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The Streamlining of the Kabinakagami River Hydroelectric Project Environmental Assessment: What is the "Duty to Consult" with Other Impacted Aboriginal Communities When the Co-Proponent of the Project is an Aboriginal Community?

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Abstract
There is existing tension within many Aboriginal communities between economic development and preservation of traditional lands for the continued practice of traditional activities. The "duty to consult" doctrine has has become an important mechanism by which these concerns were identified and addressed (when possible) prior to development. This is a legal requirement that is rooted in the Constitution Act (1982) and subsequent legal case law that has further defined and outlined requirements under this obligation. This article describes the process that was carried out to advance the proposed Kabinakagami River Hydro Project Class Environmental Assessment in Northern Ontario, Canada with an emphasis on the approach to Aboriginal consultation. This project is unique because the co-proponent of the project is an Aboriginal community, with several neighbouring Aboriginal communities potentially affected by the project. This project raises questions about the approach to carrying out the duty to consult in an effective way. An evaluative framework was developed to examine timeline, information, means, and flexibility and transparency of the process to highlight shortcomings in the process and make recommendations for improvement.

Keywords
environmental assessment, Aboriginal, duty to consult, infrastructure, hydroelectric, Canada, remote communities

The Streamlining of the Kabinakagami River Hydroelectric Project Environmental Assessment: What is the "Duty to Consult" with Other Impacted Aboriginal Communities When the Co-Proponent of the Project is an Aboriginal Community?

In Canada, the Aboriginal[1] population is 1,172,785 and growing. The largest numbers of Aboriginal people in Canada live in the area encompassing Ontario and the Prairie Provinces. In Ontario, 2% of the population is Aboriginal with the majority of people of Aboriginal decent concentrated in the north (Statistics Canada, 2006). Inequalities between Canada's Aboriginal and non-Aboriginal communities in income, educational outcomes, and various other social and economic determinants of health have been reported as substantial (Blackstock, 2011; Reading & Wien, 2009). Increasingly in Canada, to address these glaring inequalities, Aboriginal organizations have been advancing economic development as a road forward in order to enhance employment opportunities and establish greater control within their traditional territories; the end goal is self-determination and equity (Anderson, 1997; Anderson, Dana, & Dana, 2006). However, a dilemma exists in that economic development must be balanced with the deep connection Aboriginal people have with the environment and their stewardship responsibilities. The tension that exists in many Aboriginal communities between economic development and preservation of traditional lands for the continued practice of traditional activities is a significant concern. Thus, the "duty to consult" has been an important mechanism by which these concerns are identified and addressed (when possible) prior to development.

As Aboriginal rights and treaty rights[2] were affirmed in the repatriated Canadian Constitution Act (1982) section 35(1)[3] and have since been the subject of many Canadian provincial and federal court cases[4] to establish the extent of these rights—the case law that has followed has served to define the meaning of these rights and is embodied in the duty to consult. As stated by Lawrence and Macklem (2000), "The nature and scope of the duty of consultation will vary with the circumstances . . . the Crown, in most cases, [is required] to make good faith efforts to negotiate an agreement specifying rights of the parties when it seeks to engage in an action that adversely affects Aboriginal interests" (p. 252) or, in other words, the duty to consult is triggered when an action would infringe on Aboriginal and/or treaty rights. More specifically, threshold conditions have been identified that are:

> Based on a knowledge element, a contemplated Crown conduct element, and an adverse effect element. The knowledge element is met when the Crown has actual or constructive knowledge of a potential Aboriginal rights or title claim or of an Aboriginal claim under a treaty. The contemplated Crown conduct element is typically met when the Crown is considering an administrative decision of some kind. The adverse effect element is met when the decision could adversely affect Aboriginal title, an Aboriginal right, or a treaty right, with an implicit

[1] In this article, the term Aboriginal people refers to First Nation, Inuit, and Métis populations in Canada.

[2] The British Crown recognized that the "Indians" in their North American colony had established land rights long before the British arrived (Henry, 2006). These existing land rights meant that land had to be ceded or purchased through treaties to facilitate settlement (Cauchon & Cockburn, 1867).

[3] "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (Constitution Act, 1982, s. 35(1)).

[4] The Dominion of Canada was founded on a federated system of government in 1867.

> requirement that the adverse effect be genuine and not wholly speculative. (Newman, 2014, p. 39)

In addition, depending on the severity of infringement, the process can require consent from Aboriginal groups impacted by a proposed policy or project (Nishnawbe Aski Nation [NAN], 2007; Prno & Slocombe, 2012). While the doctrine is relevant in defining terms and conditions that inform the consultative process, the approach is not limited to the legally prescribed elements and considers the development of the relationship moving forward. The expectation is that the consultative process be meaningful, transparent, and reflect efforts to reduce the impact on Aboriginal and/or treaty rights with an important emphasis on going beyond the legal doctrine towards reconciliation (Newman, 2014).

In addition, while the Crown is responsible for its own actions that may affect Aboriginal interests, they are also legally responsible for the actions of third parties if they affect Aboriginal interest (Newman, 2009). Procedural elements of the duty to consult can be delegated to third parties—common practice in environmental impact assessments and environmental assessments (EAs)—although ultimately the legal responsibility remains with the Crown. Additional concerns are related to what constitutes consultation; for instance, when First Nations community members engage in discussions with project proponents, they are often surprised when that "discussion" is reported as consultation in EA documents. To help avoid this type of outcome, clear and explicitly defined roles in the consultation process need to be identified with the government carrying out the consultation process (Newman, 2009). However, this is not always the most cost-effective approach and proponents are apprehensive of anything that would make the cost of the project prohibitive (Newman, 2009). Thus, the duty to consult continues to be shaped by these types of issues—but what is clear is that it is necessary that all parties show a willingness to participate in a meaningful way in the consultation activities. Lastly, it should be emphasized that the duty to consult framework has been built upon case law where, historically, the proponent of the project has been a non-Aboriginal organization and the people to be consulted are Aboriginal.

In 2008, a partnership was created between Constance Lake First Nation (CLFN) and Northland Power Incorporated to develop the Kabinakagami River run-of-river hydroelectric project. The Kabinakagami River is located in northern Ontario, Canada (Figure 1). The river is a tributary of the Albany River, a major river system in the Mushkegowuk Territory (Figure 1), and one of the livelihood aquatic highways of the Mushkegowuk Cree. The Mushkegowuk (or Omushkego) Cree that inhabit the coastal region of the western James Bay region of the Mushkegowuk Territory occupy four First Nations (i.e., Moose Factory, Fort Albany, Kashechewan, and Attawapiskat) and one town (Moosonee) (Figure 2). The project has proceeded through the feasibility, and Class EA process under Ontario's Environmental Assessment Act (2010). While the project has advanced through the required permitting stages, and environmental report and screening, there have been significant challenges with respect to the consultative process (or lack thereof) employed with respect to First Nations communities downriver of the proposed hydroelectric development (i.e., closer to James Bay on the Albany River), scoping inadequacies, and restrictive timelines. This case provides a unique situation in that CLFN is both the proponent of the new project and subject to the impacts of the development, which begs the question: What is the duty to consult with other potentially impacted Aboriginal communities when the proponent of a project is an Aboriginal community?

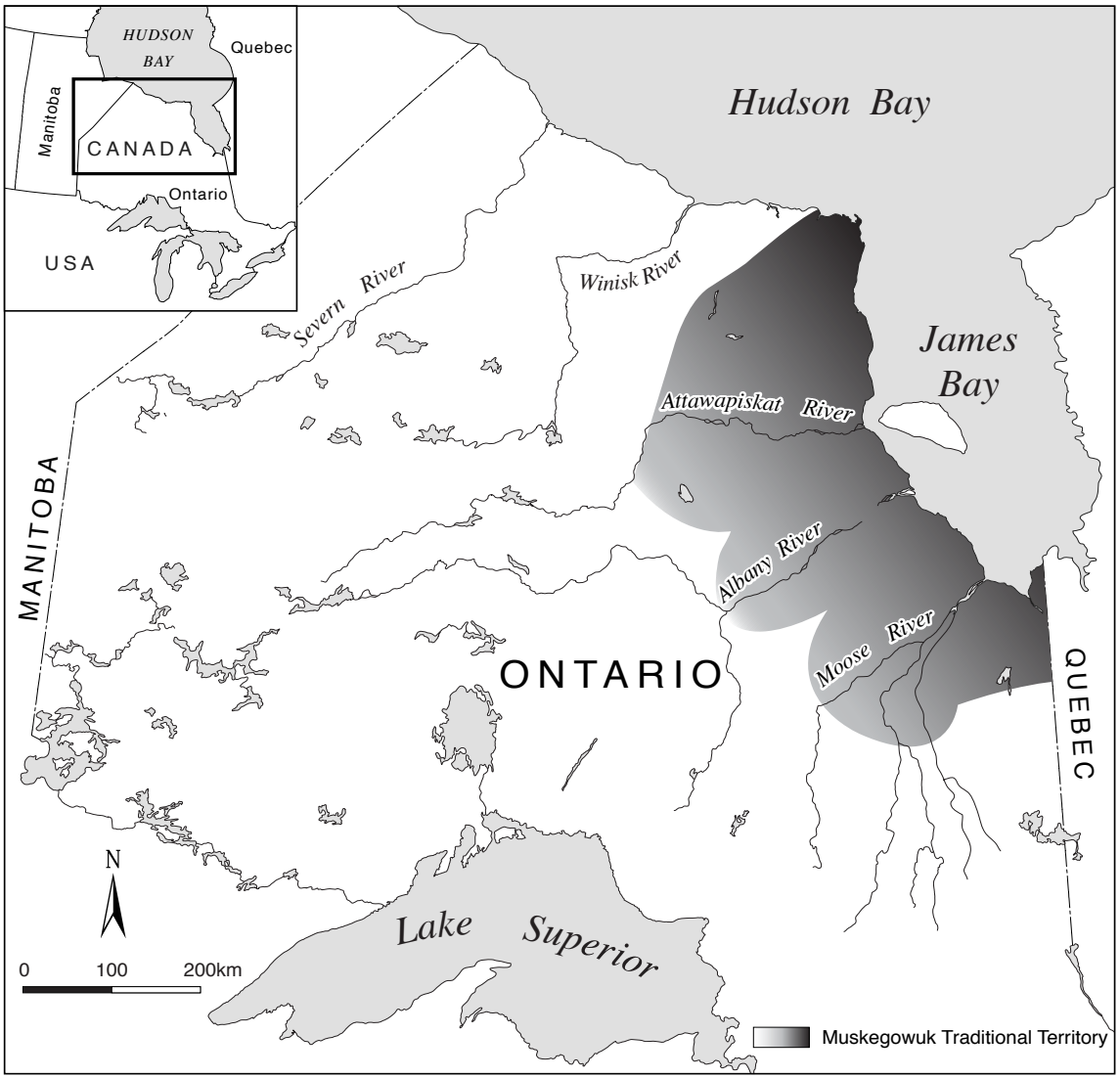

Figure 1. Map showing northern Ontario, Canada with grey shaded area indicating approximate area of the Mushkegowuk Traditional Territory (revised from Gardner, Tsuji, McCarthy, Whitelaw, & Tsuji, 2012).

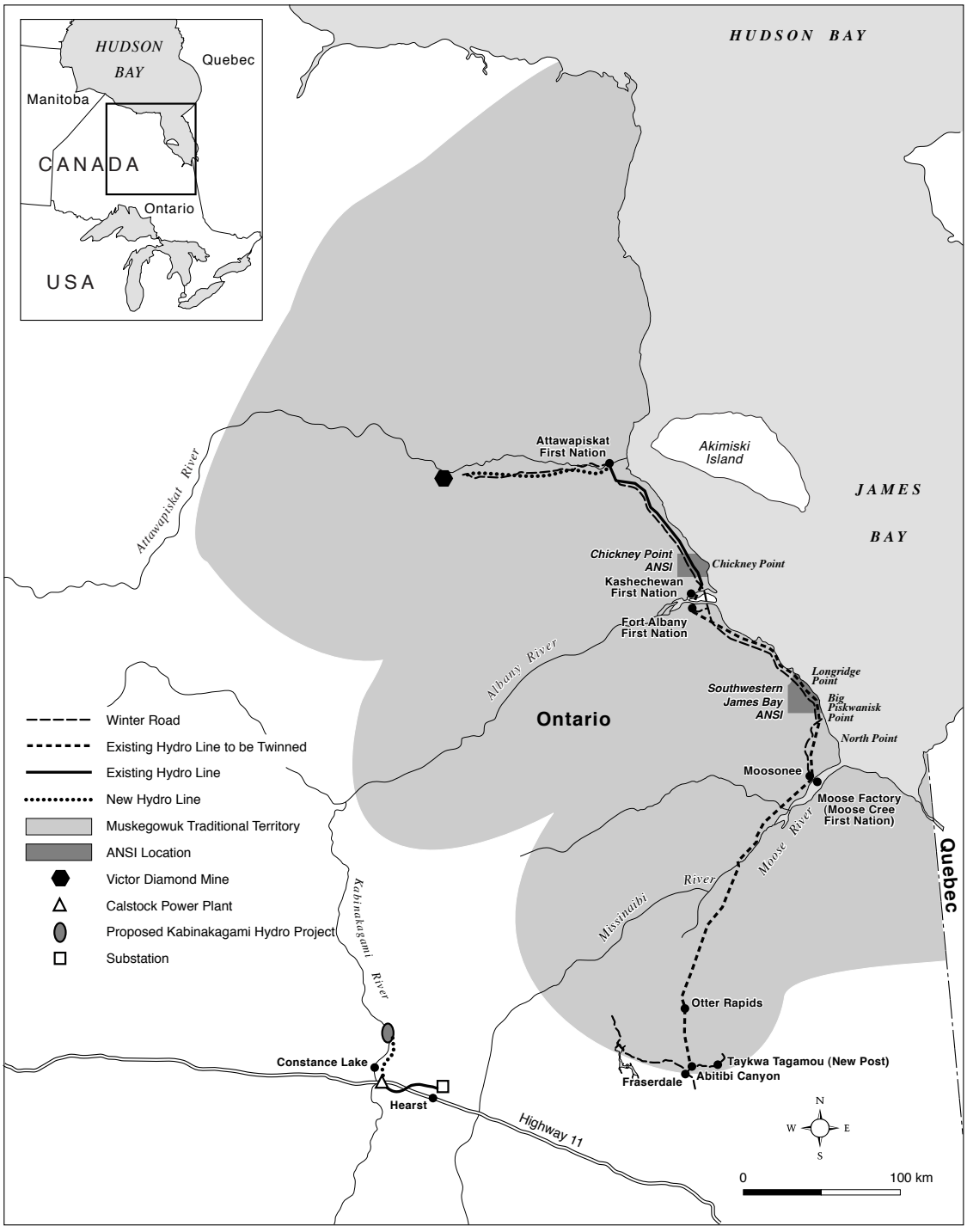

Figure 2. Map showing the Mushkegowuk Traditional Territory, including existing development and infrastructure (winter road, DeBeers Diamond Mine) as well as the proposed Kabinakagami River Hydro Project components.

The first part of this article will present the context of the case study (i.e., Canadian environmental regulation, hydroelectric development in Canada, and historical hydroelectric development in the Mushkegowuk Territory), followed by a brief description of the study area, First Nation governance structure, and consultation expectations; the Kabinakagami River Hydroelectric Project case study; research methods used including the evaluative framework, and primary and secondary data sources. Finally, the results and discussion section situates the analysis in the context of the legal and ethical duty to consult for this particular case study whereby a First Nation community is the co-proponent of the project. The article concludes with recommendations on how to improve outcomes for future projects based on this case.

The Context

Canadian Environmental Regulation

The federated system of governance employed in Canada divides the responsibility for administering and enforcing laws and statutes between the Government of Canada (the federal government) and the provincial governments, as detailed in the Constitution Act of 1857 (original named the British North American Act (BNA) of 1867). Later, the Constitution Act of 1982 (Section 92A) gave jurisdiction over exploration and development of natural resources to the provinces. Nonetheless, certain areas of jurisdiction are shared between the Government of Canada and the provincial governments, as these areas of jurisdiction were specified as being shared between the two levels of government or were not mentioned in the BNA 1867. One of these shared areas of responsibility is for the environment, since the environment was not mentioned in the BNA 1867. Thus, in Canada, EA legislation exists at both the federal and provincial levels and can either be harmonized or reviewed on an ad hoc basis. Ontario has two types of EAs: individual EAs and "streamlined" Class EAs (reviewed in McEachren, Whitelaw, McCarthy, & Tsuji, 2011). Class EAs are used for projects that are routinely carried out with predictable and minimal easily managed environmental impacts (McEachren et al., 2011). There are 11 "parent" Class EAs for different kinds of projects; each parent Class EA acts as a framework for conducting a specific type of Class EA. In the present case, the parent Class EA is for waterpower projects. Satisfying the requirements outlined in the Class EA clears the way for the relevant approvals and permitting.

In Canada, much of the environmental regulation associated with the planning, development, and operation of hydroelectricity has, until recently, been realized through the Canadian Environmental Assessment Act (CEAA) (Fortin, 2001). The first CEAA was enacted in 1992. It has since been a part of the planning, development and operation of a range of projects throughout the country including: oil and gas, hydroelectric power, mining and exploration, and agricultural developments. The requirements of the legislation have led to the emergence of new partnerships and shared ownerships among industry, government and community stakeholders (Fortin, 2001). However, proponents became concerned with the stringent requirements, expanding timelines, and capital requirements for EA; likewise, community and stakeholder groups have been concerned about their ability to participate meaningfully in the EA process (Kirchhoff, Gardner, & Tsuji, 2013). Significant changes to the CEAA were enacted in 2012 through two omnibus bills,[5] C-38 and C-45 (Kirchhoff & Tsuji, 2014). Many of the changes were meant

[5] Omnibus bills package together several measures into one, covering a number of diverse and often unrelated topics (Goertz, 2011).

to streamline the process by reducing the number of projects that required an EA and limiting the timeline to complete an EA to 365 days (Gibson, 2012; Kirchhoff et al., 2013; Kirchhoff & Tsuji, 2014). Historically, the Navigable Waters Protection Act protected waterways and served as a trigger for federal involvement in the EA process, but this changed with the passing of Bills C-38 and C-45 (Kirchhoff & Tsuji, 2014). The number of waterways that were subject to federal protection was significantly reduced from 40,000 lakes and more than 2 million rivers to only approximately 100 lakes and coastlines and 62 rivers (Abouchar & Vince, 2012; Kirchhoff et al., 2013). Two very important issues emerged from these changes in Canadian environmental legislation with respect to Aboriginal people and hydroelectric development—Aboriginal peoples' opportunities to consider, review, and contribute to the EA process were severely limited due to the reduced EA timeline, and the cutting of funding to Aboriginal organizations through the passing of other legislation at the federal level (Kirchhoff et al., 2013; Kirchhoff & Tsuji, 2014)—and very few of proposed hydroelectric projects would trigger federal government involvement (Kirchhoff & Tsuji, 2014).

Hydroelectric Development in Canada

Canada's natural resource-based economy has meant that much of the large-scale development that supports economic growth begins in northern, remote, and sparsely populated regions of the country. Because these areas are remote, development brings with it a whole suite of infrastructure needs to service these operations. As such, many of the hydroelectric projects in Canada are located in remote areas inhabited by Aboriginal groups (Fortin, 2001), and paves the way for future natural resource development.

Hydroelectric generation harnesses flowing or falling water. Water movement is used to turn turbines; the greater the volume and/or height the water falls, the more energy is produced. Projects differ in scale, capacity, and technology. Canada has a long history of hydroelectric production that began in 1881 at Chaudière Falls, Ontario and Quebec, Canada. Further, future hydroelectric development to facilitate development of a region was often provided for in treaties, such as Treaty No. 9, or hydroelectric power generation was the actual reason for a treaty (i.e., the James Bay Treaty 1976). Today, more than 70,000 MW of hydroelectric power has been developed in 475 generating plants. The top producers are the provinces of Quebec, British Columbia, Manitoba, Newfoundland and Labrador, and Ontario. Globally, Canada ranks second, only behind China, for hydropower production with 355 TWh/year (Canadian Hydropower Association [CHA], 2008).

Hydroelectric development is often touted as a green energy source—being considered a renewable energy resource with relatively low operational and maintenance costs over a long service life—while offering competitive prices, jobs, and economic growth opportunities (CHA, 2008). Indeed, hydroelectric development in Ontario has often been identified as an effective means of supporting growth of the economy in a sustainable way, establishing a long-term revenue stream through the sale of surplus electricity to surrounding markets (CHA, 2008; Krupa, 2012a). Nevertheless, hydroelectric development also has well-established impacts including: habitat and landscape destruction, environmental mercury contamination that detrimentally impacts food systems, and increased greenhouse gas emissions (Rosenberg, Bodaly, & Usher, 1995; Rosenberg et al., 1997). This is why the decision-making process related to the establishment of these projects is often described as inadequate (Paterson & Sears, 1993). Thus, contemporary approaches to hydroelectric energy production must

consider advanced approaches that may more effectively realize the goal of sustainable development, leading to more effective policy frameworks that ensure the social and environmental impacts of hydroelectric development are weighed effectively. Considering this type of development also requires navigating important ethical dilemmas related to tensions between development and preservation, the distribution of wealth, rights holders, and social and environmental standards (Klimpt, Rivero, Puranem, & Koch, 2002). The decision must be balanced and the early activities of the impact assessment, such as the scoping exercise and "alternatives to," "alternative means,"[6] and "no-go" options must be informed through public participation, and take into consideration past developments and "established scientific practice," with an awareness of the long-term costs and benefits of the project (Klimpt et al., 2002, p. 1309). Clarity about potential benefits of the project in terms of social development must be identified, including an understanding of the rights of those directly and indirectly affected by and benefitting from the development (i.e., local communities and those at the regional or national level) (Klimpt et al., 2002).

Many of the hydroelectric projects that have or will be developed in Canada are located in areas that are mainly populated by Aboriginal people, who in theory should reap the benefits of anticipated employment opportunities and spin-off activities, but bear all the impacts on their social and cultural way of life (Fortin, 2001). This is why over-the-years many different approaches to hydroelectric development have been advanced in hopes of improving the process to ensure that Aboriginal perspectives are well represented and considered (Fortin, 2001). Various partnership and revenue-sharing agreement schemes have been developed. The proposed Gull Rapids, Notigi, and Gull Rapids hydroelectric project in Manitoba have prioritized collaboration with local Aboriginal communities and undertaken discussions to better understand social and environmental impacts to ensure that benefits of these projects are shared between proponent and impacted communities (Fortin, 2001). Further, the Wisichawayasihk Cree and Manitoba Hydro have established the Wuskowatim Power Limited Partnership, a benefit sharing agreement that includes business development, other job opportunities, and dividends to be paid to the community (CHA, 2008).

Historical Hydroelectric Development in the Mushkegowuk Territory

The watershed to the south of the Albany River is the Moose River watershed (Figure 1). The Moose River is home to the Lower Mattagami River Hydroelectric Complex that includes four generating plants: Smoky Falls (built in 1931), Little Long (1963), Harmon (1965), and Kipling (1966). These facilities are operated by Ontario Power Generation (OPG) and are within the Mushkegowuk Territory. This complex has recently been redeveloped to achieve greater efficiency (OPG and Moose Cree First Nation, 2009). The redevelopment was bound by the requirements outlined in the Northern Rivers Agreement, an obligation made by the Government of Ontario with respect to hydroelectric

[6] Scoping is an "early component of the EIA process used to identify important issues and parameters that should be included in the assessment" (Noble, 2010, p. 267). Alternatives to refer "to different ways of addressing the problem at hand or meeting the proposed project objectives; renewable energy, for example, would be considered an 'alternative to' a proposed coal-fired generating plant" (Noble, 2010, p. 260). Alternative means refers to "different ways of carrying out a proposed project—typically alternative location, timing of activities, or engineering design" (Noble, 2010, p. 260).

development on northern Ontario rivers. The agreement required that any consideration of extension of this project be carried out through a co-planning process between the Government of Ontario and First Nations affected by the project.[7] Any future governments are bound to this commitment in consideration of future hydroelectric development. The agreement also required the initiation of negotiations between Ontario Hydro (created by the Government of Ontario) and First Nations to reconcile past grievances over the initial development (Ministry of Environment and Energy, 1993).

Potential hydroelectric development has been identified throughout the Province of Ontario and includes several high yielding sites throughout the Mushkegowuk Territory. Two sites, Hat Island and Chard River, have been identified along the Albany River to have the potential to produce 490MW and 370MW, respectively (Ontario Waterpower Association [OWA], 2005). These two sites are considered to be the only feasible sites within the policy constraint area as a result of the Northern Rivers Commitment. The sites remain feasible because they have economic potential, could be designed to operate with minimal flooding, and would require minimal additional infrastructure as a result of proximity to the Moose River Complex. However, development of these sites would require a discussion with First Nations if the projects were to advance (OWA, 2005). Among the rivers in Ontario recently evaluated for hydroelectric development, the Albany River has one of the greatest projected potentials of about 2,300 MW (OWA, 2005).

There have been three diversions of the Albany River. The Lake St. Joseph diversion built in 1935 redirects water from the Albany River watershed into Lac Seul. The volume of water is estimated to be 80 m^3/s (Lake of the Woods Control Board, 2002; see also George, 2007). In 1939, the Long Lake diversion was completed. This project diverted the flow of the Kenogami River, a tributary of the Albany River, from north to south through Long Lake to empty into Lake Superior (Day, Bridger, Peet, & Frieson, 1982). The Ogoki River, another tributary of the Albany River, was diverted to flow south to Lake Nipigon and then into the Great Lakes basin. The volume of water diverted has been estimated to be 113 m^3/s; this diversion became operational in 1943 (Day et al., 1982). The development of this project resulted in the inundation of pristine lands up to 40 feet above the natural levels (Day et al., 1982).

[7] The Northern River Agreement applies to the Moose, Attawapiskat, Albany, and Winisk Rivers and requires a co-planning process between Government of Ontario and local First Nations be carried out for any hydroelectric development greater than 25 MW (Ontario Water Association [OWA], 2005). "[O]ur government would agree that there will be no hydroelectric development of greater than 25 Megawatts (MW) installed capacity within the basins of the Attawapiskat, Albany and Weenusk [*sic*] Rivers. Hydroelectric proposals of less than 25 MW installed capacity would be considered if they were proposed by, or directly consented to, by the potentially affected First Nation." Further the letter indicated that the agreement "bind present and future Provincial and First Nations Government" (Ministry of Environment and Energy, 1993, para. 4). This requirement is repeated in Ontario Ministry of Natural Resources' (MNR) site release policy "[a]t this time, individual developments greater than 25MW will not be considered within the basins of the Severn, Winisk, Attawapiskat and Albany Rivers" (MNR, 2004, Section 3.2).

Study Area and Case Background

The First Nations

The Omushkego Cree have occupied the Mushkegowuk Territory of southwestern Hudson Bay and western James Bay for millennia (Figures 1 and 2). The Omushkego Cree signed Treaty No. 9 between 1905 and 1906, and the adhesions to Treaty No. 9 between 1929 and 1930. This region has a population of approximately 10,000 Omushkego Cree. Locally elected chiefs and councils govern individual First Nations communities, with terms of office being determined at the community-level. The communities in the region have road access only during the winter months via an ice-and-snow road, and rely on air transport for the rest of the year, while the river is used throughout the ice-free season for travel.

The community that we are focusing on is Fort Albany First Nation, located on Sinclair Island in the Albany River. The community has a population of approximately 950 people. Kashechewan First Nation is located just north of Fort Albany, on the north shore of the Albany River (Figure 2). Both communities maintain a traditional lifestyle that depends on the Albany River and tributaries as their "highways" for traditional pursuits and the lifeblood of their communities.

As mentioned previously, elected chiefs and councils govern First Nations at the local level. Tribal councils are formed by several regional First Nations and represent regional interests; while, supra-regional First Nation organizations are formed when several tribal councils come together. There are also provincial-level First Nations organizations (e.g., Chiefs of Ontario) composed of these supra-regional First Nations organization, and the Assembly of First Nations (AFN) represents national interests for most First Nation organizations. All of these bodies have a role in advocating for First Nation people— contributing to policy development, and representing First Nations' positions at various levels of government—and providing support and leadership among member communities. Of relevance to the present case study is one regional First Nations organization, the Mushkegowuk Tribal Council or simply Mushkegowuk Council, and one supra-regional governing body, Nishnawbe Aski Nation (NAN). Each organization has a well-defined consultation policy that serves to identify the expectations and guiding principles for the duty to consult process.

Mushkegowuk Tribal Council/Mushkegowuk Council

Mushkegowuk Council represents the Cree communities in the western James Bay region including the coastal communities of Attawapiskat, Kashechewan, Fort Albany, and Moose Cree, and the inland communities of Chapleau, Missinabie, and Taykwa Tagamou Nation (formerly New Post First Nation). Mushkegowuk Council's main purpose is to provide support to member communities through a collective governance structure (Mushkegowuk Council, 2012).

In 2007, the Mushkegowuk Council Chiefs endorsed "The Mushkegowuk Resource Development Protocol" with the purpose of outlining the process to identify, track, and evaluate proposed development in their traditional territory. The protocol has since been amended and also affirmed in 2009 (Mushkegowuk Council, 2009). The principles of the protocol include key points, such as development activities have to be consistent with the continuation of cultural traditions, and values and laws have to be aligned with Aboriginal and treaty rights. Further, accountability for the range of potential impacts on social, economic, and environmental systems must be built into the development

process along with an effective communication system of all those involved. Figure 3 shows the cycle for receipt, review, and decision making as supported by the Mushkegowuk Council protocol. The protocol was designed to reflect the holistic worldview of the Mushkegowuk people with the intention of establishing an agreed upon and consistent process throughout their traditional territory (Mushkegowuk Council, 2009). The protocol considers and incorporates varying levels of complexity within projects. Complexities may arise—based on different scenarios—and the protocol provides a centralized application process through Mushkegowuk Council. This process is meant to allow the facilitation and coordination of technical and other resources at the regional level, allowing for the enactment of regional decisions and the monitoring of projects. The project review is a collaborative process under this protocol including a regional working group made up of Mushkegowuk Council's Lands and Resources staff and representatives from impacted communities. Finally, the proponent has the responsibility to cover the costs associated with the application (Mushkegowuk Council, 2009).

Since 2009, additional resolutions have been passed by Mushkegowuk Council to support the protocol in light of ongoing and emerging issues. Of relevance to the Kabinakagami River Hydroelectric Project is the issue of development impacts extending into the Mushkegowuk Territory even though the development may be situated outside the boundaries of the Mushkegowuk Territory. The Mushkegowuk Council Resolution entitled *Unity Concerning Resource Development* identified key issues important for the advancement of development in the Mushkegowuk Territory, such as benefits and revenue sharing, and the need to develop a process whereby unity could be achieved with groups outside the traditional territory of Mushkegowuk Council (Mushkegowuk Council, 2010). A critical first step to advance inter-jurisdictional cooperation was established through the "Joint Declaration of the Mushkegowuk First Nations and Matawa First Nations,"[8] which highlights the interconnectedness of the two groups based on familial relations, shared historical agreements, and shared environment. Priorities were affirmed, such as the push for observance of the promises outlined in Treaty No. 9; the continued enjoyment of traditional activities; and the advancement of free, prior, and informed consent with respect to development including the sharing of information and strategies to achieve the shared goals of the people (Mushkegowuk Council, 2011).

Nishnawbe Aski Nation

Nishnawbe Aski Nation (NAN) is a supra-regional organization established in 1973, representing 49 First Nations communities that are signatories of Treaties No. 5 and 9 in the Province of Ontario. This organization provides a collective governing body among all of the NAN Chiefs (of First Nation member-communities) and serves as a liaison with other government institutions and offices, at both the provincial and federal levels. The tribal councils counted among the members of NAN are as follows: Independent First Nations Alliance, Keewaytinook Okimakinak, Matawa First Nations, Mushkegowuk Council, Shibogama First Nations Council, Wabun Tribal Council, Windigo First Nations Council, and Independent Bands. The NAN territory is vast and encompasses two-thirds of Ontario's landmass (NAN, 2007).

[8] Matawa First Nations include Aroland First Nation, Constance Lake First Nation, Eabametoong First Nation, Ginoogaming First Nation, Hornepayne First Nation, Long Lake #58 First Nation, Marten Falls Indian Reserve #65, Neskantaga First Nation, Nibinamik First Nation, and Webequie First Nation.

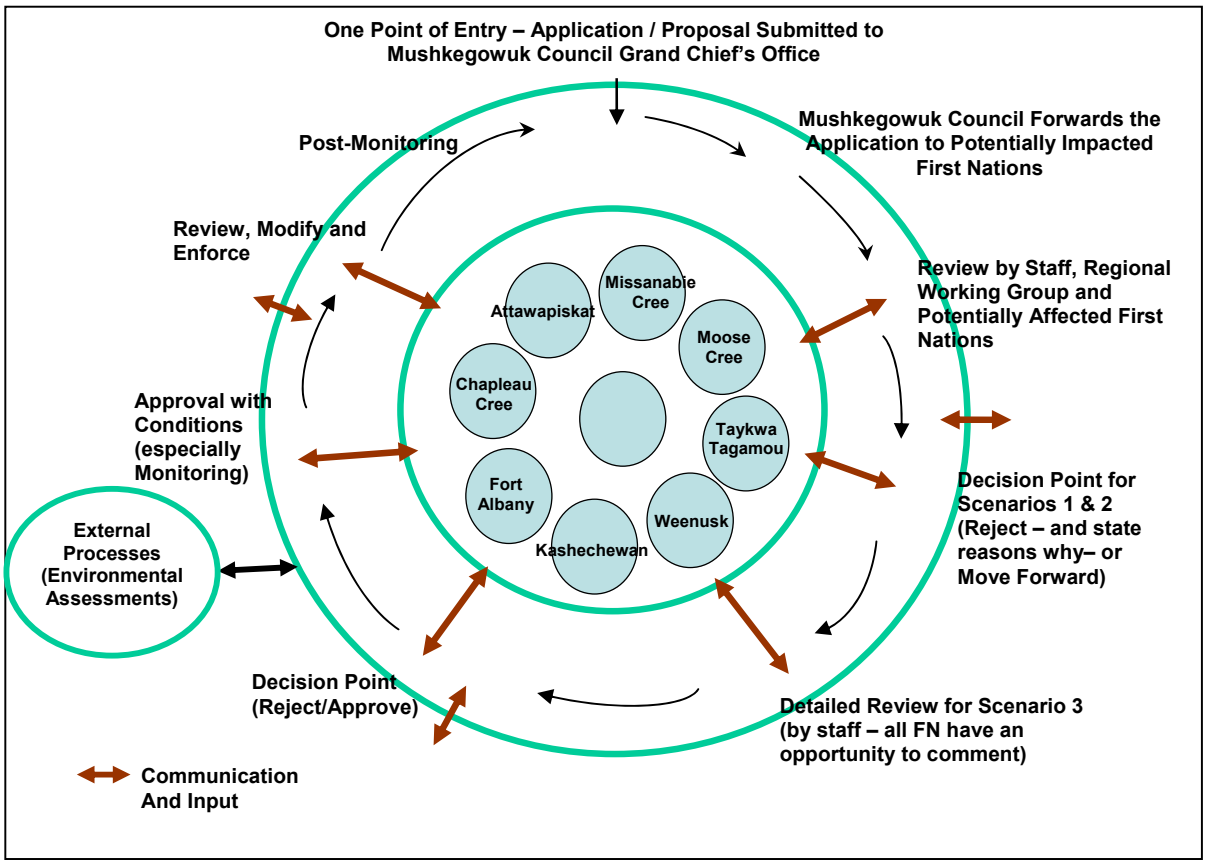

Figure 3. The Resource Development Protocol framework of the Mushkegowuk Tribal Council including Attawapiskat, Kashechewan, Fort Albany, Moose Cree, Chapleau, Missinabie, and Taykwa Tagamou Nation (Mushkegowuk Council, 2009, p. 3).

The NAN consultation policy was ratified in 2001; it was meant to be used as a guide for both government involvement in policy development, as well as a guide to the way resource development should be carried out by proponents of these development projects (NAN, 2007). The NAN policy identifies the community likely to be impacted the most as the priority for early contact. The responsibility for consultation is centred on the Crown, with the consultation process being advanced in a respectful and meaningful way. The policy also distinguishes between consultation and notification. NAN (2007) identified consultation as an "information-sharing and issue-resolution" process carried out in advance of authorizations, approvals, and permits, as opposed to a notification process, which occurs after approvals have been made (p. 18). Appropriate consultation is characterized by early notice, and a process that is open, transparent, and inclusive, providing for financial resources to the First Nation or organizations to help facilitate meaningful participation; the process is also described as being flexible to reflect community needs whereby rights infringement are adequately considered, accommodated, and reconciled with the responsibility of the process remaining with the government (NAN, 2007).

Taking into account the varying complexity and potential impacts of individual projects requires thorough consideration of the NAN protocol, as the proponents of a project need to demonstrate not only meaningful consultation, but also community benefits with limited environmental damage and adequate compensation based on infringement (NAN, 2007). The process is concluded when the membership reaches an informed decision and provides consent (NAN, 2007). A 10-step process is outlined by NAN (2007) that incorporates the above requirements:

1. Initiation
2. Notice
3. Information exchange
4. Technical resourcing
5. Communication
6. Information gathering by First Nation
7. Analysis
8. Negotiation/accommodation
9. Impasse or reconciliation
10. Benefits. (p. 22)

Kabinakagami River Hydroelectric Development

The proposed Kabinakagami River Hydroelectric Project is the product of a partnership between Northland Power Inc. and CLFN (Hatch, 2013b). The physical installation includes access roads and four power-generation facilities—Neeskah (Goose), Peeshoo (Lynx), Wapeestan (Marten), and Wapoose (Rabbit)—each site would consist of an earth-filled dam with various structures to control flow intake, outlet, and power generation (Hatch, 2013b). Collectively, the project is designed to produce 26 MW with transmission line installation to connect to the main Ontario power grid (Figure 3; Hatch, 2013b).

There are three main environmental approvals required for the project:

- Class EA for Waterpower Projects (OWA, 2012).
- Class EA for Resource Stewardship and Facility Development Projects, which relates to the transmission line that will be located on Crown land (MNR, 2003).
- A Water Management Plan (WMP) under the Lakes and Rivers Improvement Act (OWA, 2012).

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Initially, the Kabinakagami River Hydroelectric Development Project had requirements under the Canadian Environmental Assessment Act (CEAA, 1992) requiring a federal-level Environmental Screening related to the Fisheries Act (1985) and Navigable Waters Protection Act (now called the Navigation Protection Act, 1985). However, changes to the CEAA in 2012 meant that those requirements were no longer a consideration (Kirchhoff & Tsuji, 2014). Nonetheless, the final Environmental Report for the project addresses both the provincial requirements and the federal Environmental Screening requirements (Hatch, 2013b). The Class EA for waterpower projects includes a categorization of the project, concept, definition, assessment, documentation, and implementation requirements (OWA, 2012). This Class EA allows for integration with other legislative requirements, and is submitted and subject to review under the individual review process (OWA, 2012). The advancement of the Class EA process is also meant to provide opportunities to incorporate the consideration of other legislative requirements. In addition, the Kabinakagami River Hydroelectric Project proposes the installation of a transmission line that transects Crown land and therefore requires a Class EA for Minor Transmission Facilities. These two Class EA processes are coordinated in one report to improve the transparency and efficiency of the process (OWA, 2012).

The Kabinakagami River Project is considered to be within an unmanaged waterway (Hatch, 2012)—a category B, Class EA that is thought to have the broadest impacts—and therefore require greater Aboriginal community involvement and agency interest (OWA, 2012). These types of projects require four notifications, which are meant to fit into the targeted final report timeline of 12 to 24 months (OWA, 2012):

1. Notice of Commencement is meant to inform all potentially affected parties, including landowners, Aboriginal communities, regional MOE, MNR offices, government agencies, municipalities, interest groups, and the President of OWA of projects.

2. Notice of Inspection (to parties who have expressed an interest or participated and additional parties at the discretion of the proponent) for unmanaged waterways provide an additional opportunity to review the Environmental Report for 30 days (unless extended by the proponent).

3. Notice of Completion is issued once the input provided has been considered and the Environmental Report is finalized, a 30-day period for comment follows as well as requests for Part II Orders. The proponent can extend this period; they can determine that further consultation is required based on outstanding issues.

4. Statement of Completion notice includes a description of outstanding issues following the notice of completion 30-day review period. Once these issues are addressed, and as long as no Part II Order is received, the statement of completion can be submitted and the final Environmental Report made available. This is the conclusion of the EA process and further permit and approval processes can be carried out.

While the above notification forms the basis of the mandatory requirements for the proponents, proponents are also meant to consider the context of the proposed project including the geography and

timing. The principles that guide this consultation process should include mutual respect, clarity, transparency, flexibility, trust, and certainty (OWA, 2012).

Research Methods

The mandatory criteria required for the fulfillment of the duty to consult legal obligation under the Province of Ontario environmental legislation—and the non-obligatory criteria put forward by the Mushkegowuk First Nations at the community, regional, and supra-regional levels—form the backbone of our evaluative framework on whether duty to consult was met with the Kabinakagami River Project. Our framework includes two levels of consultation: There is the legal obligation of the proponent whether Aboriginal or non-Aboriginal, and then there is the ethical obligation inherent in the dealings of one Aboriginal group with another. We believe the latter should be at the highest standard, as it is the way that Aboriginal people want non-Aboriginal groups to interact with them (Sistili, Metatawabin, Iannucci, & Tsuji, 2006); these better practices criteria are described in Table 1. These criteria (mandatory and better practices) were used to structure our evaluation of the Kabinakagami River Project.

Primary information was collected using the culturally appropriate semi-directed interviews (Tsuji et al., 2007). Interviews were conducted with the current Deputy Chief and Chief of Fort Albany First Nation, and the former Chief of Fort Albany First Nation, as communication concerning the Kabinakagami River Hydroelectric Project was always directed toward these community leaders. All participants gave oral consent, and interviews were in English, although the option of an interview in Cree was open. All available relevant written documents for the case study were obtained and evaluated. These documents included: EA documents, the record of communications compiled by the community leaders and Mushkegowuk Council, relevant Band and Tribal Council Resolutions, joint declarations, and consultation protocols. A themed deductive analysis of the interview and written record was performed, framed by the criteria (Table 1) needed to satisfy the Class EA process for this type of development in order to gain Government of Ontario approval, and the better practices informed from Aboriginal organizations.

Results and Discussion

The chronology of the major milestones and requirements associated with the Kabinakagami River Class EA project is presented in Table 2. Reference is made throughout the EA process to the "Aboriginal Engagement Plan and Public Consultation Plan" (Hatch, 2013a). This Plan guides the delivery of information, mandatory notification, and what information, if any, will be collected as part of the planning process. The Aboriginal communities identified by Northland and CLFN in the Aboriginal Engagement Plan to be consulted with included: CLFN, Hornepayne First Nation, Fort Albany First Nation, Kashechewan First Nation, Métis Nation of Ontario, and Cochrane Northern Lights Métis Council. However, CLFN was identified as the community whose traditional lands would be directly affected by the project.

Table 1. Characteristics of an Effective Consultation Process for Hydroelectric Projects involving First Nations Communities

Criteria	Description
Timeline	To be initiated and carried out as early as possible in the project planning and assessment process. Allow for adequate time for communities to gather additional information and understand the potential impacts of the development on their Aboriginal and treaty rights.
Information	Respectful, timely, comprehensive, and reciprocal information (Indigenous knowledge and "Western" science) exchange prior to government decision-making, authorization, permits, or licenses are issued. Notification is not consultation.
Means	Providing the means to allow for participation in the process. This is necessary to ensure equality between industry, First Nations, government, and industry. Financial, technical, and human resources are necessary to ensure that First Nations are able to fully understand and participate.
Flexibility/ Transparency	Towards accommodation and reconciliation. A process that shows openness to accommodate additional information requests, communications, and thorough consideration of suggestions brought forward by the First Nations to improve the project, achieve greater benefit to the communities or mitigate impacts, or compensate.

Note. Compiled from characteristics used to describe an effective consultation process in the Nishnawbe Aski Nation handbook on Consultation in Natural Resource Development (NAN, 2007), Reaching Effective Consultation, (Anishinabek/Ontario Resource Management Council, 2003), The Resource Development Protocol of the Mushkegowuk Tribal Council (Mushkegowuk Council, 2009), and the Ontario Water Association Environmental Assessment guidelines (OWA, 2012).

Table 2. Chronology of Events to the Development of the Kabinakagami Hydroelectric River Project

Date	Milestone
May 2007	CLFN and Northland Power Inc. commence discussions regarding development of up to 8 waterpower sites on the Kabinakagami River.
July 2008	CLFN and Northland Power Inc. sign first Letter of Intent to develop a project on the Kabinakagami River.
November 17, 2008	Agreement signed between Hatch Inc. (consulting company) and Northland Power Inc. (terms and conditions).
April 2009	Applications submitted to the Ontario MNR to obtain rights to pursue development on Crown land under the Direct Site Release Process for 8 waterpower plants. Hatch Inc. retained to prepare Pre-Feasibility Engineering Study and commence baseline environmental field investigations.
November 2009	CLFN and Northland Power Inc. sign formal agreement to proceed with the Project.
November 2009	Applications for Feed in Tariff (FIT) contracts for seven (7) sites submitted to the Ontario Power Authority's (OPA) FIT Program.
December 2009	Hatch Inc. prepares Prefeasibility Study document (design information on Project Description document is the same from the Prefeasibility Study).
June 2010	MNR provides a Site Information Package (SIP), which identifies potential stakeholders. The Project Description document stated, "Aboriginal Engagement and Public Consultation Plans have been prepared to identify the consultation processes that will occur" (Hatch, 2011, p. 1-2). The Project description lists Fort Albany First Nation as one of the stakeholders to be consulted for this EA. It also stated, "All agencies and stakeholders listed in Table 1.1 will be sent an introductory letter and copy of the Notice of Commencement" (Hatch, 2011, p. 1-2).
June 17, 2010	Notification of Kabinakagami River Hydroelectric Project given to Fort Albany First Nation from CLFN and Northland Inc.
June 23, 2010	Notice of Site Release (MNR's Waterpower Site Release process) posted in newspapers. CLFN sent notice as part of MNR's Duty to Consult during Applicant of Record review stage.

Date	Milestone
June 26, 2010	Workshop held at CLFN to provide community members with information on the proposed project.
July 22, 2010	Site Release process letter sent from MNR to Fort Albany First Nation, Kashechewan First Nation, Hornepayne First Nation, Northern Lights Métis Council, and Métis Nation of Ontario.
June 20, 2011	All Agency kick-off meeting held at the MNR office in Hearst, ON. Federal agencies involved included Department of Fisheries and Oceans (DFO), Transport Canada (TC), Aboriginal Affairs and Northern Development Canada (AANDC), and Natural Resources Canada (NRC) (Hatch, 2012b, Appendix C8 included minutes of the meeting).
November 11, 2011	Public Notice of Commencement, Notice of Water Management Plan.
November 2011	Open community meeting held at CLFN—"community voted to move forward with the project" (Hatch, 2012, pp. 2-21).
November 21, 2011	Notice of Public Information Centre #1 (sent from Niagara Falls, ON, meeting held in Hearst, ON).
December 2, 2011	Hatch Inc. receives email with "Scoping Document for Federal Screening of the Kabinakagami River Hydroelectric Project."
December 6, 2011	First Public Information Centre (PIC) held in Hearst.
December 6, 2011	"All-agency" (federal and provincial) meeting held in Hearst (however, only NRC attended, via teleconference, only for a short duration of the meeting due to bad connection).
December 11, 2011	Follow-up meeting for all-agency meeting (June 2011) MNR, CLFN, Ontario Ministry of Environment (MOE), Northland, and Hatch Inc.
December 13, 2011	Teleconference held regarding the Scoping Document with federal agencies including Canadian Environmental Assessment Agency (CEAA), DFO, TC, Environment Canada (EC), and NRC. MNR and MOE also participated in the call.

Date	Milestone
December 14, 2011	Federal Notice of Commencement under the Canadian Environmental Assessment Act (Screening Environmental Assessment (EA))—DFO and TC involved.
December 19, 2011	Notice of public information Center #2 (sent from Niagara Falls, held January 11 in Hearst, ON).
January 11, 2012	Second Public Information Centre (PIC) held in Hearst.
February 1, 2012	The draft ER was provided to CEAA, DFO, TC, EC, NRC, and Health Canada (HC) for review and comments.
March 1, 2012	Teleconference held with the Federal Review Team to discuss the project and the draft Environmental Report (ER). The draft ER was revised to address the preliminary comments received from the federal agencies before issuing the Notice of Inspection.
April 11, 2012	Notice of Inspection (under the Ontario Water Association Class EA) issued including Draft EA—30-day review period runs from April 13 until May 14, 2012.
July 2012	Environmental Screening (Federal Trigger) no longer required resulting from changes to the Canadian Environmental Assessment Act (2012).
February 5, 2013	Final ER for the Kabinakagami River Hydro Project was released.
February 27, 2013	Second Part II Order (Bump-up) request sent by Chief Rex Knapysweet, Fort Albany First Nation to Minister of Environment (First request was made in May 2012, following Notice of Inspection, which was deferred as it was submitted too early in the process and should follow the final ER).
January 2015	Anticipated Commercial Operation date.

Note. Taken from the Kabinakagami River Project revised from Hatch, 2012, 2013b; ongoing correspondence provided by Chief Rex Knapysweet.

Table 3 also follows the EA process but is specific to communication between Constance Lake First Nation, and Fort Albany and Kashechewan First Nations. The chronology of events shows that the required notifications and information sessions were carried out as a mandatory part of the process. Some of the relevant meetings involving responsible authorities and government officials with an interest in the project are also included.

It is also important to note that throughout the EA process for this project there were significant issues related to CLFN community support and changes in community leadership in CLFN and Fort Albany First Nation, as well as Kashechewan First Nation that further complicate inter-community communication. Moreover, there was a majority vote against the project in CLFN in August 2010. However, it was not until February 2011, when INAC (now known as AANDC) indicated that the CLFN Chief and Council could, as elected officials, decide to advance the project irrespective of the community membership vote. In June of 2011, CLFN elected a new Chief (Roger Wesley) and replaced three Band Council members. In the summer of 2012, Fort Albany First Nation and Kashechewan First Nation elected new Chiefs and Councils. The new Chiefs and Councils faced significant challenges in coming up to speed with respect to the various areas of responsibility related to the EA process.

Criterion 1 Timeline

The Class EA guidelines outline a 12 to 24 month timeline to carry out the process. This presents a problem in many communities with the limited resources, both technical and financial, and especially impacts northern Canadian communities. Geography and timelines are always a complicating factor in remote areas. Indeed, the first notification of the project was provided to Fort Albany First Nation and all potentially affected First Nation communities in June 2010, while the partnership between Northland and CLFN was formalized in July of 2008. In addition, Fort Albany First Nation made a request for direct consultation in December 2011 following the first public information session held in Hearst, Ontario.

A meeting with Fort Albany First Nation and Kashechewan First Nation was held in Fort Albany on February 21, 2012, and was attended by Chief and Band Council members from CLFN, Fort Albany First Nation, Kashechewan First Nation, representatives from Northland, and the MNR. However, Hatch Inc., the consulting firm responsible for drafting the technical documents and delivering the Public Information Centre (PIC) session, was not present. The draft EA was released shortly thereafter in April 2012. Fort Albany First Nation submitted several comments detailing their concerns. While Fort Albany First Nation expressed an openness to host further community consultation, no sessions were scheduled by CLFN. A new Chief and Council were elected in Fort Albany First Nation in August of 2012, and several attempts were made to organize community consultation between December 5, 2012 and February 2013 with CLFN. The final Environmental Report was released on February 5, 2013, ending any opportunity for meaningful consultation. Dates for a community meeting in Fort Albany First Nation were finally advanced for the weeks of February 11th and 25th, following the announcement of the final Environmental Report.

Table 3. Chronology of Communication and Community Information with Affected First Nations

Date	Description/Notes
April – May 2009	Traditional Environmental Knowledge interviews conducted with Constance Lake First Nation (CLFN) members.
October 2009	Through discussions with CLFN, it was decided to reduce the number of proposed facilities to 7, due to environmental concerns associated with one of the proposed sites at Roger's Road Landing.
August 17, 2010	CLFN holds referendum to discuss the project (105 against and 97 for the project).
December 2010	AANDC, at the time known as Indian and Northern Affairs Canada (INAC), provides a letter indicating that the referendum could only be classified as an expression of interest, and says that, ultimately, the decision lies with the elected leadership of CLFN.
February 2011	CLFN Chief and Band Council (based on AANDC's letter) decide to move ahead with the project.
February 24, 2011	Information meeting for CLFN members in Thunder Bay Area was held in Thunder Bay, ON.
June 2011	CLFN local elections—New Chief elected (Roger Wesley) and three new Band Council members.
December 6, 2011	Chief Solomon of Fort Albany First Nation requests direct consultation with his community and Kashechewan First Nation, and an additional information session with these communities.
December 8, 2011	Two open houses held at CLFN to provide additional information to the CLFN membership regarding the proposed project.
January 14, 2012	Open house held at CLFN school gymnasium.
February 21, 2012	Meeting in Fort Albany between CLFN Chief and Band Council members, representatives from Northland, MNR, and the Chiefs and representatives from the Band Councils of Fort Albany First Nation and Kashechewan First Nation.
March 16, 2012	Letter from William Armstrong (Ontario Ministry of Environment (MOE), Southwest Region) to Noel Boucher (Hatch Inc.) taking issue with geography, language boundaries, and that, so far, the process has not included meaningful or effective Aboriginal consultation.

Date	Description/Notes
May 11, 2012	Chief Solomon of Fort Albany First Nation submits a request to Minister Jim Bradley (Ontario Ministry of Environment) for a bump-up to an Individual Environmental Assessment and Comments on Draft Class EA report based on, among other things, the duty to consult not being met.
July 12, 2012	Letter received from CLFN responding to bump up request because it should be submitted once the final environmental report has been submitted. Concerns outlined were forwarded to proponents and CLFN responded.
August 15, 2012	Letter to Chief Andrew Solomon of Fort Albany First Nation from Jim Bradley (Minister of Environment) declining request for Part II order (bump-up) and indicating that the proponent would consider revising the Draft EA and the time to request the Part II order is during the Notice of Completion public review period.
August 2012	Election of new Chief and Council Fort Albany First Nation.
December 5, 2012	CLFN letter sent to organize an information session in Kashechewan First Nation and Fort Albany First Nation.
December 5, 2012	Chief of Kasheschewan responds suggesting a meeting in the new year.
December 13, 2012	Chief Rex Knapaysweet of Fort Albany responds indicating open availability for meeting.
December 18, 2012	Information was requested to determine staff members who could act as point of contact through the information session planning process. Response from Fort Albany making Thomas Scott (Deputy Chief) the point of contact.
January 15, 2013	CLFN suggests advancing to possible dates in February once the ice road along the coast of James Bay is operational to hold the information session.
January 21, 2013	CFLN sends follow-up email expressing some concern over lack of response and suggesting February 11th to the 15th and February 25th to March 1st, 2013.
February 5, 2013	Final Environmental Report for the Kabinakagami River Hydroelectric Project was released.
February 25, 2013	Chief of CFLN sends an official letter updating the project. The Environmental Report had been finalized. Describes importance and community consultation and numerous attempts to set up community meetings and requests efforts be made to schedule these.
February 27, 2013	Second Part II Order (bump-up) request sent by Chief Rex Knapysweet of Fort Albany First Nation to Minister of Environment.

Note. Source Hatch, 2012, 2013b; ongoing correspondence provided by Chief Rex Knapysweet.

It is clear that Fort Albany First Nation had expressed an interest and an expectation of being consulted as part of this project early on in the process (i.e., before the legislated EA report review period). Little opportunity for meaningful consultation was incorporated into the Aboriginal Engagement Plan that also guided information sharing and communication with CLFN. The requirements outlined in the OWA guidelines as part of the Class EA include specific notification timelines for "stakeholders" and Aboriginal consultation, which was followed in the case of CLFN. Aboriginal Consultation with CLFN in the Kabinakagami Project meant traditional ecological knowledge (TEK) studies, workshops, notifications, meetings for off-reserve members, liaison staff, multiple meetings with Chief and Council, door-to-door notification of meetings, community information centres, as well as personal notice of commencement, draft report for inspection, and notice of completion. However, when describing the consultation and engagement strategy for "other First Nations" (Hornepayne First Nation, Fort Albany First Nation, Kashechewan First Nation, Métis Nation of Ontario, and Cochrane Northern Lights Métis Council) engagement is limited to the mandatory notifications, with an option for additional meetings if requested. The guidelines also recognize the need to consider the context of the project including timelines and geography. The principles that guide the consultation frameworks, for both the NAN and MC protocol, highlight the importance of early notice of First Nations that may be impacted, so that resources can be made available to participate, with flexibility being incorporated in the process. The location of the information session in Hearst, Ontario, highlights an existing shortcoming of this Class EA process whereby northern First Nation people have to fly out of their home communities at great expense and on little notice to attend a consultation session supposedly put on for their benefit.

This case clearly demonstrates why Class EA frameworks developed and designed in southern Ontario should not be applied to northern Ontario carte blanche (McEachren et al., 2011). The circumstances related to environmental issues, geographic location, infrastructure, data, and capacity are completely different (McEachren et al., 2011). The strict timelines incorporated into the EA process here are completely inappropriate. At the very least, the proponents must take into account the unique logistical requirements that relate to the geography of the area and provide participant funding, if they want to demonstrate a commitment to meaningful and effective consultation.

In moving forward, the Minister of Environment has yet to respond to the second Part II Order (bump-up) request submitted in February 2013. If the Minister orders a bump-up, the project would be subject to an Individual EA, requiring more time and adding greater uncertainty into the feasibility of the project under the present scheduling. Perhaps the Ontario Minister of Environment would require consent for this project by affected downstream communities.

Criterion 2 Information

Information exchange figures prominently in the advancement of the project with a clear primary purpose in the current case being placed on informing CLFN to cultivate community support, solicit input to shape the project, and advance community benefits. Prior to the notification of the project being sent, the TEK interviews were carried out with CLFN members (April to May 2009). The report detailing the process carried out indicated that no responses were received following the Notice of Commencement from representatives of Aboriginal communities (November 2011) (Hatch, 2013b (Section 2, p. 3). This assertion is not based on facts, as Fort Albany First Nation had already expressed an interest in the project well in advance of the Notice of Commencement. Raymond Ferris (CLFN) expressed this interest in a meeting discussing the early development of the project (unpublished minutes of meeting between Northland Power Inc. and the Ministry of Natural Resources regarding the Kabinakagami River Hydro Project 2009 Field Investigation Results that was held at the MNR office in Hearst, Ontario. Representatives from the MNR, Constance Lake First Nation, Northland Power, WESA and Hatch (consulting) February 26, 2010; see also Hatch, 2013b, Appendix C8, p. 63). In addition, the Chief of Fort Albany sent an official request for direct consultation with his community in December of 2011. The leadership of Fort Albany First Nation indicated that they would prefer an initial meeting with CLFN leadership, as well as a community information session in Fort Albany First Nation. A meeting was held between Northland Power Inc., CLFN, and Fort Albany First Nation leadership on February 21, 2012. The initial meeting would allow the Fort Albany First Nation leadership to evaluate the nature of the project and assess their own needs to effectively participate in future discussions.

The draft EA was released on April 11, 2012. Immediately following the release, Fort Albany First Nation submitted a long list of questions and concerns as part of a Part II Order bump-up request. Concerns were related to the following issues: duty to consult; lack of scientific evidence presented describing water quality; lack of mitigation regarding "fish passages;" lack of consideration of water temperature changes and changes in river ice regimes as a result of the development; inadequacies related to consideration of cumulative effects; and approach to boundary selection for study. Hatch Inc. responded to the concerns indicating that no further study would take place, nor would there be further consideration of changes to the design, or changes to boundary selection. The response did indicate that the proponents would hold one additional meeting with the community members in Fort Albany First Nation and Kashechewan First Nation. However, efforts to provide information sessions in the communities (December 2012 to February 2013) did not materialize until within weeks of announcing the final environmental assessment on February 25, 2013.

Information sessions must form an important part of the project development process. As mentioned in the background section of this article, there is a small window of time in the western James Bay region where access to the coastal communities is logistically easier and more affordable along a seasonal snow-ice road that connects the southern terminus of rail transportation in Moosoneee, Ontario to the James Bay coastal communities. Notices of public information sessions were all sent within a two-week window of the session, and it must be emphasized that mail (and courier) service is not reliable in this region. This fact would have been common knowledge to leadership of CLFN. Further, each of the notices was mailed from Niagara Falls, Ontario, so if mail service was good for this particular case, the notices would have arrived before the actual sessions, but the timing would have put notification within days of the information session, which is exactly what happened. This is a very short period of time to

arrange and schedule transport for community leadership and membership to the information sessions located in southern Ontario. In addition, Fort Albany First Nation and Kashechewan First Nation are located in a remote area of northern Ontario, and travelling to the locations for information sessions in Constance Lake and Hearst, Ontario, would represent a significant expense with respect to flights and accommodation, in the thousands of dollars per person range. The cost of travelling is prohibitive for Band Council and even more so for community members. This limits the ability of community members to attend information sessions outside of the community, which would be known by CLFN leadership.

There is some dispute related to the degree of impact directly from the project that will be experienced related to traditional activities of First Nations people downstream, in this case from the proposed project on the Albany River. The proponents have advanced the position that Fort Albany First Nation is 400 km downstream from the project, a distance beyond any possible impacts. In addition, they argued that the water from the Kabinakagami River contributes less than 3% of the source water to the Albany River (Hatch, 2012), though no source for this information is cited in the report. It is well known that Fort Albany First Nation and Kashechewan First Nation are located a distance downstream of the proposed project, however, the traditional activities (e.g., moose hunting, fishing) of people from this region extends inland to the Kabinakagami River. Assessing the degree of impact based on the proximity of the settlement area to the sited resource development project is not appropriate, as significant subsistence activities are undertaken all along the Albany River. In addition, the TEK study for this project was only carried out with a small number of community members and they were all from CLFN, further narrowing the information used to inform this report. Relevant TEK held by members of Fort Albany First Nation and Kashechewan First Nation was not represented in the report.

Clearly, the legal requirements of the duty to consult were not met in this process, let alone the higher standards that should be in place where one of the proponents is a First Nation organization. The lack of adequate community meetings—the siting and timing of project information meetings—and the advanced state of the project when the other First Nations were notified do not even meet the minimum standard for information sharing. It is difficult to understand this oversight when considering the context of the development: a First Nation co-proponent of a project with potential impact on treaty rights with respect to neighbouring First Nation communities. Further, there were two overarching governance structures in place—NAN and MC—CLFN is not a member but has made joint declarations regarding development impacts, both with established consultation protocols and extensive institutional experience. Yet, none of these protocols were implemented nor the First Nations guiding principles reflected in the spirit of these documents. This raises serious questions about the comprehension of the NAN and MC protocols and their "legitimacy," if First Nations that have supported them in principle do not support them in practice.

Criterion 3 Means

Outside of provision of information upon request and mandatory notification, there was no provision of financial, technical, or human resources being provided outside of the community of CLFN; CLFN was even provided a liaison position. Indeed, no financial resources were made available to assist community leadership or community members of other First Nations to attend public information centres held in Hearst, Ontario, to receive information, or to provide input regarding ongoing concerns. A digital copy of the information used during the information session was provided to Fort Albany First Nation, but no actual support to understand this information was provided. Also, there was no mention of providing means to surrounding First Nations to attend or participate in the collection of TEK data about areas of cultural, spiritual, or environmental importance to be used to inform the development of the project at the time that these studies were carried out (April to May 2009).

Criterion 4 Flexibility/Transparency

The Aboriginal Engagement Plan was meant to provide an opportunity for Aboriginal communities to be informed about the project, provide TEK, identify important cultural and spiritual site information, identify areas of special interest, and communicate issues of concern present in the affected community related to the project. The Aboriginal Engagement Plan for this project described transparency as a guiding principle for Aboriginal engagement. The Hatch (2013b) report defined "transparency in terms of sufficient information for meaningful and constructive participation and consideration of values, and transparency in terms of how participation informs the outcomes of and the final decisions for the project" (Appendix C1, p. 2). There was some flexibility demonstrated with the reduction in the number of sites to be developed as a result of environmental concerns revealed though discussions with CLFN community members (see Table 4, October 2009), as CLFN was a co-proponent. However, the proponents did not elicit or consider input from other First Nations downstream of the proposed project. As mentioned, Fort Albany First Nation did submit comments as part of the bump-up request that detailed many concerns with the project including the lack of provision of information in Cree and a lack of opportunity for information gathering from the community to inform project design, participation, and consultation. The proponent did indicate a willingness to provide a copy of the executive summary detailing the project in Cree (as provided to CLFN); however, no changes to project design or additional consultation were carried out. The Aboriginal Engagement document lists Fort Albany First Nation under "other aboriginal communities" and describes mandatory notification, with additional meetings to be facilitated when requested. Fort Albany First Nation directly requested meetings and consultation with CLFN prior to February 2010 and more formally in December 2011. The first and only meeting to be held happened in February 2012. There were some efforts to schedule an additional community information session to take place after that date but it was not pursued after the final environmental report was released.

Conclusions

The duty to consult is certainly triggered in this area based on treaty rights. However, the process that has been carried out failed to meaningfully consider the impact on treaty rights for downstream communities. TEK studies with downstream communities were not contemplated due to the adopting of limited boundaries with respect to project effects. Thus, potential cumulative impacts related to past

diversions and water impoundment structures on fish populations were not thoroughly considered. The process that was carried out limited opportunities to develop a relationship, did not engage downstream communities in a meaningful way, nor did it reflect the flexibility needed to reduce the impact on Aboriginal and/or treaty rights towards reconciliation.

Beyond the need for consultation that flows from prescribed elements of the legal doctrine, there is a substantial ethical obligation, as there is a history of limited consultation with previous hydroelectric developments in the region (Moose River Complex), which creates a need for reconciliation. This is evident in the Northern Rivers Agreement between First Nations and the Ministry of Environment and Energy (later known as the MOE), which requires consent from those communities that would be affected by hydroelectric development then and now. The application of this agreement presents itself in the MNR (2004) Site Release policy document, which implies shared recognition of this agreement by both the MNR and MOE. The Class EA guiding document also describes this project as a category B project, requiring greater agency and Aboriginal interest. Together these elements would suggest that the highest level of consultation with downstream First Nations would be expected. However, this process has, at best, demonstrated the minimum standard for "public" consultation by providing notification—which is surprising since a co-proponent was a First Nation. Or, perhaps *because* a co-proponent was a First Nation, the proponents felt no need for extensive consultation.

The presentation of this case study has served to highlight the standard for consultation that is expected and some standards that are introduced in this case as a result of unique geographic, cultural, and historical conditions. The evaluation has highlighted significant shortcomings in this case that have resulted in increased conflict and uncertainty related to development. While there has been no response to the Part II Order in the first quarter of 2014, the co-proponent, Northland Power, downgraded the project from "highly certain" of being constructed status. As a result, $5.2 million of previously deferred development costs were written off, meaning that the future of the project is now uncertain (Northland, 2014).

Recommendations

Future approaches would benefit from direct government involvement in early consultation activities to ensure that all involved understand roles and expectations; this approach would contribute to greater awareness of the nature of the project and potential for infringement. Proponents should engage with all potentially impacted communities, beyond a simple notification to identify early concerns or policies that would trigger more rigorous consultation processes. This would benefit the process in the long run with a more realistic understanding of time, information, and capacity requirements that would be necessary. In addition, there should be greater oversight by Crown representatives throughout the process with the ability to delay or suspend the process, when it becomes clear that requirements for adequate consultation are not being met, to help to ensure that these issues are addressed.

There is a need to instil greater awareness of limitations to the consultation process when restrictive project timelines are used, such as in the case of streamlined EAs (e.g., Ontario's Class EA). Limitation will be particularly evident when streamlined EAs are applied to remote, predominantly First Nations communities, in northern areas for logistical, cultural, and other reasons. In addition, clear guidelines

detailing opportunities for realistically derived participant funding should be implemented, particularly in cases where finances and geography present significant barriers to participation.

There was certainly organizational awareness of the presence of requirements for consent that flow from the Northern Rivers Agreement, as evident in the project policy and strategic planning documents. However, this heightened expectation for consent from downstream communities was not carried through in the approval of the Aboriginal Engagement Plan that guides consultation in this case. Clearly, more thorough consideration of the degree of consultation is required especially in light of agreements that have been made towards reconciliation of past wrongs related to hydro development in the region.

Early and meaningful engagement in information exchange related to the advancement of project design, feasibility studies, TEK studies, background review by those First Nations communities listed under "Other" is critical to an effective EA process. The effort to satisfy these requests for further information and consideration of concerns advanced by downstream communities were only prioritized in later stages of the process, arguably, well past the point of influencing the project or advancing mitigation. Greater accountability related to flexibility and openness is required to avoid future oversight of these principles meant to guide the process and prevent litigation.

A series of training exercises for community leaders and staff introducing the legal (and ethical) requirements of duty to consult, with special emphasis being put on EA scenarios similar to the one that is of particular concern for that community, is necessary. This community engagement is critical to building community-based capacity for participation. There is organizational knowledge that can be shared here by members of the regional and supra-regional First Nations governance organizations, along with protocols that can serve as tools at the community level with provision of more overt efforts to knowledge training and support[9]

The establishment of a participation strategy within potentially impacted communities to ensure thorough documentation, reporting, and information sharing would enhance the ability of a community to participate within the limited timelines often present in the EA process. This ability to mobilize more readily and engage in the process would ensure that the community meets its obligation to actively participate at every opportunity.

[9] Krupa (2012b) undertook an evaluation of the experience of one Aboriginal community, Pic River First Nation (PRFN) in northern Ontario, who have successfully developed three hydro electric projects: Wawatay a 13.5 MW operation, Twin Falls a 5 MW operation, and Umbata Falls 24 MW operation. The first, Wawatay was developed as a proponent that gained them significant equity; the second, Twin Falls, employed a financing strategy that led to full ownership; and finally, Umbata Falls where PRFN was the lead developer and owner of majority shares. PRFN, a community with a wealth of experience in hydropower development, has gathered a number of lessons and strategies that have helped to maintain continuous improvement in their community with respect to meeting objectives related to social well-being. Along the way, they have also met with dissention related to social and environmental impacts. They have incorporated significant opportunities for participation by community members in the planning, environmental assessment, and impacts on daily or subsistence activities. Incorporating these mechanisms into the process has improved the efficiency of the process for approvals and permits and also within the community improved the social legitimacy of the ventures (Krupa, 2012a).

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