A MATTER OF
CREE TREATY RIGHTS AND GOOD POLICY:

JAMES BAY AND NORTHERN QUEBEC AGREEMENT
ENVIRONMENTAL AND SOCIAL
IMPACT ASSESSMENT AND REVIEW
VS.
CANADIAN ENVIRONMENTAL ASSESSMENT ACT

Brief to the
House of Commons
Standing Committee on the Environment and Sustainable Development
Regarding
Bill C-19 : ***An Act to amend the Canadian Environmental Assessment Act***

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1.0 INTRODUCTION

Twenty-six years ago, the Crees of Eeyou Istchee were promised in our Treaty with the Crown that, in the face of development projects and resource exploitation, there would be a permanent, adapted and effective regime of environmental and social protection under Section 22 of the *James Bay and Northern Quebec Agreement (1975)* ("*JBNQA*").[1] Section 22 is entitled "Environment and Future Development". Our Cree Treaty rights include a distinct and adapted procedure of environmental and social impact assessment and review ("the E&SIA procedure").

Specifically, Cree rights in the Section E&SIA procedure include the following:

Cree Rights	
Effective federal presence	The Crees were promised and have a right to an effective federal presence under our Treaty at all times and at all levels where development or projects involve matters of federal jurisdiction.
Special status	The Crees were promised and have a right to a special status whereby we are present and involved in the environmental and social impact assessment procedure at all stages and levels of its interpretation and application.
Consent for changes	Cree consent must be obtained for any changes made to the E&SIA procedure.

These solemn Treaty promises of a distinct and adapted regime of environmental and social protection are largely unrealized. The federal government has instead:

Federal Record	
Underfunding and neglect	Underfunded and neglected the Treaty bodies providing for review and development of environmental and social protection law and policy and for the administration and harmonization of the Section 22 assessment of projects in our Territory;
Denied triggering federal E&SIA	Denied that federal assessment is triggered under the Section 22 E&SIA procedure; and
Unilaterally imposed CEAA	Unilaterally imposed and relied on the *Canadian Environmental Assessment Act* ("*CEAA*") as the primary federal regime of impact assessment to which the constitutionalized rights of the Crees are constrained to conform through a process not of harmonization, but of homogenization.

[1] The full text of the *JBNQA* and information on the Crees of Eeyou Istchee and the mandate and work of the Grand Council of the Crees and the Cree Regional Authority may be found at: www.gcc.ca. Sections 1, 2 and 22 of the *JBNQA* are appended to this brief.

In short, the Grand Council of the Crees (Eeyou Istchee) / Cree regional Authority come before your Committee today because the Government of Canada is following a dishonourable path which does not respect our environmental and social protection rights. Indeed, Canada is treading perilously close to outright Treaty denial.

We submitted a detailed and carefully-considered brief in the context of the consultations on the five-year review of *CEAA*. Beyond a standard-form acknowledgement, we received no response. Our concerns and suggestions for amendments to federal legislation and changes in federal policy are not in any way dealt with or reflected in the Minister of the Environment's, Report to Parliament on the Review of the *CEAA*, "Strengthening Environmental Assessment for Canadians", March 2001 ("Minister's Report") or in Bill C-19 (*An Act to amend Canadian Environmental Assessment Act*).

As we shall see, the James Bay Advisory Committee on the Environment ("JBACE") is an official Cree-federal provincial body explicitly charged under our Treaty (*JBNQA*, par. 22.3.27 and 22.3.30) with making recommendations on the improvement of impact assessment. The JBACE submitted a brief on the Five-Year Review of *CEAA* with essentially the same recommendations as the Crees. The JBACE unfortunately fared no better in being heard and in influencing the Minister's Report and proposed legislation.

Your Committee is now engaged in consideration of Bill C-19 and more generally in the study of legislative and policy options for federal environmental assessment further to the Minister's Report.

We are pleased to come once again before this Committee. You have distinguished yourselves in the past by your independence, vision and initiative.

Recommendation #1 -
Role and Approach for the Committee:

As Parliamentarians you are not bound by the bonds of supposedly immutable statutes, government policy and the narrow and often shortsighted legal advice of the Department of Justice.

Rather, in accordance with your constitutional role as legislators, you are uniquely placed to set the Government of Canada on the path of vindicating the substantive treaty rights of the Crees under the *JBNQA* to adapted and effective environmental and social protection, notably through impact assessment under Section 22 of the *JBNQA* and to a continuing and effective federal presence and role in this regard. As detailed here, we recommend that you act accordingly.

Your action should be guided by the solemn Crown Treaty promise to procure to the Crees "the rights, privileges and benefits" set out in the *JBNQA* (Section 2[2]), by the confirmation of our rights and the paramountcy of the *JBNQA* over all other federal law set out in the *James Bay and Northern Quebec Native Claims Settlement Act*[3] and by the constitutional recognition and affirmation of Cree rights under of section 35 of the *Constitution Act, 1982*.

This brief is under reserve of and without prejudice to the Aboriginal and Treaty rights, claims, interests, negotiations, agreements, court proceedings and positions of the Crees of Eeyou Istchee and subject to the Treaty, constitutional and fiduciary obligations of Canada and Quebec.

[2] Appended to this brief.
[3] S.C. 1976-77, c. 32, appended to this brief.

2.0 PARAMOUNT STATUS, PROPER INTERPRETATION AND PROMISE OF THE *JBNQA*

2.1 Paramount Status and Interpretation

The *James Bay and Northern Quebec Native Claims Settlement Act* approves, gives effect to and declares valid the *JBNQA*, makes it paramount federal law, and ensures to the Cree beneficiaries the rights, privileges and benefits provided for in our Treaty.

Cree rights reflected in the *JBNQA* are further recognized and affirmed under section 35 of the *Constitution Act, 1982*.

Our Treaty rights must all be given broad, liberal and remedial effect according to the spirit and intent of the *JBNQA*. The Supreme Court of Canada insists on the sacred nature of treaty promises and sets a high standard for Crown behaviour:

> […] the honour of the Crown is always at stake in its dealing with Indian peoples. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[4]

Although in practice our rights are not honoured, in responding to the Royal Commission on Aboriginal Peoples in 1997, the Government of Canada affirmed in "Gathering Strength" its commitment to historic and modern treaties and the treaty relationship as the cornerstone of future Aboriginal-Crown relations. The honour of the Crown and good policy demand that the Government of Canada be held to its promise.

2.2 Guiding Principles and Unique Features of Section 22 E&SIA

Nine guiding principles form part of the Treaty obligations or promises of the Crown under Section 22. They have been largely ignored by federal officials and in federal legislation, but they must be considered in interpreting and applying Section 22, including the environmental and social impact assessment and review procedure, and in considering its relationship to *CEAA* and Bill C-19.

[4] *R. v. Badger*, [1996] 1 S.C.R. 771, par. 41.

JBNQA SECTION 22 GUIDING PRINCIPLES

Par. 22.2.4 The responsible governments and the agencies created in virtue of this Section shall within the limits of their respective jurisdictions or functions as the case may be give due consideration to the following guiding principles:

a) The protection of the hunting, fishing and trapping rights of Native people in the Territory, and their other rights in Category I lands, with respect to developmental activity affecting the Territory;

b) The environmental and social protection regime with respect to minimizing the impacts on Native people by developmental activity affecting the Territory;

c) The protection of Native people, societies, communities, economies, with respect to developmental activity affecting the Territory;

d) The protection of wildlife resources, physical and biotic environment, and ecological systems in the Territory with respect to developmental activity affecting the Territory;

e) The rights and guarantees of the Native people within Category II established by and in accordance with section 24 until such land is developed;

f) The involvement of the Cree people in the application of this regime;

g) The rights and interests of non-Native people, whatever they may be;

h) The right to develop by persons acting lawfully in the Territory;

i) The minimizing of negative environmental and social impacts of development on Native people and on Native communities by reasonable means with special reference to those measures proposed or recommended by the impact assessment and review procedure. [emphasis added]

Reflecting the guiding principles, there are a number of fundamental distinctions between Section 22 E&SIA and other assessment procedures, including *CEAA*. Section 22 does not simply provide for the protection of the biophysical environment. Rather, read purposively, as is required, it holds out the substantive promise of the vindication of Cree rights, and of our way of life and economies. Specifically, in the face

of resource projects and economic development, Cree rights under Section 22 of the *JBNQA*, and our right to the E&SIA procedure, include the following features:

- The procedure is specially adapted to protect Cree traditional land tenure and resource allocation and to ensure the perpetual protection of Crees and our environment, ecosystems, wildlife resources, society, communities and economies;

- Social impact assessment is not just an accessory afterthought, but rather an integral and co-equal requirement.

- A special status and role for the Crees in impact assessment over and above the general public is guaranteed, as manifested notably through our representation on all of the bodies created under Section 22 and at every stage of the procedure;

- Section 22 provides for permanent assessment bodies, not the multiple responsible authorities and *ad hoc* panels of *CEAA*.

- Section 22 provides for decisions and project authorizations on the basis of impact assessment, not just information for decisions taken outside of the procedure as under *CEAA*;

- We must participate in and consent to changes in the applicable assessment procedure.

- The E&SIA procedure has paramount effect over *CEAA*.

3.0 ASSESSMENT PROCESS AND FEDERAL ABDICATION OF TREATY OBLIGATIONS

3.1 Assessment Process

Section 22 provides for the environmental and social protection regime and for the adapted impact assessment and review procedure to which Crees have a constitutional right. The Crees are directly present on all bodies and at all stages. In its details and institutions, the E&SIA procedure makes distinctions on the basis of development involving matters of federal, provincial and joint or mixed jurisdiction. The involvement of both federal and provincial government in the face of development is integral to our Treaty protections, and jurisdictional issues should not be exploited to diminish those protections.

i) Advisory Committee

Section 22 provides for the establishment of the James Bay Advisory Committee on the Environment ("JBACE"), with the promise of a permanent secretariat and a membership of 13 comprising an equal number of members named by the Cree Regional Authority, Quebec and Canada, plus the Chairman of the Hunting, Fishing and Trapping Coordinating Committee. With voting rules adjusted to whether matters of exclusive provincial jurisdiction, exclusive federal jurisdiction or joint or mixed jurisdiction are being discussed, the Advisory Committee is a compulsory consultative body. As such it is, as a matter of our Treaty right, the "preferential and official forum" (*JBNQA*, par. 22.3.24) for responsible governments concerning the development of and the oversight, administration and management of the Section 22 regime of environmental and social protection.

It is the JBACE, properly funded, staffed and respected, not the federal (or any other) Administrator, nor the Canadian Environmental Assessment Agency (the "Agency") that has overall responsibility and overseeing authority for the regime. In particular, paragraph 22.3.27 of the *JBNQA* charges the JBACE with permanent responsibility for examining and making "recommendations respecting the environmental and social impact assessment and review mechanisms and procedures for the Territory".

In our experience, chronic failure by Canada and Quebec to provide adequate resources to the JBACE has seriously affected its capacity to closely monitor the activities of the bodies directly involved in the application of the E&SIA procedure and to act to remedy problems arising from doubtful interpretations of Section 22 and improper choices in applying the assessment process.

ii) Administrator

Under par. 22.1.1, "Administrator" is variously defined as being provincial, federal or local (Cree) on the basis of the presence of matters "involving federal jurisdiction" or "respecting provincial jurisdiction" and the location of the development. In practice, the federal Administrator is the President of the Canadian Environmental

Assessment Agency ("the Agency"). The Administrator receives proponent proposals, dispatches development for assessment and review and exercises, in interaction with the Section 22 assessment bodies, structured decision-making power over the conduct of assessments and approval of development. Any deviation from the recommendations of the Evaluating and Review Committee (see below) must be the subject of discussions with those bodies, including their Cree members.[5]

iii) Evaluating and Review Committees

The two-stage assessment and review process set out in Section 22 provides throughout for federal and provincial involvement, together with the Crees.

Work at the first stage of assessment is carried out by the Evaluating Committee (known by its French acronym "COMEV"). An advisory body, it was conceived as a common forum and a clearinghouse on jurisdictional issues. It has six members (two appointees each of Canada, Quebec and the Cree) and voting rules similar to the JBACE (par. 22.5.6 and 22.5.7). The Evaluating Committee plays an important role in the determination of whether "gray" zone development (see "Development Covered" in part 4.1 below) should be subject to the E&SIA procedure and in preparing draft directives to define the scope and extent of the assessment.

The Evaluating Committee was conceived in such a way as to allow for the issuance of a single harmonized directive for the preparation of assessment documents to feed both the federal and provincial sides of Section 22 E&SIA. This was done with respect to the assessment of the Waskaganish permanent access road. The same directive was used for the review conducted under the authority of the local Cree Administrator and the provincial Administrator, but the federal Administrator (President of the Agency) refused to trigger the process, insisting on *CEAA* instead.

Furthermore, in accord with modern good practice, the Evaluating Committee introduced recently, although not on a systematic basis, a public scoping exercise prior to the issue of directives.

Contrary to the original intent, however, submission of projects to the Evaluating Committee has been controlled by proponents and by the Administrators and, we believe, their political masters. In fact the provincial Administrator has taken most of the decisions in this regard. The federal Administrator has been essentially invisible for the last 26 years (except after the litigation and out of court Memorandum of Agreement which led to the joint review of the proposed Great Whale River hydroelectric project). Therefore, the Evaluating Committee has not played its intended role in determining the course of the E&SIA procedure on the basis of whether the development in question involves matters of federal jurisdiction, provincial jurisdiction or both. Rather than being settled at the meetings of the Evaluating Committee, the relative involvement of the federal and provincial governments in the assessment of any particular project has often been discussed and decided outside of the table and made the subject of political debate.

[5] *JBNQA*, par. 22.5.4, 22.5.5, 22.5.10, 22.5.13, 22.5.14, 22.5.15, 22.6.13, 22.6.15 and 22.6.17.

Canada and Quebec have therefore by-passed the Evaluating Committee as the Treaty-mandated forum for dealing with these questions of interjurisdictional assessment.

For the review stage of the E&SIA procedure, two permanent bodies are established and involved according to whether the development in question involves provincial or federal jurisdiction or both (par. 22.6.1, 22.6.4 and 22.6.7). They are, respectively, the provincial Environmental and Social Impact Review Committee (known by its French acronym "COMEX") and the federal Environmental and Social Impact Review Panel (known by its French acronym of "COFEX").

The review bodies each have five members (three Quebec or Canada appointees as the case may be, and two Crees). Quebec and Canada respectively appoint the Chairman of the Quebec and federal bodies. Chapter 22 requires and promises "adequate staff" for each body. This promise has not been respected.

As further developed in the next section (3.2), in practice the federal Review Panel has played a marginal role. It has served for local matters of construction and infrastructure on or affecting the *JBNQA* Category I lands where the nine Cree communities are located. Specially, Federal Panel review has only been applied to over 30 such projects in 26 years, always at the instance of one of the local (Cree) Administrators. The result is that Section 22 E&SIA is used by the Crees and Quebec and their respective administrators. Only Canada and the federal Administrator refuse to apply the Section 22 E&SIA procedure.

3.2 Federal Abdication of Treaty Obligations

In accord with the historical and constitutional role and responsibilities of the Government of Canada and its status as a party to the *James Bay and Northern Quebec Agreement*, a fundamental premise and condition of the *JBNQA* is ongoing federal presence in giving effect to the regime of environmental and social protection provided for in Section 22. The Crees' right to a continued and effective federal role is constitutionally recognized and affirmed under section 35 of the *Constitution Act, 1982*.

In practice, the Government of Canada has not fulfilled its fiduciary and statutory duties and respected constitutionally-protected Cree rights in this regard.

As with the parallel existence and application of federal and provincial assessment regimes throughout Canada, duality does of course require coordination, cooperation and even harmonization; but it does not imply regulatory chaos and economic gridlock. Section 22 both contemplates federal and provincial involvement in assessment and review and provides permanent mechanisms for coordination or harmonization.

At the stage of determining the assessment path to be followed, the treatment of "gray" zone projects and the preparation of impact assessment directives, these functions are to be carried out by the tripartite Evaluating Committee.

At the review stage, paragraph 22.6.7 of the *JBNQA* provides for harmonization of federal and provincial reviews.

JBNQA harmonization: combine reviews where federal and provincial jurisdiction engaged

> 22.6.7 The Federal Government, the Provincial Government **and the Cree Regional Authority may by mutual agreement** combine the two (2) impact review bodies provided for in this Section and in particular paragraphs 22.6.1 and 22.6.4 provided that **such combination shall be without prejudice to the rights and guarantees in favour of the Crees established by and in accordance with this Section.**
>
> Notwithstanding the above, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Territory and in part elsewhere where an impact review process is required. [our emphasis]

The first sub-paragraph of par. 22.6.7 allows for measures of harmonization internal to the Section 22 E&SIA procedure, but only with Cree consent and if it is without prejudice to Cree rights. The second sub-paragraph both limits the application of more than one procedure and contemplates such application if the project falls within the jurisdiction of both Quebec and Canada or triggers a procedure outside of the Territory (e.g. the *JBNQA* Section 23 Inuit impact assessment procedure). In practice, the federal Administrator has always denied any federal involvement in the review process. With the exception of the special circumstances of the Great Whale River Project (see above, part 3.1 (iii)), this harmonization mechanism has never been applied.

Cree Regional Authority v. Canada (Federal Administrator)[6] is the decision of the Federal Court - Trial Division dealing directly with the question of whether hydroelectric development engages the federal as well as the provincial side of the E&SIA procedure. Correctly interpreting and applying Section 22 as part of a Treaty engaging the fiduciary duty of the Crown, the Court rejects the notion that projects are either exclusively federal or provincial for the purposes of impact assessment. Federal impact assessment under Section 22 of the Great Whale Project was required because it involved matters of federal jurisdiction. The federal failure to give effect to the E&SIA procedure and the substitution, by side agreement with Quebec, of a procedure under general federal law (the predecessor to *CEAA*), is sharply and clearly rejected in the following terms:

> The federal/provincial Agreement entered into some sixteen years subsequent to the JBNQ Agreement purports to substitute the federal environmental review process and to proceed with an assessment in accordance with the EARP Guidelines. It is apparent

[6] [1992] 1 F.C. 440 (T.D.).

> that this Agreement was intended both to appease and circumvent the native populations who desired to have a separate federal review of matters within federal competence as required by the 1975 understanding; moreover, it appears to have been negotiated in an attempt to free themselves from the duties and responsibilities imposed under the JBNQ Agreement.
>
> In my opinion, the new bipartite (November 15, 1990) agreement cannot legally be substituted by the federal authorities as an answer to their obligations under the JBNQ Agreement. (p. 465)

Because of the withdrawal of appeals previously pending, this decision in the *Cree Regional Authority* (Great Whale case) is now final and binding authority.[7]

In this context, the remarks by two judges of the Federal Court of Appeal in the *Eastmain* case[8] cannot be used as a pretext for the refusal to apply federal impact assessment by claiming that development under Section 22 is either federal or provincial and that in the vast majority of cases, despite the purposes, principles and provisions of Section 22, no federal impact assessment is required or permitted. Those remarks were only in the nature of *obiter dicta* unnecessary to the judgement. The *Eastmain* case does not constitute binding or good authority for the non-application of Section 22 in matters involving federal jurisdiction.

Unfortunately, the federal track record with respect to Section 22 obligations regarding impact assessment is very poor. As part of a larger failure to ensure the existence and implementation of an appropriate regime of environmental legislation in the *JBNQA* Territory, there has been ongoing and unacceptable refusal of the Government of Canada to apply the Section 22 federal process of impact assessment to development projects which involve matters of federal jurisdiction.

Rather, for 26 years, the Government of Canada and its members of the bodies created under Section 22 have exploited the intricacies of jurisdictional questions in Canada, and in the process details of Section 22, to circumvent federal E&SIA obligations. Canada has acted contrary to its constitutional fiduciary and Treaty duties, taking a minimalist, mechanical and adversarial (or "superficially neutral"[9]) approach to legal issues of all kinds. This has meant ongoing refusal to apply the Section 22 federal E&SIA procedure to development projects which clearly involve matters of federal jurisdiction.

In dealing with the rights and interests of Aboriginal peoples, the conduct of the Crown is to be trust-like and not adversarial. The refusal to apply the Section 22 federal process is poor policy, contrary to a purposive and contextual reading and application of Section 22, and inconsistent with the relevant principles of environmental and constitutional law as they have emerged over recent years.

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[7] Federal Court of Appeal No. A-1008-91, discontinued by Canada, Quebec and Hydro-Quebec in November and December, 1996.
[8] [1993] 1 F.C. 501 (C.A.).
[9] Disapproved in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1110.

Under Section 22, the Crees have the right to the active involvement of both Canada and Quebec in a co-ordinated effort, with the direct participation of the Crees, to ensure the protection of the Cree way of life and the environment on which it depends. As elsewhere in Canada, the Cree experience is that our interests and the protection of the environment are best served by the involvement of interlocking jurisdictions with coordinated joint reviews. Both federal and provincial impact assessment under Section 22 are often required to ensure that all relevant expertise is brought to bear and that there prevails a minimum of independence of the impact assessment process from the political will of any one government committed to certain development projects.

This is consistent with the teaching of the Supreme Court of Canada in *Friends of the Oldman River Society*[10] that it is constitutionally inappropriate to speak in terms of "federal" and "provincial" projects. Instead, what is required in order to meet the challenge of environmental protection is the exercise by both the federal and provincial governments of their jurisdiction. In a more recent decision, the Supreme Court of Canada has confirmed and clearly stated that the power and duty to protect the environment falls both on federal and provincial shoulders. [11]

The *Canadian Environmental Assessment Act* contemplates the application of provincial regimes and impact assessment processes under comprehensive claims and self-government agreements. Co-ordinated impact assessment by more than one level of government has become absolutely standard in Canada.

Indeed, the recent testimony of the Vice-president of the Agency confirms that, in contrast to its abdication under Section 22, in interpreting and applying *CEAA* the federal government takes a radically different view of Canada's constitutional authority and the appropriateness of federal and provincial assessment.[12]

To paraphrase the Supreme Court of Canada in the Grand Council of the Crees case involving the environmental jurisdiction of the National Energy Board[13] it would be surprising if the elaborate apparatus for federal impact assessment required by the *JBNQA* was established only to be almost never set in motion.

In this broader Canadian context of exercise of federal and provincial authority to protect Canadians and their environment, it is inconceivable and perverse to interpret and apply the *JBNQA* in such a way that the Crees, who have a constitutional right to an effective process of environmental and social impact assessment and to the federal role therein, never benefit from the federal side of the Section 22 E&SIA procedure.

[10] [1992] 1 S.C.R. 3.
[11] *Attorney General of Canada v. Hydro-Quebec*, [1997] 3 S.C.R. 213.
[12] Testimony of Robert Connelly, House of Commons, Standing Committee on Environment and Sustainable Development, December 4, 6 and 11, 2001, especially December 4 at 10h00.
[13] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, p. 191.

The Crees have recently reached an Agreement with Quebec on a certain issues relating to resource and economic development and the implementation of the *JBNQA*. The Agreement ends as regards Quebec a variety of pending lawsuits, including on matters of impact assessment. In the same spirit, it would become the Government of Canada, with this Committee showing the way, to take the interpretation of the *JBNQA* regime of environmental and social protection away from the litigators of the Department of Justice and to give broad, liberal and purposive effect to Cree rights and federal duties.

Recommendation #2 -
Interpreting Section 22 to Trigger <u>Federal</u> E&SIA :

We recommend that this Committee prefer the interpretation of Section 22 that accords with the letter, spirit and intent of the *JBNQA* and triggers <u>federal</u> E&SIA, giving substance to federal Treaty obligations. This Committee should recommend specific statutory language implementing Section 22 which definitively puts aside negative and short-sighted interpretations whereby the federal side of the E&SIA procedure is never engaged. If we are to avoid the rule of judges, then as Parliamentarians, you have the duty to interpret and give direct application to constitutionalized federal Treaty obligations.

4.0 SECTION 22 E&SIA, *CEAA* AND BILL C-19

Section 22 comprehensively provides for the oversight, application, operation and ongoing evolution of the E&SIA procedure as the adapted system of impact assessment for our Territory and to protect our rights. The application of *CEAA* to the detriment of the development and application of the federal side of the Section 22 E&SIA procedure violates Cree Treaty rights to our adapted procedure. This difficulty is not remedied by the layering of processes through non-Treaty harmonization and coordination mechanisms.

4.1 *CEAA* Compared With Section 22 E&SIA

The following table provides a summary comparison of Section 22 E&SIA and *CEAA*:

Points of Comparison	**Section 22 E&SIA**	***CEAA***
Legal nature	E&SIA procedure is a constitutionalized Treaty right and paramount federal law.	Ordinary statute.
Process for amendment	Cree consent required for changes to Section 22.	Cree treated as one of many stakeholders making representations to Parliament, bypassing the JBACE.
Purpose	Protect Cree, Cree environment and economies, giving equal weight to social and environmental concerns.	Integration of environment into decision-making. Focus on biophysical environment; socio-economic only considered if consequence of environmental effects.
Development covered	Open-ended coverage of all listed developments plus screening and possible assessment for all others, except listed exclusions.	Must have: - Federal authority - Federal Trigger Project which is physical work or one of few listed activities.
Institutions	Permanent advisory, assessment and review committees.	*Ad hoc* panels, interested departments acting as federal authorities, Minister of the Environment, Canadian Environmental Assessment Agency.

Points of Comparison	**Section 22 E&SIA**	***CEAA***
Cree role	Special status for Crees through membership on all bodies and requirements of consideration of protection of Crees.	Aboriginal interests treated as marginal add-on to main process. Bodies have no guaranteed Cree membership. No Cree role beyond general public.
Assessment process	All not-excluded development considered by Evaluating Committee regarding a) whether review required ("gray zone"); and b) extent, timing and content of assessment (all Schedule 1 and "gray zone"). Development subject to E&SIA is submitted to federal Review Panel, for paper or oral hearing.	99% of projects triggering *CEAA* subject to summary screening process only.
Decision-making	Decisions based on results of E&SIA and made in consultation with Crees. For Category 1 lands, Cree Administrator is decision-maker.	Assessment feeds decisions by federal authorities outside of process.

We now set out in greater detail the divergences of Section 22 E&SIA and *CEAA*.

CEAA Gives No Equal Weight to Environmental* and *Social

Under *CEAA*, the section 2 definitions of "environmental effect" and "environmental assessment" are biophysical. They determine the object of the Act and the nature of the assessment factors studied pursuant to s. 16 and weighed in decisions regarding projects during and at the end of the *CEAA* process (ss. 20, 23 and 37).

Socio-economic conditions, heritage and use of lands and resources by Aboriginal persons are considered, but only where and insofar as they are affected by primary environmental change. Of course, for the Crees, direct social impact of development is a matter of great concern, but it does not enter into *CEAA* assessment. Thus, the *CEAA* approach stands in stark contrast to the equal weight given to environmental and social factors in all aspects of the Section 22 E&SIA procedure.

Territorial Application

In terms of territorial application, the Section 22 procedure applies to all development or development projects "which might affect the environment or the people of the Territory" (par. 22.1.1). It is not restricted to projects physically located in the Territory or even in the province of Quebec. Section 22 is thus adapted to transboundary assessment and *CEAA* provides no added protection in this regard.

Development Covered

In sharp contrast to *CEAA*, the development subject to assessment under Section 22 is open-ended. Certain development is either automatically subject to or automatically exempt from the procedure (Schedules 1 and 2). In addition, Section 22 provides for screening by the Evaluating Committee of "gray" zone development not listed in either schedule in order to determine whether assessment is required. The coverage of the E&SIA procedure is thus much broader and more flexible than *CEAA*.

Public Participation

Public participation in assessment is an important tenet of *CEAA* (Preamble, s. 4). This is of course laudable. However, the relevant *CEAA* provisions (ss. 2 ("interested parties"), 16(1)(c), 18(3), 20(1)(c)(iii), 22, 23 and 34) do not accommodate and ensure the special status and involvement of Crees which lies at the heart of Section 22.

Self-Assessment

Self-assessment by federal authorities is a fundamental organizing principle of *CEAA*. It does not accord well with the requirement under Section 22 of "special status and involvement for the Cree people" (par. 22.2.2(c)) as reflected in the presence of Cree representatives on the advisory, assessment and review bodies under the *JBNQA*. This defect is not curable by the naming of Cree members to *CEAA* public review panels, notably because *CEAA* assessment, in the vast majority of cases, does not ever reach the panel phase. Furthermore, s. 33 of *CEAA* contemplates *ad hoc* panels, not the permanent parity bodies which exist under Section 22.

Decision-Making

Decision-making under *CEAA* to allow federal powers to be exercised and to allow projects to proceed is on the self-assessment model by federal authorities (ss. 20 and 37). Such authorities are often proponents, partners in projects or the federal department with a "client" interest in seeing the project proceed. Furthermore, at the end of the day, *CEAA* makes it rather easy to put aside environmental concerns on the basis of it being "justified in the circumstances".

In contrast, as seen the Section 22 procedure provides: 1) for Cree involvement in the decision-making process; and 2) structures discretion by reference to the *JBNQA* Section 22 guiding principles and to "environmental and social impact considerations" (par. 22.6.15)). Furthermore, there is a presumption that the evaluating and review

recommendations will be followed and, as seen, a Cree role is ensured by consultation requirements prior to any deviations therefrom.

Section 22 of the *JBNQA* provides for development decisions and project authorizations on the basis of impact assessment, while under *CEAA*, the assessment simply feeds decisions taken outside of the assessment process. This difference is sometimes invoked by federal officials and legal advisors as a reason for preferring *CEAA* to the federal side of the E&SIA procedure on the grounds that the Section 22 procedure may carry the risk of federal overstepping of its constitutional authority and thus interference with provincial jurisdiction.

We say that this line of argument does not resist examination and in fact is nothing more than a further manifestation of the longstanding pattern of federal resistance to honouring its Treaty promises. Specifically:

1. The pivotal and powerful role given to the E&SIA procedure, including on the federal side, forms part of the Treaty regime the Crees bargained for and we insist on obtaining its protection.
2. At the same time, decision-making on the basis of impact assessment does not, at least in our Treaty context, risk unconstitutional federal interference with provincial jurisdiction:
   a) Constitutionally, the argument to prefer *CEAA* to Section 22 is distinction without a difference. Constitutionally, there are no federal and provincial projects (see part 3.2 above). As between Canada and Quebec, the need to obtain a federal *Navigable Waters Protection Act* or *Fisheries Act* authorization after *CEAA* assessment, to take common examples, can "stop" projects, or lead to project conditions, just as much as Section 22 authorization. This is further confirmed by clauses 12 and 19 of Bill C-19 which would make explicit the breadth of federal authority in deciding on federal authorizations after *CEAA* assessment (see part 4.2 below).
   b) To the extent that it would otherwise pose any problem in terms of the division of powers (which we deny), Section 22 federal E&SIA rights are part of Crown Treaty obligations and are constitutionalized. All parts of Canada's constitutional structure must be reconciled. The division of powers cannot trump our Treaty rights. Rather, provincial and federal authority is conditioned by our status and rights and the conditions under which the boundaries and resources of Quebec were extended.[14]

CEAA and Land Claims Assessment Procedures: Cooperation, Delegation and Substitution

[14] See: *Constitution Act, 1867*, ss. 91(24), 109, 146; *An Act respecting the north-western, northern and north-eastern boundaries of the province of Quebec, (1898)*, S.C. 1898 (61Vict.), c. 3; *The Quebec Boundaries Extension Act, 1912*, S.C. 1912 (2 Geo.V.), c. 45, s. 2(c), (d) and (e) (now repealed); *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, Preamble, ss. 3, 7 and 8; *Constitution Act, 1982*, s. 35(1) and (3); *Reference Re Remuneration of Judges of the Provincial Court*, [1997] 3 S.C.R. 3, par. 107.

A number of *CEAA* provisions deal with the participation of Aboriginal peoples in *CEAA* assessment; others provide for the relationship between *CEAA* and land-claims based assessments. These elaborate provisions for joint public review (ss. 40-42) and for substitution of other processes such as land-claims assessment for a panel under the Act (s. 43-45) are no answer to our fundamental concerns. They certainly do not justify the supplanting of Section 22, including the federal side of its process of environmental and social impact assessment and review.

These provisions are almost never engaged; 99 % of assessments under *CEAA* are screenings, there are a few comprehensive studies and only a handful of panel reviews[15], so the possibility of naming Crees to panels does almost nothing to address our absence, contrary to our Treaty, from the structures involved in most assessments. Furthermore, even when engaged, these provisions, no matter how flexible, do not ensure that the purposes and principles of Section 22 E&SIA govern the assessments.

No Uniformity

CEAA, the five-year review discussion paper, the Minister's report and Bill C-19 take no notice of and give no effect to primacy of the Section 22 E&SIA procedure, nor to the constitutional nature and protection of the rights of the Cree under Section 22.

The precept of uniformity in environmental assessment and the assumption the layering and the marrying of multiple processes operate to the detriment of the specificity of the Section 22 procedure. Thus, the mandate of the Agency to promote uniformity and harmonization (*CEAA*, s. 62(b)), is contrary to and legally subordinate to the *JBNQA*.

The Canadian Environmental Assessment Agency and federal departments are in the habit of preparing and presenting assessment-process flow charts to the Crees which purport to satisfy the requirements of *CEAA* and of other processes, including Section 22 E&SIA. But such technical and managerial feats do nothing to breath life into Section 22 and in practice accepting them would downgrade and dilute Cree rights.

Recommendation #3 -
Substitution of CEAA and Harmonization Dilute Cree Rights:

Although the <u>mechanics</u> of *CEAA* can be married with the procedure set out in Section 22, the <u>institutions</u> and <u>purposes</u> of the two are quite different and *CEAA* does not provide sufficient guarantees of Aboriginal involvement in the assessment. Specifically, the addition or substitution of the *CEAA* process for projects in Eeyou Istchee dilutes Cree rights to bodies with guaranteed and direct Cree representation, constraining these bodies to share assessment responsibilities and powers with *CEAA* "federal authorities", the Minister of the Environment, and the Agency. Therefore, we recommend against substitution of *CEAA* for the E&SIA procedure - or "harmonizing" with *CEAA*. To do so dilutes Cree rights and is inconsistent with our Treaty.

[15] Minister's Report, p. 4.

No Unilateral Federal Action

The *JBNQA* (par. 22.7.10) recognizes an absolute Cree veto over changes to the provisions of Section 22; the federal and provincial legislative role is limited to giving effect to Section 22.

The prohibition of changes to the E&SIA procedure without Cree consent applies whether the modification is direct and explicit, or *de facto* by way of non-application or the establishment and application of a competing process like *CEAA* (see in part 3.2 above, the excerpt from the *Cree Regional Authority* case).

While refusing to engage federal side of the E&SIA procedure, the federal government has created a state of confusion by, on occasion, triggering *CEAA* instead. This amounts to *de facto* recognition of a federal role, coupled with a refusal to collaborate with the Crees on the review of such projects as provided for under our Treaty. There are even cases where, contrary to all principles of coherent impact assessment, the staged approval of federal funding and thus triggering of *CEAA*, has forced the splitting of projects for purposes of assessment. For example, this occurred with respect to the Nemaska wastewater treatment system (split between the collector system and treatment plant).

CEAA, its five-year review and Bill C-19 are measured against an exacting standard. Even if well-intentioned, government legislation and initiatives must be scrutinized and circumscribed to protect Cree rights. As the Supreme Court of Canada said in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1110:

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. [emphasis added]

4.2 Minister's Report and Bill C-19

As seen in general terms, the Minister's Report to Parliament on the review of *CEAA* and Bill C-19 do nothing to undo the history of federal refusal to implement and apply the E&SIA procedure as contemplated under the *JBNQA*, nor to remedy the divergences between Section 22 E&SIA and *CEAA*. For example, after Bill C-19, projects covered by Section 22 will still be excluded from *CEAA* assessment, direct social effects will still not be taken into account, the Crees will still be largely absent from the key bodies dealing with impact assessment and, at the end of the day, federal decisions will still not be guided by the purposes and principles of the *JBNQA*.

If anything, Bill C-19 confirms that *CEAA* provides inferior protections to the Crees and offers *ad hoc* solutions to matters already addressed 26 years ago in the compulsory and adapted E&SIA procedure under Section 22 of the *JBNQA*.

This is not to say that Section 22 E&SIA requires no reform and updating. Rather, close examination reveals that Section 22 already contemplates or at least allows the evolution of the E&SIA procedure. Furthermore, points of convergence with *CEAA* can be harnessed to increase the benefits of impact assessment. For example, to meet concerns about possible gaps in the application of federal assessment, at least until the Treaty obligation to update the schedules to Section 22 is fulfilled[16], *CEAA* triggers can be used to trigger the Section 22 E&SIA procedure[17]. However, nothing warrants treating *CEAA*, with all of its idiosyncrasies, as some kind of "gold standard" to which all other impact assessment processes must conform.

At the same time, *CEAA*, especially as it would be amended by Bill C-19, reflects a broad view of federal constitutional authority and responsibility in matters of impact assessment. It also contemplates multi-jurisdiction impact assessment as a not-infrequent occurrence. This is in stark contrast to the federal posture, driven by the Department of Justice, with respect to the application of the federal side of the Section 22 E&SIA procedure. By implication, it is appropriate to take a broad view of the application of the federal side of the E&SIA process where development involves matters of federal jurisdiction. It is unsustainable to assert, in effect, that only the Crees, with the benefit of a negotiated and constitutionalized environmental and social impact assessment and review procedure, should be denied a strong federal presence to protect our people and environment.

Some examples will illustrate these points.

Clause 2 of Bill C-19 would amend section 4 of *CEAA* to include two new purposes: federal/provincial cooperation and coordination in the conduct of environmental assessment processes (s. 4(b.2)); and, federal/Aboriginal communication and cooperation with respect to environmental assessment (s. 4 (b.3)).

[16] *JBNQA*, par. 22.5.1 and 22.5.2.
[17] See our Recommendation #8 below proposing a new subsection 7.1(4) for *CEAA*.

We note that:

- Clause 2 would add new purposes of *CEAA* that ignore the permanent, constitutionalized and paramount provision made for interjurisdictional coordination and cooperation under Section 22 of the *JBNQA* through the James Bay Advisory Committee on the Environment and the Evaluating Committee. Under Section 22, as seen, where matters of federal and provincial jurisdiction are involved, there is already the possibility of one directive and one impact statement and the option, with Cree consent, of combining the review bodies.

- Clause 2 treats provincial assessment as co-equal with *CEAA* assessment, referring to cooperation and coordinated "action", while with respect to Aboriginal peoples the bill only speaks of "communication and cooperation".

- Bill C-19 correctly proceeds from the assumption that projects are not federal or provincial for purposes of assessment, but rather that projects may have federal and provincial aspects, attracting assessment by both levels of government. The same should apply under Section 22.

Clause 8 of Bill C-19 further illustrates the pitfalls of ignoring our constitutionalized rights and paramount federal legislation. The provisions of new ss. 12.1 - 12.5 would institute the role of "federal environmental assessment coordinator".

Of course coordination between the Agency and federal departments is a good idea. This was driven home to us when *CEAA* was applied to the Waskaganish road project after its review was well advanced under the authority of the Cree local Administrator and the provincial Administrator. But, this coordination must not take place without the direct involvement of the Crees and the institutions provided for under our Treaty.

However, as drafted, Clause 8 would take a role we have been promised will be played by the JBACE, the Evaluating Committee and the federal, provincial and Cree Administrators, and hand it over to the Agency or to a *CEAA* responsible authority. Agreements in this regard are contemplated without Cree participation. All of this would violate our Treaty rights.

The difficulty is compounded by what would become new s. 12.3 of *CEAA*. *Ad hoc* powers are granted to establish a coordination committee. This takes no account of the role of the JBACE as the forum for the oversight of the administration and management of the Section 22 regime and the role in all cases of the Evaluating Committee in shaping and coordinating the course of assessments in our Territory.

The Minister's Report (pp. 9, 10 and 24) correctly notes that *CEAA* and its application do not provide adequate opportunities for Aboriginal participation and do not address the roles of traditional knowledge. However, rather than recognizing and

deferring to the paramount and adapted land-claim regimes like Section 22 E&SIA, Bill C-19 and the Minister would substitute *ad hoc* and narrow measures.

Specifically, the Minister proposes a non-statutory "Aboriginal advisory committee" (Report, p. 24). Furthermore, the full complexity and range of Aboriginal concerns in the face of development, as reflected for example in the guiding principles, institutions and process of Section 22 of the *JBNQA*, are reduced to the patronizing, largely symbolic and timid permissive provision of **Clause 9** of Bill C-19, that would add new s. 16.1 to *CEAA*:

> 16.1 Community knowledge and aboriginal traditional knowledge <u>may</u> be considered in conducting an unconventional assessment. [our emphasis]

The double-standard, whereby the federal government takes a broad view of its environmental assessment jurisdiction under *CEAA*, while abdicating its Treaty responsibilities under the *JBNQA* in favour of the province is evident in **Clauses 12** and **18** of Bill C-19. These clauses, that would add new subsections 20(2.1) and 37(2.1) to the decision-making powers under *CEAA*, make it explicit that federal authority to attach mitigation conditions to project approvals is not narrowly limited to the specific statutory power that a federal authority is called upon to exercise with respect to a project.

5.0 CONCLUSIONS

This brief addresses three principal shortcomings in federal legislation and policy which together amount to a failure to honour our Treaty rights under the *JBNQA*:

1. Persistent federal failure to provide the personnel, financial resources, institutional support, field presence and political commitment necessary to give effect to the rights of the Crees as regards to the process and the institutions of environmental and social impact assessment and review provided for in Section 22 of the *JBNQA.*

2. Federal reliance on a narrow and mechanical reading of Section 22, and of our Treaty relationship with Canada, so as to effectively deny the application of the federal side of the E&SIA procedure to most significant development in our Territory.

3. Application instead, in a sporadic, tardy and disruptive way, of the *CEAA* procedure even though it is at odds with the letter, spirit and intent of our Treaty. This amounts to effectively denying to the Cree the constitutionally-protected process and substantive rights promised in Section 22 as an integral part of our Treaty arrangements with the Crown.

These fundamental issues have been ignored by the Minister of the Environment and the Agency in the five-year review of *CEAA*. If anything, the problems are compounded by Bill C-19.

It will be clear that it is our view that *CEAA*, its application and its five-year review must yield to the E&SIA procedure established by and in accordance with Section 22 of the *JBNQA*. Of course, this does not exclude borrowing from *CEAA* and its triggers where to do so allows the promises of Treaty to be fulfilled, for example by preventing any feared gaps in the application of at least some form of federal assessment.

What then do we ask this Committee to do with a view to the honourable fulfilment of the Treaty promises of the Crown and the implementation of the regime of environmental and social protection provided for in Section 22 of the *JBNQA* ?

We demand not a “separate approach”, but rather implementation of <u>the</u> applicable federal regime of social and environmental protection, i.e. that provided for by and in accordance with Section 22. The Cree position must not be confused with that of provinces or industry interests who wish to effectively eliminate federal assessment in favour of the sole application of provincial regimes. On the contrary, the Crees insist on <u>federal</u> assessment under the applicable law, i.e. the E&SIA procedure in Section 22 of the *JBNQA*. This is required under our Treaty, under the *JBNQA* as paramount federal law and as a matter of constitutional right.

The necessary response will involve a mix of policy, budgetary and legislative changes. In this connection, we note that going far beyond the minimal approach to implementation represented by federal adoption of only the *James Bay and Northern Quebec Native Claims Settlement Act*, Quebec has adopted a full range of special legislation for the implementation of our Treaty.

Although the Quebec record on Chapter 22 is far from unblemished, the province has enacted a whole separate part of the *Environment Quality Act*[18] devoted only to the Treaty environment regimes. This incorporation by way of repetition in provincial statute law is flawed in some respects, but it has the advantage of making our obligatory Treaty E&SIA procedure more visible for proponents, consultants and decision makers.

5.1 Re-Commit to Section 22

Recommendation #4 -
Re-Commit to Section 22:

We call upon the Committee to report to the House, and recommend to the Government, the policy, programme, spending and legislative changes required to give full effect to the Section 22 E&SIA procedure.

Pursuant to general principles applicable to Crown-Aboriginal relations in resource and economic development matters, to the spirit and intent of the *JBNQA* and the Treaty relationship thereunder and to the text and institutions of Section 22 (notably par. 22.3.27 and 22.5.10), such action to further develop and give effect to the E&SIA procedure must be taken not unilaterally, but in concert with the Crees.

A policy and budgetary commitment is required to the provision of the administrative, scientific, legal and support services necessary for the vindication of Cree rights under Section 22. This means devoting significant federal effort and resources to the JBACE, Evaluating Committee and COFEX. Of course, all of this is only relevant insofar as development is subjected, as required, to the federal side of the Section 22 procedure (see part 5.2 below).

This is not to say that the Section 22 E&SIA procedure as originally designed is perfect. It needs policy support, financing and use to develop fully. But it is a flexible procedure designed to evolve over time. In this connection, we understand that the Cree substantive right is to effective environmental and social protection, notably through E&SIA. Therefore, Cree rights are not frozen by the *JBNQA*. We have the right to benefit fully from evolution and improvement in environmental and social impact assessment and review by amendment of Section 22 and by changes in practice thereunder, without requiring that we embrace the supplanting of Section 22 by *CEAA*.

A full revision of Schedules 1 and 2, automatically subjecting and excluding developments from assessment, is long overdue. *JBNQA* paragraphs 22.5.1 and 22.5.2

[18] R.S.Q., c. Q-2, ss. 131 ff.

provide for recurrent five-year review of the lists. Of course, the revision of the lists would not amount to a general review of the E&SIA procedure, but 26 years is a long time to wait for such a modest renewal. Such a review would be an opportunity to harmonize where appropriate the *CEAA* and Section 22 triggers for assessment. But for now, we cannot help but notice that the five-year review of *CEAA* and Bill C-19 are apparently regarded by the Government of Canada as matters of much greater importance than making good on Treaty promises and constitutionalized rights.

With respect to the E&SIA process once triggered, scoping and public hearings are developing under Section 22. There is also a need to develop the practices of preparing formal assessment reports to document the process and reasoning behind assessment determinations. Similarly, post-assessment and approval monitoring is an area where Section 22 E&SIA should be improved.

5.2 Apply the E&SIA Procedure on the Federal Side

Recommendation #5 -
Change Policy and Declare Law on Requirement of Federal E&SIA:

We call upon this Committee to report to the House and recommend to the Government a reversal of its current policy so as to take an expansive view of the application of the federal side of E&SIA procedure to development in our Territory.

We further call up this Committee, given the entrenched position of the Department of Justice in this matter, to adopt an amendment to Bill C-19 to declare and ensure the engagement of the federal side of the Section 22 E&SIA procedure where development involves matters of federal jurisdiction.

5.3 Give Effect to the Primacy of Section 22 E&SIA

As seen, the institutional presence throughout of the Crees and our special status in the assessment procedure are absent under *CEAA*. Direct social impacts are not assessed and Section 22 contemplates assessment of development excluded from the projects and activities subject to *CEAA*. Section 22 makes detailed and adapted provision for coordination, cooperation and harmonization, while guaranteeing Cree participation throughout. Our experience is that the application of *CEAA* has been sporadic and apparently arbitrary. It is applied late in the day, to projects which are not necessarily of the highest priority and without proper respect for the rights and role of the Crees and the assessment bodies under Section 22.

Recommendation #6 -
Act on Primacy of Section 22 E&SIA:

The application of *CEAA* undermines the Treaty rights of the Crees and disrupts the better administration of the E&SIA procedure. The Minister's Report and Bill C-19 do nothing to remedy this situation. On the contrary, the proposed

changes would further establish the pretended primacy of *CEAA*, ignoring federal Treaty obligations and our rights under the *JBNQA* and relegating Aboriginal people to a marginal and symbolic role. We recommend that, with Cree participation, *CEAA* and Bill C-19 be amended to reverse the failure to respect our rights.

5.4 Legislative Changes

Section 22 contemplates changes in federal legislation to accommodate and vindicate Cree rights. It also requires full Cree partnership in determining the nature and details of changes made.

The challenge is to make the changes that are necessary to give effect to the paramount E&SIA procedure under Section 22 without creating the perverse result that our Territory becomes the only place in Canada where in practice federal impact assessment does not apply to projects involving or affecting matters of federal jurisdiction.

Recommendation #7 -
Recommendations #4, #5 and #6 Must Proceed Together:

We recommend that the changes of policy, spending and legislation we call for, all proceed together. Otherwise, we risk putting aside *CEAA* in favour of an underfunded federal Section 22 E&SIA procedure which is never applied. This would be a denial of the environmental and social protection promised under Section 22.

Recommendation #8 -
Amend C-19 to Reflect Federal Duties and to Accommodate Cree Rights:

Therefore, without prejudice to wider issues regarding the implementation of Section 22 and as regards only *CEAA*, we call upon Committee to make the following amendments to Bill C-19 immediately after Clause 3:

3.1 The Act is amended by adding the following after section 7:

James Bay and Northern Quebec Agreement

Applicable procedure

7.1 (1) Notwithstanding anything in this Act or any other law, the environmental and social protection regime, including the environmental and social impact assessment and review procedure, applicable to a project which might affect the environment or people of the part of Eeyou Istchee defined in paragraph 22.1.6 of the *James Bay and Northern Quebec Agreement*, shall be as established by and in accordance with Section 22 thereof.

Federal jurisdiction

(2) For greater certainty and without prejudice to the possibility of resort to combined review by agreement in accordance with paragraph 22.6.7 of the *James Bay and Northern Quebec Agreement*, it is declared that a project subject to environmental and social impact assessment and review pursuant to paragraph 22.5.1 or 22.5.5 of the *James Bay and Northern Quebec Agreement*, shall, to the extent that it involves matters of federal jurisdiction and provincial jurisdiction, be deemed to be of joint or mixed jurisdiction falling within the jurisdiction of both Quebec and Canada and to engage, with respect to Canada, the responsibilities of the federal Administrator and the Environmental and Social Impact Review Panel provided for respectively in paragraphs 22.1.1 and 22.6.4 of the *James Bay and Northern Quebec Agreement*.

Exclusion

(3) Further to subsection (1) and notwithstanding anything else in this Act or any other law, with respect to a project within the part of Eeyou Istchee defined in paragraph 22.1.6 of the *James Bay and Northern Quebec Agreement* or which might affect the environment and people thereof, no environmental assessment or assessment of environmental effects is required or may be carried out by or in accordance with this Act.

Incorporation by reference

(4) Where, but for subsection (3), an environmental assessment or assessment of environmental effects under or in accordance with this Act would be required with respect to a project within the part of Eeyou Istchee defined in paragraph 22.1.6 of the *James Bay and Northern Quebec Agreement* or which might affect the environment and people thereof, that project shall be deemed to be development contemplated in paragraph 22.5.1 of the *James Bay and Northern Quebec Agreement* unless it is contemplated in paragraph 22.5.2 thereof.

5.5 Closing

We thank you for your attention. We are of course available to the Committee for questions and we can provide greater detail to you and your staff on any of the points we have raised.

We hope that this Committee will carefully consider our recommendations and act in a manner which reflects the solemn nature of federal Treaty promises and ensures to us the right to effective and adapted federal environmental and social impact assessment and review pursuant to the procedure detailed in Section 22 of the *James Bay and Northern Quebec Agreement*.

SUMMARY OF RECOMMENDATIONS

Recommendation #1 -
Role and Approach for the Committee:

As Parliamentarians you are not bound by the bonds of supposedly immutable statutes, government policy and the narrow and often shortsighted legal advice of the Department of Justice.

Rather, in accordance with your constitutional role as legislators, you are uniquely placed to set the Government of Canada on the path of vindicating the substantive treaty rights of the Crees under the *JBNQA* to adapted and effective environmental and social protection, notably through impact assessment under Section 22 of the *JBNQA* and to a continuing and effective federal presence and role in this regard. As detailed here, we recommend that you act accordingly.

Recommendation #2 -
Interpreting Section 22 to Trigger Federal E&SIA :

We recommend that this Committee prefer the interpretation of Section 22 that accords with the letter, spirit and intent of the *JBNQA* and triggers federal E&SIA, giving substance to federal Treaty obligations. This Committee should recommend specific statutory language implementing Section 22 which definitively puts aside negative and short-sighted interpretations whereby the federal side of the E&SIA procedure is never engaged. If we are to avoid the rule of judges, then as Parliamentarians, you have the duty to interpret and give direct application to constitutionalized federal Treaty obligations.

Recommendation #3 -
Substitution of CEAA and Harmonization Dilute Cree Rights:

Although the mechanics of *CEAA* can be married with the procedure set out in Section 22, the institutions and purposes of the two are quite different and *CEAA* does not provide sufficient guarantees of Aboriginal involvement in the assessment. Specifically, the addition or substitution of the *CEAA* process for projects in Eeyou Istchee dilutes Cree rights to bodies with guaranteed and direct Cree representation, constraining these bodies to share assessment responsibilities and powers with *CEAA* "federal authorities", the Minister of the Environment, and the Agency. Therefore, we recommend against substitution of *CEAA* for the E&SIA procedure - or "harmonizing" with *CEAA*. To do so dilutes Cree rights and is inconsistent with our Treaty.

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Act on Primacy of Section 22 E&SIA:

The application of *CEAA* undermines the Treaty rights of the Crees and disrupts the better administration of the E&SIA procedure. The Minister's Report and Bill C-19 do nothing to remedy this situation. On the contrary, the proposed changes would further establish the pretended primacy of *CEAA*, ignoring federal Treaty obligations and our rights under the *JBNQA* and relegating Aboriginal people to a marginal and symbolic role. We recommend that, with Cree participation, *CEAA* and Bill C-19 be amended to reverse the failure to respect our rights.

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Recommendations #4, #5 and #6 Must Proceed Together:

We recommend that the changes of policy, spending and legislation we call for, all proceed together. Otherwise, we risk putting aside *CEAA* in favour of an underfunded federal Section 22 E&SIA procedure which is never applied. This would be a denial of the environmental and social protection promised under Section 22.

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Federal jurisdiction

(2) For greater certainty and without prejudice to the possibility of resort to combined review by agreement in accordance with paragraph 22.6.7 of the *James Bay and Northern Quebec Agreement*, it is declared that a project subject to environmental and social impact assessment and review pursuant to paragraph 22.5.1 or 22.5.5 of the *James Bay and Northern Quebec Agreement*, shall, to the extent that it involves matters of federal jurisdiction and provincial jurisdiction, be deemed to be of joint or mixed jurisdiction falling within the jurisdiction of both Quebec and Canada and to engage, with respect to Canada, the responsibilities of the federal Administrator and the Environmental and Social Impact Review Panel provided for respectively in paragraphs 22.1.1 and 22.6.4 of the *James Bay and Northern Quebec Agreement*.

Exclusion

(3) Further to subsection (1) and notwithstanding anything else in this Act or any other law, with respect to a project within the part of Eeyou Istchee defined in paragraph 22.1.6 of the *James Bay and Northern Quebec Agreement* or which might affect the environment and people thereof, no environmental assessment or assessment of environmental effects is required or may be carried out by or in accordance with this Act.

Incorporation by reference

(4) Where, but for subsection (3), an environmental assessment or assessment of environmental effects under or in accordance with this Act would be required with respect to a project within

the part of Eeyou Istchee defined in paragraph 22.1.6 of the *James Bay and Northern Quebec Agreement* or which might affect the environment and people thereof, that project shall be deemed to be development contemplated in paragraph 22.5.1 of the *James Bay and Northern Quebec Agreement* unless it is contemplated in paragraph 22.5.2 thereof.

APPENDICES

JBNQA, Preamble, Section 1 and Section 2

JBNQA, Section 22

James Bay and Northern Quebec Native Claims Settlement Act