting rights; and
2. accommodations for impacts on section 35 rights other than project mitigation measures.

In addition, the NEB EA for Energy East is currently scoped like the Kinder Morgan Project, with the marine shipping component of the project partly, but not fully, included. This stands in contrast to the Northern Gateway Project EA, which fully included the marine shipping component of the project. The NEB's Kinder Morgan Project report failed to fully assess marine impacts and it provided far fewer marine mitigation measures than the NEB report for the

Northern Gateway Project. Unless the scope of the Energy East EA is expanded, the NEB's report on this project is bound to be deficient as well, and additional information gathering, impact assessment, and Crown-Aboriginal consultation on marine impacts will be required outside of the EA.

- ***The Proposed Approach should confirm that Canada will begin consulting now on strength of claims, accommodations other than project mitigation measures, and any other relevant consultation issues that lie outside the NEB's mandate***.

Substantial Completion of Consultation and Accommodation Prior to Crown Decision-Making

Related to the lack of assurance, in the Proposed Approach, that *substantive*, direct Crown-Aboriginal consultation will begin early and not be rushed, is the lack of commitment that the Crown will substantially complete consultations and accommodation discussions before it decides whether to approve Energy East. A key purpose of consultation is determining *whether* a project should be approved at all in light of its adverse impacts on section 35 rights. Therefore, prior to making that decision, the Crown must truly understand the impacts of a proposed project on Aboriginal peoples and identify reasonable accommodation measures to address those impacts.

Canada failed to substantially complete consultation and accommodation prior to approving the Northern Gateway and Kinder Morgan Projects. The Federal Court of Appeal confirmed this breach in the case of Northern Gateway in *Gitxaala Nation.* Cabinet also approved the Kinder Morgan Project in the face of major consultation and accommodation gaps:

- Canada acknowledges that more research is required to better understand the behaviour of petroleum products released into the water and the impact of increased marine vessel traffic on marine mammals,[4] issues that many Aboriginal groups stressed needed to be better understood before deciding whether to approve the Kinder Morgan Project and if so, on what conditions.
- Canada is still developing accommodation measures to address Aboriginal concerns with the Kinder Morgan Project, months after approving the project. For example, it

[4] Canada's Oceans Protection Plan, the ECHO program, and the Southern Resident Killer Whale draft Action Plan all represent acknowledgements of the serious information gaps that currently exist with respect to these issues.

announced the concepts of the Oceans Protection Plan and the Indigenous Monitoring Committee on the eve of its approval for the Kinder Morgan Project, without providing Aboriginal groups with any opportunity to understand and provide feedback on these proposals prior to Crown decision-making. And neither measure has been concretely developed yet.

Unfortunately the Crown's apparent commitment to adhere to a mere 3-6 month period of consultation for Energy East, regardless of the strength of the claims and rights, potential impacts on such claims and rights and depth of the consultation required in each case, does nothing to assure us that meaningful consultation will be substantially complete prior to any decision on the project being made.

- ***The Proposed Approach needs to expressly confirm that Canada will not end consultation until it has completed a meaningful dialogue with all affected Aboriginal groups and identified reasonable accommodations on all relevant issues. Canada should confirm that only accommodations that relate to detailed permitting decisions will be postponed to the permitting stage. The timeline in Appendix 3 of the Proposed Approach should expressly note that "Phase III Consultation" will not end until consultation on impacts and the main accommodation measures is complete***.

Crown Responsiveness to Issues Raised by Aboriginal Groups

We acknowledge that we will be responsible for identifying our section 35 rights that stand to be affected by Energy East, our concerns with the Project, and our proposed accommodations. We are committed to providing our information and views on all these matters. However, to be meaningful, consultation requires a responsive two-way dialogue. A major problem in the Northern Gateway Project and Kinder Morgan Project consultations was Canada's failure to respond, prior to decision-making, to the relevant issues raised by Aboriginal groups, such as affected section 35 rights, information gaps, and accommodation proposals. The Proposed Approach provides no assurance that the Crown will provide more reciprocity in the Energy East consultations as it commits merely to *exchange* information, *document* our issues and concerns, help follow-up on those issues, and provide summaries that will form part of the consultation record.

Asserted Rights

Strength of section 35 rights claims is one of two key factors that determines the depth of the Crown's consultation and accommodation obligations. Canada erred in the Northern Gateway Project consultation process by failing to share its views with Aboriginal groups about their section 35 rights claims.[5] Canada remained evasive on strength of claims in the Kinder Morgan Project consultations: for example, Canada refused to acknowledge which Douglas Treaty rights stood to be affected by the Kinder Morgan Project, even though the existence of the Douglas Treaties is well established and despite repeated requests for Canada to provide its views on this matter. Refusal to acknowledge which established treaty rights face potential harm from Energy East would be problematic for us, as we hold Peace and Friendship Treaty harvesting rights.

- ***The Proposed Approach should confirm that as part of its direct consultation with Aboriginal peoples, Canada will:***
    - ***acknowledge which established section 35 rights stand to be affected by the Project; and***
    - ***confirm which asserted rights Canada accepts as reasonably asserted and therefore as requiring consultation and, where potential adverse impacts are established, accommodation.***

Information Gaps

Responsiveness includes responding to reasonable Aboriginal information requests in a timely way. Where Aboriginal groups need information to properly assess the impacts of a proposed project or the value of proposed mitigation or other accommodation measures, the Crown must provide that information in a timely manner, as part of the consultation (as opposed to post project approval).

- ***The Proposed Approach should confirm Canada's commitment to providing relevant information in a timely manner, i.e. during consultation, so as to inform the consultation process.***

Aboriginal Accommodation Proposals

We are overwhelmed with referrals and consultation processes. We do not have time for consultation unless it serves to identify meaningful accommodations prior to Cabinet's decision

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[5] *Gitxaala Nation* at paras. 288-309

on whether to approve Energy East. This did not happen in the Northern Gateway Project or Kinder Morgan Project consultations.

Although the Crown was more responsive to accommodation proposals in the Kinder Morgan Project consultations, it still proceeded to decision without responding to many accommodation proposals. For example, Canada did not respond to a widespread request for guarantees of compensation to section 35 harvesting rights, including non-pecuniary harms, in the event of an oil spill from the project.

Canada was also unresponsive in respect of accommodations for the harm that the Kinder Morgan Project will do to Southern Resident Killer Whales. The Killer Whale is a species of deep spiritual importance to many West Coast First Nations, and they raised major concerns with the impact of the Kinder Morgan Project marine traffic on this endangered population. Canada's consultation team acknowledged this Aboriginal concern but then punted the issue to the federal team that is developing the federal Killer Whale Action Plan under the *Species at Risk Act*. That team in turn did not make itself available for substantive discussions with Aboriginal groups about its proposed Action Plan prior to federal decision making on Kinder Morgan Project and Canada approved the Kinder Morgan Project without a finalized Action Plan, or any other meaningful accommodation measures for killer whales. Thus, a primary concern of Coastal Aboriginal groups has gone unaccommodated.

- ***Canada's Proposed Approach should expressly commit that Canada's consultation team will have the mandate and time required to discuss and negotiate reasonable accommodation measures for mitigating, offsetting, or compensating for adverse project impacts prior to Crown decision-making***.

Transparency about Federal Decision-Making Process

Consultation requires an open and transparent dialogue between the Crown and Aboriginal groups. Neither the Northern Gateway Project nor the Kinder Morgan Project consultation processes respected that principle.

The Proposed Approach provides no commitment of direct access to the ultimate decision-makers, Cabinet. We seek the opportunity to engage directly with Cabinet about Energy East. The opportunity to provide written submissions to Cabinet (which is what Aboriginal groups got on the Northern Gateway and Energy East Projects) is inadequate, particularly given the high volume of submissions that Cabinet will receive and how particularly affected our Nations will

be by the construction of new pipeline on un-ceded Aboriginal title lands. Thus, the Proposed Approach should commit the federal Crown to in-person meetings between the most affected Aboriginal groups and Cabinet representatives.

The Proposed Approach states that Aboriginal groups will have the opportunity to review and comment on the draft Crown Consultation Report. While this is good, Crown Consultation Reports on previous projects, such as Northern Gateway Project and Kinder Morgan Project, did not provide the federal consultation team's views on Aboriginal groups' outstanding concerns and accommodation proposals. Those are critical issues that go to the heart of whether a project should be approved and if so, on what conditions. Aboriginal groups do not know whether Cabinet received any advice on those matters, let alone the nature of any such advice. This secrecy is fundamentally incompatible with the duty to consult and the trust and relationship building that underpins the duty.

- ***The Proposed Approach should commit the federal Crown to in-person meetings between the most affected Aboriginal groups and Cabinet representatives.***
- ***The Proposed Approach should commit to transparency with Aboriginal groups on all relevant issues. That is to say, Canada must commit that its federal consultation team will share with Aboriginal groups the views that it will share with Cabinet about the Aboriginal group's outstanding concerns and accommodation proposals. Canada can and must find a way of providing this transparency notwithstanding any choice that Cabinet makes to claim privilege over the advice that it receives about the adequacy of consultation and accommodation***.[6]

Transparency also requires reasons for decision. The Federal Court of Appeal confirmed the need for reasons where deep consultation is required in *Gitxaala Nation.* Canada's Proposed Approach does not currently assure Aboriginal groups that they will receive reasons for the NEB's recommendation or Cabinet's ultimate decision. Cabinet should be required to demonstrate how they considered the concerns of Aboriginal groups and potentially significant adverse effects on Aboriginal and treaty rights in their deliberations, and if Cabinet approves the

[6] It is important to remember that Cabinet is not required to claim privilege over Cabinet confidences under section 39 of the *Canada Evidence Act*, but rather chooses to do so. In any event, there are ways to share information with Aboriginal groups that is relevant to those groups without sharing the precise documents going to Cabinet.

project, it should explain the basis on which it concludes that Aboriginal rights are being adequately accommodated.

- ***The Proposed Approach should be amended to confirm that in the event that Energy East is approved by Cabinet, the federal Crown will explain in writing how adverse impacts on section 35 rights were considered, factored into the decision-making and reasonably accommodated***.

Coordination of Federal and Provincial Consultation

It is our understanding that the federal and provincial Crowns will be collaborating to fulfill their roles in the duty to consult and accommodate. However, the role of the provincial Crown in this process is entirely unclear and the Proposed Approach does not indicate how consultation will be coordinated with the provincial Crown. This is particularly concerning given that the provincial Crown has been so publicly and actively supporting Energy East. Not only has the Province made clear its position that there will be no provincial Environmental Impact Assessment for Energy East, most recently, the Premier introduced a motion in legislature in support of it. This conduct is completely unacceptable—the NEB EA has not even gotten started nor has consultation with the Maliseet begun. What the provincial Crown is basically saying is that it does not care what the impacts on the Maliseet are or whether the Maliseet are consulted. This is in clear breach of the Province's constitutional duty to consult and accommodate

The provincial and federal Crowns hold specific duties to consult with First Nations, a fact which has already been acknowledged by both Crowns. As such, each jurisdiction must maintain and discharge its duty to consult and accommodate. If the province holds constitutional authority to act, as is the case with Energy East, then the province must maintain and discharge its duty to consult, a duty which is not automatically discharged by the federal government´s consultation. In all cases, consultation must be meaningful, in good faith, and intended to substantially address Aboriginal concerns. Consultation cannot exclude accommodation from the outset, and cannot merely be a superficial exercise to let Aboriginal parties "blow off steam". A genuine engagement on the relevant issues is essential. This means that the province must not only consult about the impacts, but have the ability to address and accommodate those impacts. The province should not be breaching its constitutional duty before the EA has even begun and its role should be clearly outlined.

Some overlap in discussions are inevitable, and Canada and New Brunswick will share responsibility for ensuring adequate accommodation of Maliseet section 35 rights. Therefore, for the sake of efficiency, we anticipate that it will make sense for at least some consultation meetings to be tripartite and for at least some issues to be discussed on a tripartite basis.

- ***The Proposed Approach should provide for tripartite consultation by agreement of the Aboriginal group, the provincial Crown and the federal Crown***.

Conclusion

We look forward to your response to our concerns and to improvements to the Proposed Approach, which is essential for a project with such major implications for our section 35 rights. Please contact us with any questions or concerns about our recommended improvements, and please confirm that a response is forthcoming in the near future.