



Reforming the National Energy Board: What Role Will Indigenous Women Play?

Submission by
Quebec Native Women Inc.
to the National Energy Board Modernization Expert Panel

Prepared in collaboration with Hutchins Legal Inc.



HUTCHINS LEGAL INC.
AVOCATS-BARRISTERS & SOLICITORS

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***“The Earth does not belong to us;
we belong to Mother Earth.”***

- *Viviane Michel, President of Quebec Native Women (QNW)*

Introduction

This submission is presented by Quebec Native Women Inc. (QNW) to the National Energy Board Modernization Expert Panel. The Expert Panel has been tasked by the Minister of Natural Resources Canada to study the current structure, role and mandate of the National Energy Board (NEB) under the *National Energy Board Act*. Based on the comments and recommendations received from indigenous peoples, amongst others, the Expert Panel will make recommendations to the Government of Canada on how to modernize the NEB, including through possible legislative changes.

QNW represents Quebec’s First Nations women. Our membership includes women from the 11 indigenous nations in Quebec, i.e. Abenaki, Algonquin, Atikamekw, Eeyou, Huron-Wendat, Innu, Maliseet, Mig’maq, Mohawk and Naskapi. Some of our members living in urban areas come from elsewhere in Canada. As a member of the Native Women’s Association of Canada (NWAC), QNW is also represented on the Assembly of the First Nations of Quebec and Labrador (AFNQL), the First Nations Human Resources Development Commission of Quebec, and several other Native and non-Native commissions and committees.

QNW is encouraged by the Government of Canada’s efforts and the interest expressed by the Expert Panel to “speak to organizations and groups representing the interests of Indigenous women that can provide a gender-based lens on how the NEB can be modernized.”¹ **Indeed, restoring the nation-to-nation relationship involves achieving parity between and among the various stakeholders. For this to be attained, the next generation of indigenous rights and the regulatory mechanisms designed to protect them must therefore take into explicit consideration the perspective of indigenous women.**

This submission is designed to make the Expert Panel aware of the realities experienced by indigenous women as an intersectional group², with respect to the specific impacts and risks that the large-scale projects regulated by the NEB may represent for them. It is intended to serve as a reminder that **indigenous women are subjected to specific and disproportionate impacts from large-scale energy development projects and pipelines** that have an irremediable impact on their land and resources. These projects also **contribute to climate change, to which indigenous women, and indigenous peoples more generally, are more vulnerable than the rest of the**

¹ Expert Panel, “NEB Modernization: A Proposed Indigenous Engagement Plan” (January 2017), online:

<<http://www.neb->

[modernization.ca/system/documents/attachments/8001c28f44afd197354a91793437298f66aba2ea/000/005/188/original/Proposed_NEB_Modernization_Indigenous_Peoples_Engagement_Plan_Feb10_EN.pdf?1486756776](http://www.neb-modernization.ca/system/documents/attachments/8001c28f44afd197354a91793437298f66aba2ea/000/005/188/original/Proposed_NEB_Modernization_Indigenous_Peoples_Engagement_Plan_Feb10_EN.pdf?1486756776)>

² Intersectionality is a concept used in sociology and political science that refers to the condition of people subject to various forms of domination or discrimination in society due to their being part of two or more marginalized groups.

population. What makes this reality all the more worrisome is that indigenous women are those who gain the least from the economic benefits of such projects within their communities.

Currently, **NEB regulations, policies and guidance notes contain no requirement as to the need to consider and evaluate the concerns of indigenous women and the specific and disproportionate impacts suffered by them.**³ The NEB's processes and decisions do not take this reality into account.⁴ Indeed, while a request from NWAC and Pauktuutit led to the inclusion of directions on how to conduct gender-based analysis as part of consultations with indigenous communities in the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*⁵ in 2011, neither the *National Energy Board Act*, the *Canadian Environmental Assessment Act* nor their respective enforcement policies make doing so a requirement.

As part of its mission to defend the rights of indigenous women, QNW has for many years been involved in activities aimed at protecting the environment, with a view of bringing attention to the specific concerns and perspectives of indigenous women as these relate to their access to the land and its resources and the protection of their traditional knowledge.

In 2013, QNW implemented the “Environment and Sustainable Development” program in order to examine the specific impacts of development projects and climate change on indigenous women and their families. In May 2012, QNW was part of a coalition of organizations that set up the “Forum Plan Nord” aimed at bringing together indigenous and non-indigenous, regional, environmental and labour union players to reflect on and propose more sustainable solutions to Northern development.⁶ In May 2014, QNW took part in hearings of the Permanent Peoples’ Tribunal (PPT) on the Canadian Mining Industry which examined the responsibility of the five Canadian mining companies involved in multiple cases of labour rights violations, denial of the rights of indigenous peoples to self-determination, and destruction of the environment.⁷ In 2014 and 2015, QNW also took part in a series of conferences held in Ottawa and Vancouver as part of the international symposium entitled *Gendered Impacts: Indigenous Women and Resource Extraction*.⁸ These events revealed **a worrisome lack of precise data on the specific impacts of**

³ National Energy Board, “Regulations, Guidance Notes and Related Documents under the *National Energy Board Act*” (last update: February 23, 2017), online: <<https://www.neb-one.gc.ca/bts/ctr/g/gnnb/index-eng.html>>.

⁴ This observation is based on our knowledge and analysis of several large pipeline projects that have been recently approved or are being studied by the NEB. Any exception to this current practice is therefore marginal.

⁵ Indigenous and Northern Affairs Canada, “*Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*” (March 2011), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>.

⁶ Aurélie Arnaud, “Plan nord – Où sont les femmes autochtones?” (2011) 16 *Recherches amérindiennes au Québec* 81 and “Plan nord – Où sont les femmes autochtones?,” *Le Devoir* (May 2, 2012), online:

<<http://www.ledevoir.com/societe/actualites-en-societe/348959/ou-sont-les-femmes-autochtones>>. See also the Forum Plan Nord summary report: Martin Thibault and Julien Marcadet,

“Rapport synthèse: Forum Plan Nord, 2-3 mai 2012” (March 2013), p. 13, online:

<http://www.naturequebec.org/fichiers/Aires_protegees/RA13-03-ForumPlanNord.pdf>.

⁷ Permanent Peoples’ Tribunal, Press Release: “Guilty Verdict: Canadian Government Shares Responsibility for Mining Injustice” (December 10, 2014), online: <<http://www.tppcanada.org/communiqués/?lang=en>>.

⁸ For more information, see Kairos, “Gender Justice: Gendered Impacts of Resource Extraction,” online:

<<http://www.kairoscanada.org/what-we-do/gender-justice/gendered-impacts-symposium>>, and Kairos, “Gendered Impacts: Indigenous Women and Resource Extraction,” Kairos Symposium Executive Summary (November 20, 2014), online: <http://www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf>.

land and resource development projects on indigenous women, even though it is increasingly being recognized in Canada and around the world that indigenous peoples, and indigenous women in particular, suffer disproportionately from the impacts of these types of projects and the climate changes that ensue⁹

At the international level, numerous reports, including those from the Intergovernmental Panel on Climate Change, have shed light on the differential and disproportionate impacts of climate change on women, and especially those who, like indigenous women, are subject to multiple forms of discrimination.¹⁰ The 2015 Paris Agreement on climate change explicitly advocated a “**gender-responsive, participatory and fully transparent, approach, taking into consideration vulnerable groups, communities, [...] traditional knowledge, [and] knowledge of indigenous peoples**” in the creation of relevant environmental policies.¹¹ More recently, following COP22 held in Marrakesh in November 2016 as part of the implementation of the Paris Agreement, special emphasis was placed on the need for signatory states to promote gender equality in their climate change policies¹², as well as address intersectional issues¹³ such as gender equality and knowledge of indigenous peoples.¹⁴

Indigenous women have a **special relationship with their environment and the land**, and this relationship is intrinsic to and forms an integral part of their identity and culture. Hence, they possess traditional knowledge and a territorial perspective that are specific to them and often

⁹ Pauktuutit, “The Impact of Resource Extraction on Inuit Women and Families in Qamani’tuaq, Nunavut Territory: A Report for the Canadian Women’s Foundation,” (January 2014), online: <<http://pauktuutit.ca/wp-content/blogs.dir/1/assets/Final-mining-report-PDF-for-web.pdf>>; Deborah Stienstra et al. “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North,” FemNorthNet/The Canadian Research Institute for the Advancement of Women (May 13, 2016), p. 11, online: <<http://fnn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>; Kairos, “Indigenous women to brief mining and government officials on mining impacts” (October 2015), online: <<http://www.kairoscanada.org/indigenous-women-to-brief-mining-and-government-officials-on-mining-impacts>>.

¹⁰ Lakshmi Puri, “Op-ed: Making Paris Climate Change Agreement Deliver for Women and Girls – The Marrakech Opportunity” (November 15, 2016), UN Women, online: <<http://www.unwomen.org/fr/news/stories/2016/11/op-ed-by-ded-puri-on-making-paris-climate-change-agreement-deliver-for-women-and-girls>>.

¹¹ Annex to the Decision of the Conference of Parties, adopted at the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, Paris, November 30 - December 13, 2015: COP 21-Decision 1/CP.21: “Adoption of the Paris Agreement” (January 29, 2016), online: <http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>.

¹² Decision of the Conference of Parties, adopted at the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, Marrakech, November 7-18, 2016: COP 22/CMP 12, Decision 21/CP.22: “Gender and Climate Change” (November 17, 2016), online: <<http://unfccc.int/resource/docs/2016/cop22/eng/10a02.pdf>>.

¹³ The intersectorial approach in the development of public policy consists in considering the intersection of various forms of domination or discrimination experienced by a person, and more specifically by women in vulnerable situations.

¹⁴ Decision of the Conference of Parties, adopted at the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, Marrakech, November 7-18, 2016: COP 22/CMP 12, Decision 16/CP.22: “Third comprehensive review of the implementation of the framework for capacity-building in developing countries under the Convention” (November 17, 2016), p. 9, online: <<http://unfccc.int/resource/docs/2016/cop22/eng/10a02.pdf>>.

different from those of indigenous men.¹⁵ Over the centuries, they have played, and continue to play, a **central role within their communities. They have contributed to the preservation of their cultures, the integrity and wellbeing of their families and nations**, and have successfully mobilized themselves and made themselves heard, despite the numerous barriers they face to doing so.

However, the consultation policies currently applied by the Government of Canada as part of regulatory and environmental processes, including those conducted by the NEB, leave no room for the voices of indigenous women and do not require a fair representation of their interests. This situation is associated with a **double under-representation of indigenous women** and an almost complete lack of consideration for their specific concerns, risks and interests, **both within indigenous governance structures at the community, regional and national levels, and in consultation processes led by the federal government or its officials and delegates**. This state of affairs generates and perpetuates inequality and discrimination towards them.

This double under-representation is reflected not only **in environmental and socioeconomic impact studies, environmental assessments, and monitoring measures required by regulatory processes** like those of the NEB – such as those to approve pipelines, importing and exporting of crude oil, natural gas liquids, refined petroleum products, as well as international and interprovincial power lines – but also in **pre-negotiations and the content of agreements signed with proponents and governments**. In all of these, little to no special attention is given to indigenous women, their concerns, their rights and their interests.

However, a fair representation of the interests of indigenous women in the context of resource development is not impossible. This role may, depending on the cases, be assumed by the various groups that represent Indigenous women, such as NWAC and its 12 provincial/territorial member associations across Canada, including QNW, or the AFNQL council of elected women, of which QNW is a part.

In the first part of this submission, we will provide an **overview of indigenous women in Quebec and Canada, their relationship with the land, their traditional knowledge, and their place and role within their communities**. We will then discuss the specific and disproportionate impacts and risks of NEB-regulated projects and other large-scale development projects **on the health and safety of indigenous women, their environment and their ability to access their territory**.

In the second part, we will look at the importance of **two positive sources of law, namely, indigenous legal traditions and international law**. We will reiterate the role played by women within indigenous legal systems as well as their role as holders of traditional knowledge and as those primarily responsible for its transmission to future generations. We will then discuss some of the international obligations the Government of Canada has towards indigenous women in relation to the NEB's role, mandate and processes.

¹⁵ Native Women's Association of Canada, "Aboriginal Women and Aboriginal Traditional Knowledge (ATK): Input and Insight on Aboriginal Traditional Knowledge" (2014), pp. 27-28, online: <<https://www.nwac.ca/wp-content/uploads/2015/05/2014-NWAC-Aboriginal-Women-and-Aboriginal-Traditional-Knowledge-Report1.pdf>>.

In the third part, we will propose that **the modernization of regulatory and environmental processes requires the full participation of women in decisions affecting the land and its resources, along with adequate consideration of their interests.** The consultation process currently in use in Canada must comply with the right to self-determination and self-governance of indigenous peoples, based on a combined reading of sections 35(1) and (4) of the *Constitution Act of 1982*, the *Canadian Charter of Rights and Freedoms* and the *United Nations Declaration on the Rights of Indigenous Peoples*. This can be achieved by implementing appropriate mechanisms aimed at ensuring the adequate representation of indigenous women and consideration of their interests, such as by including gender-based and intersectional analysis in environmental assessment studies, and by implementing of the principle of free, prior and informed consent.

To conclude, we will present a summary of our recommendations as to the manner in which NEB processes could be reformed to ensure that the unique voices and perspectives of indigenous women are heard and considered.

1. Recognizing inequality: specific impacts of NEB-regulated projects on indigenous women

The indigenous women of Quebec and Canada form a diverse group; they come from nations and societies that are culturally and traditionally unique from one another. Nevertheless, they also share a point of commonality, and that is their special relationship with the land and its resources. This relationship is inextricably linked to their identity as indigenous women.

1.1. The indigenous women of Quebec and Canada

1.1.1. Relationship between the land and indigenous knowledge

Indigenous societies are characterized by the intrinsic links that exist between their identity, social relations, culture, and traditional knowledge with the land.¹⁶ Across Quebec and Canada, the traditional knowledge of indigenous peoples and the legal systems that flow from it, are based, despite their considerable diversity, on common principles such as respect, reciprocity, balance, harmony, cooperation and gratitude. These principles are grounded in a profound appreciation of the interrelations found between all creatures and the belief that each one is worthy of being respected. **In the context of today's land use and resource development, these principles remain extremely relevant and must form the basis of any response to the environmental crisis our society currently faces.**

¹⁶ Ciaran O'Faircheallaigh, "Women's absence, women's power: indigenous women and negotiations with mining companies in Australia and Canada," (2013) 36 *Ethnic and Racial Studies* 1789, p. 1792.

As explained by Professor Deborah McGregor, indigenous knowledge “comes from the Creator and from Creation itself.”¹⁷ The stories and teachings through which knowledge is transmitted “are gained from animals, plants, the moon, the stars, water, wind, and the spirit world. Knowledge is also gained from vision, ceremony, prayer, intuitions, dreams and personal experiences.”¹⁸ Professor Marlene Brant Castellano has identified three sources of indigenous knowledge: traditional (passed on from generation to generation); empirical (acquired by observation); and revealed (of spiritual origin and considered to be a gift).¹⁹ These are the same sources of knowledge which, according to Professor John Borrows, **form the basis of indigenous laws and legal traditions, namely, natural, sacred, deliberative, positive and customary law.**²⁰ For example, John Borrows explains how natural law is derived from observing the physical environment:

“Indigenous peoples who practise this form of law might watch how a plant interacts with an insect, and draw legal principles from that experience. Others may study how an insect interrelates with a bird, and take legal guidance from that encounter... There might also be analogies drawn from the behaviours of watersheds, rivers, mountains, valleys, meadows or shorelines to guide legal actions. As such, **these laws may be regarded as literally being written on the earth.**”²¹

Indigenous knowledge is therefore not something that can be simply learned from a book; it is *practiced* and *lived*. Indigenous knowledge is not just “knowledge about relationships with Creation or the natural world; it is the relationship itself. It is about being in the relationships with Creation; it is about realizing one’s vision and purpose and assuming responsibilities accordingly.”²²

It is therefore difficult to define indigenous identity without referring to the land wherein the laws, stories, teachings, language and practices of the indigenous peoples are found. In fact, **it is because their roles, experiences with the land, and lives differ from those of men that indigenous women have their own unique traditional knowledge.**

1.1.2. Place and role of indigenous women within their communities

Since indigenous knowledge is closely linked to the land, that knowledge has aspects that are specific to women in that it stems from indigenous women’s particular place and role within their community.²³ In several indigenous communities, and as we will see in more detail below, women have traditionally been responsible for the transmission of knowledge to children, the protection

¹⁷ Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, Environment, and Our Future,” (2004) 28 *American Indian Quarterly* 385, p. 388.

¹⁸ *Ibid.*

¹⁹ Marlene Brant Castellano, “Updating Aboriginal Traditions of Knowledge,” cited in Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, Environment, and Our Future,” (2004) 28 *American Indian Quarterly* 385, p. 388.

²⁰ John Borrows, *Canada’s Indigenous Constitution*, Toronto, University of Toronto Press, 2010, pp. 23-58.

²¹ *Ibid.*, pp. 28-29.

²² Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, Environment, and Our Future,” (2004) 28 *American Indian Quarterly* 385, p. 391.

²³ Nancy J. Turner, Marianne Boelscher Ignace et Ronald Ignace, “Traditional ecological knowledge and wisdom of Aboriginal peoples in British Columbia,” (2000) 10 *Ecological Applications* 1275, p. 1276.

of water, administering medicinal plants, the making of clothing, the harvesting, preparation and preservation of food, the gathering of berries and vegetables, and fishing.²⁴ It is because of these roles that they are **the first to observe changes in the quality of the water,**²⁵ **the loss of potency in medicinal plants**²⁶ **and when food is contaminated with toxins**²⁷, to name but a few examples.

Traditionally, indigenous women also play a key role in governance. For instance, based on the traditional governance system of the Haudenosaunee Confederacy, certain women have the title of *lakoiane* (“clan mother”) and are responsible for protecting the clan by choosing the Chiefs and supervising them in the performance of their duties in accordance with *Gayanashagowa* (the “Great Law of Peace”). These women have a veto power over decisions they consider are not in their community’s best interests.²⁸

1.1.3. Impacts of colonization on indigenous women

The brief summary above allows us to better appreciate just how central the land is to the identity and knowledge of indigenous peoples. It also allows us to understand **why the colonization of the lands that form what is now known as Canada has had such a deeply devastating impact on indigenous peoples and especially indigenous women.**

Moreover, in most indigenous communities in Quebec and Canada, indigenous women live in the shadow of a colonial system that institutionalized a patriarchal political structure that is foreign to their traditional systems of governance. By preventing indigenous women from voting or sitting on elected councils prior to 1951, the government system imposed by the *Indian Act* destroyed the decision-making power of indigenous women and the important role they played in most traditional indigenous governance systems, a large number of which were matriarchal. As stated by the Truth and Reconciliation Commission, **“Canada replaced existing forms of Aboriginal government with relatively powerless band councils whose decisions it could override and whose leaders it could depose. In the process, it disempowered Aboriginal women, who had held significant influence and powerful roles in many First Nations, including the Mohawks,**

²⁴ See, for instance, Deborah McGregor, “Traditional Ecological Knowledge: An Anishnabe Woman’s Perspective,” (2005) 29 *Atlantis* 103, p. 107; Gerdine Van Woudenberg, “Des femmes et de la territorialité: début d’un dialogue sur la nature sexuée des droits des autochtones,” (2004) 34 *Recherches amérindiennes au Québec* 75, p. 78; Nancy J. Turner, Marianne Boelscher Ignace and Ronald Ignace, “Traditional ecological knowledge and wisdom of Aboriginal peoples in British Columbia,” (2000) 10 *Ecological Applications* 1275; Titi Kunkel, “Aboriginal values and resource development in Native Space: Lessons from British Columbia,” (2017) *The Extractive Industries and Society* 6, p. 12; Native Women’s Association of Canada, “Aboriginal Women and Aboriginal Traditional Knowledge (ATK): Input and Insight on Aboriginal Traditional Knowledge” (2014), p. 3, online: <<https://www.nwac.ca/wp-content/uploads/2015/05/2014-NWAC-Aboriginal-Women-and-Aboriginal-Traditional-Knowledge-Report1.pdf>>.

²⁵ Deborah McGregor, “Traditional Ecological Knowledge: An Anishnabe Woman’s Perspective,” (2005) 29 *Atlantis* 103, p. 107.

²⁶ Titi Kunkel, “Aboriginal values and resource development in Native Space: Lessons from British Columbia,” (2017) *The Extractive Industries and Society* 6, p. 12.

²⁷ Joanna Kafarowski, “Gendered dimensions of environmental health, contaminants and global change in Nunavik, Canada,” (2006) 30 *Études/Inuit/Studies* 31.

²⁸ Gerald Taiaiake Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism*, Toronto, Oxford University Press, 1995, pp. 78-79.

the Carrier, and Tlingit.²⁹ This colonial system confined indigenous women to the domestic sphere by excluding them from political life and preventing them from taking part in decisions involving the land, and the control, access and allocation of resources for over a century.

Furthermore, until 1985, the *Indian Act* provided that an Indian woman who married a non-Indian or non-status Indian man, would lose her Indian status, and therefore her band membership with all the associated rights, including that to live on the reserve. This rule also applied to her dependent children, even if they were from an earlier union with a Status Indian man. This law thus prevented many indigenous women and their children from living on their traditional land, from taking part in the political, spiritual and cultural life of their communities, and of transmitting their knowledge to their children.

Following the legislative amendments made to the *Indian Act* in 1985 reversing this rule, the many indigenous women who returned to their communities led to a wave of protests, including before the courts. These challenges sought to address inequalities between men and women as these relate to Aboriginal rights and access to land and resources,³⁰ as well as to demand equal access to financing so that women can take meaningful part in the high-level decisions that shape these rights.³¹

While the discriminatory provisions of the *Indian Act* have largely been invalidated, **the power imbalance between indigenous men and women that these discriminatory laws led to is still very much a reality today**³², including within indigenous governments. For instance, currently 91 of the 250 indigenous elected officials in Quebec and Labrador are women, and only five of them hold the position of Chief or Grand Chief. However, even as chief or elected representatives, indigenous women are still less often involved in large-scale development project negotiations and in decision-making on issues involving land and resources than their male counterparts.³³

²⁹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal and Kingston, McGill-Queen's University Press (2015), p. 2-3, online:

<http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>

³⁰ Wendy Cornet, "First Nations Governance, the Indian Act and Women's Equality Rights," *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*, National Library of Canada, online: <http://fngovernance.org/resources_docs/First_Nation_Women__Governance.pdf>.

³¹ One notable example is the refusal by the government of Canada to finance the direct participation of the NWAC in the multilateral constitutional discussions that led to the Charlottetown Accord (see *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627).

³² For more information on this topic, see the QNW submission entitled "Discrimination des femmes autochtones" (2001), online: <http://www.faq-qnw.org/wp-content/uploads/2016/07/memoire_discrimination.pdf>

³³ Quebec Native Women, "Pour que l'égalité de droit devienne une égalité de fait," submitted to the Secrétariat à la condition féminine (January 29, 2016), p. 8, online: <http://www.scf.gouv.qc.ca/fileadmin/publications/politique/memoires/femmes_autochtones_quebec.pdf>.

1.2. Impacts of large-scale development projects on indigenous women

1.2.1. Why the need for a gender-based and intersectional analysis?

Exchanges with indigenous peoples – whether through land claim negotiations, consultations, or environmental assessments – must take into account the unique history of indigenous women and the social relations within their communities. Otherwise, the specific vulnerabilities that women face cannot be addressed. Worse still, there is a risk that the opportunity to benefit from the unique traditional and environmental knowledge of which indigenous women are the keepers will be missed.

Any analysis and assessment of environmental and socio-economic impacts, such as those conducted as part of NEB processes, must therefore adopt a gender-based and intersectional approach. Intersectionality, as a methodology and analytical framework, enables a better understanding of complex situations. The approach enables us to question and understand how differences amongst individuals and various groups within society are implicated when we examine complex problems, such as climate change. It also helps to shed light on how structures of power emerge and interact and to understand how sex, gender, ethnicity, age, and the economic status of individuals affect each person's experiences and interests.³⁴ **A gender-based and intersectional analysis thus brings attention to the impacts of a given project or problem, and reveals possibilities for adaptation and compensation that might otherwise be overlooked.**³⁵

1.2.2. Gender-based impacts of large-scale development projects and climate change on indigenous women

The research conducted by QNW has revealed that there is a **blatant lack of data and analysis on the impacts of large-scale development projects and climate change on indigenous women in Quebec and Canada**. Although the perspective of indigenous peoples is increasingly being considered, “[c]urrent regulatory mechanisms, including environmental assessment (EA) and gender-based analysis (GBA) frameworks, provide neither a systematic, comprehensive analysis of the gendered and intersectional impacts of resource development and extraction, nor any guidance on how to mitigate these impacts.”³⁶ Nonetheless, **the few studies that have been conducted show that this type of development project has harmful effects that**

³⁴ Anna Kaijser et Annica Kronsell, “Climate change through the lens of intersectionality,” (2014) 23 *Environmental Politics* 417, p. 418.

³⁵ Deborah Stienstra et al, “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North,” FemNorthNet/Canadian Research Institute for the Advancement of Women (May 13, 2016), p. 2, online: <<http://fnn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

³⁶ *Ibid.*, p. 3; see also Ellen Gabriel and Aurélie Arnaud, “Gendered Impacts: Indigenous Women and Resource Extraction” (November 2014), online: <http://www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf>.

disproportionately affect indigenous women. In the words of Porter and Judd, indigenous women “stand to gain the least and lose the most.”³⁷

i. Physical and mental health and safety

As a result of their proximity to and dependence on the land, compounded by their economic vulnerability, the health of indigenous women is particularly impacted by the **environmental contamination caused by certain development projects**. For instance, lead contamination is associated with a high risk of miscarriages and other problems during pregnancy. Contaminants can also be passed on to breastfeeding babies.³⁸ Climate change, which has made access to resources like animals and wild berries more difficult, has also had an adverse effect on food safety.³⁹

Furthermore, the disruption caused by large-scale projects in the territory is associated with an **increase in rates of domestic violence towards indigenous women, child abuse, and other crimes**. For instance, one researcher working in a Northern indigenous community relocated as part of a hydroelectric project, found that the women reported an increase in cases of family violence following the displacement. The factors found to be determinative in explaining this increase in violence were the sudden changes in living conditions, loss of culture, broken family ties, and an increase in substance abuse.⁴⁰

What’s more, the arrival of temporary workers and the resulting increase in the cost of living often lead to **poverty, prostitution, sexual exploitation and human trafficking**.⁴¹ As mentioned by Aurélie Arnaud, former coordinator of QNW’s “Environment and Sustainable Development” program, with “fly-in and fly-out” projects, non-indigenous workers arrive in large numbers and often bring along alcohol, drugs and negative stereotypes. Although data are lacking to properly characterize this phenomenon, the situation is described by Arnaud as an “explosive cocktail” that leads to an increase in sexual violence and overall vulnerability of women living in affected communities.⁴²

³⁷ M. Porter & E. Judd, *Feminists Doing Development: A Practical Critique*, Londres, Zed Books, 1999, cited in Drew Meerveld, “Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities of Canada,” Graduate School of Public Policy and International Affairs, University of Ottawa, March 2016, p. 21.

³⁸ Joanna Kafarowski, “Gendered dimensions of environmental health, contaminants and global change in Nunavik, Canada” (2006) 30 *Études/Inuit/Studies* 31, pp. 33 and 36.

³⁹ Ashlee Cunsolo Willox et al., “From this place and of this place: Climate change, sense of place, and health in Nunatsiavut, Canada” (2012) 75 *Social Science & Medicine* 538, p. 543.

⁴⁰ Kathryn M. Campbell, “What Was It They Lost?,” (2007) 5 *Journal of Ethnicity in Criminal Justice* 57, pp. 64-67.

⁴¹ Deborah Stienstra et al. “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North” FemNorthNet/The Canadian Research Institute for the Advancement of Women (May 13, 2016), p. 11, online: <<http://fmn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

⁴² Aurélie Arnaud, “Plan nord – Où sont les femmes autochtones?” (2011) 16 *Recherches amérindiennes au Québec* 81, p. 82.

Finally, reports that discuss indigenous women in the mining and energy sectors reveal that they are often victims of harassment in the workplace, and that the perpetrators often go unpunished. For instance, according to QNW's research, several cases of rape at the La Romaine hydroelectric work site and around Shefferville were reported, but were never prosecuted; several women finally quit their jobs, unable to continue tolerating the harassment they were exposed to.⁴³ Similar experiences were also reported in Labrador⁴⁴ and in northeastern British Columbia.⁴⁵ According to reports made to Amnesty International, women are regularly faced with sexual harassment from their supervisors: "It's a boys club, so if something happens you don't say anything."⁴⁶

ii. *Restriction or loss of access to the land*

Another devastating effect of large-scale development projects is the decrease, or even the loss, of access to the land and the destruction of ecosystems. This loss has a significant impact on the identity of indigenous women and their capacity to assume their traditional roles on the territory. In fact, some say that, more than any other factor, loss of land is the main cause of cultural stress within indigenous communities. For instance, in the 1950s, the Hebron Inuit were relocated to a new community. This uprooting led to a colossal loss of culture, destroyed family ties, and caused several premature deaths: "[The] degrading circumstances of their lives led many Hebron Inuit to drift from community to community as permanently displaced people...[and the] young people, mature adults and also elderly adults [that passed away]... were often said to have died from heartbreak over leaving their homeland."⁴⁷

In many communities, women are responsible for the preparation of food, medicines and cultural objects. Oil and gas wells, pipelines, industrial roads and other structures fragment the landscape and destroy the habitat needed for culturally important species.⁴⁸ Climate change also affects snow, ice, plants and transportation conditions, and has an adverse effect on hunting and the availability of food and medicinal plants. These environmental changes have a direct impact on the health and the physical, mental, emotional, cultural and spiritual wellbeing of indigenous women, in particular those living in vulnerable economic and social situations.⁴⁹ They also lead to a

⁴³ Aurélie Arnaud, "Les impacts de l'industrie minière et énergétique sur les femmes autochtones du Québec ainsi que leurs luttes," published in Rapport d'atelier de l'Association québécoise des organismes de coopération internationale (April 2015), online: <<http://www.aqoci.qc.ca/?L-impact-de-l-industrie-miniére-et>>.

⁴⁴ Deborah Stienstra et al. "Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada's North" FemNorthNet/The Canadian Research Institute for the Advancement of Women (May 13, 2016), p. 11, online: <<http://fmn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

⁴⁵ Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada*, London, Amnesty International (2016).

⁴⁶ *Ibid.* at p. 42.

⁴⁷ Chantelle A.M. Richmond and Nancy A. Ross, "The determinants of First Nation and Inuit health: A critical population health approach" (2009) 15 *Health & Place* 403, p. 404.

⁴⁸ Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada – Summary*, London, Amnesty International (2016), p. 5.

⁴⁹ Ashlee Cunsolo Willox et al., "'From this place and of this place': Climate change, sense of place, and health in Nunatsiavut, Canada" (2012) 75 *Social Science & Medicine* 538, p. 539.

progressive loss of traditional knowledge, language and the capacity of women to transmit their knowledge to their children and grandchildren.

The loss of access to the land affects not only indigenous women living on their traditional territory, but also those living in urban centres. Indeed, despite the physical distance separating indigenous women living in urban areas from their land, the land remains fundamental to them and their identity. The increase in the number and magnitude of projects not only results in the displacement of communities and migration to cities, it also affects the relationships of indigenous women living in cities with their families and communities, as well as their territory.

iii. Inequalities in the distribution of economic benefits

There is no doubt that industry and development result in more jobs and higher income. However, the economic advantages and benefits of employment are precarious and unfair insofar as they are disproportionately granted to men.

Jobs in resource extraction and development are predominantly held by men. For instance, only 1% of women from the La Romaine Innu community have jobs at the work site.⁵⁰ When women are hired, they are paid lower wages and are often relegated to marginal jobs such as administrative work or cleaning.⁵¹ The lack of daycare services at companies and the atypical work schedules frequently found in these industries are major obstacles to women working in the mining and energy sectors due to the impossibility of balancing work and family.⁵²

Furthermore, the exclusion of indigenous women from decision-making and negotiating circles with proponents and the lack of fair representation and consideration of their interests deprive them from benefits with respect to royalties or specific reinvestments in the community.

In fact, since the influx of workers and sudden increase in wages have caused a rise in the local price of essential goods and housing, those, like indigenous women, who tend not to earn high wages, are forced to live in conditions marked by food insecurity and precarious housing.⁵³

⁵⁰ Aurélie Arnaud, “Les impacts de l’industrie minière et énergétique sur les femmes autochtones du Québec ainsi que leurs luttes,” workshop report of the Association québécoise des organismes de coopération internationale (April 2015), online: <<http://www.aqoci.qc.ca/?L-impact-de-l-industrie-miniére-et>>

⁵¹ *Ibid.*; Deborah Stienstra et al. “Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada’s North” FemNorthNet/The Canadian Research Institute for the Advancement of Women (May 13, 2016), p. 9, online: <<http://fnn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

⁵² *Ibid.*; William Hipwell et al., “Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change” Working Discussion Paper prepared for the North-South Institute (January 2002), p. 12.

⁵³ *Ibid.*; Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada – Summary*, London, Amnesty International (2016), p. 4.

1.2.3. The transformative potential of a gender-based approach: the case of Voisey's Bay Mine

There are few examples of projects for which an assessment of specific impacts on indigenous women was done by involving them in the assessments and negotiations prior to the start of the project. In fact, the example of Voisey's Bay Mine is often presented as an exemplary but isolated case. The Voisey's Bay Mine experience has strengths and weaknesses, and there are lessons to be learned for the future.

Voisey's Bay is located about 50 kilometres southwest of Nain, an Inuit village in Labrador and a region for which the Inuit and Innu have an aboriginal title. The mine is home to the largest nickel deposit in the world.⁵⁴ As part of the process for obtaining an operating licence for the mine, the Voisey's Bay Nickel Company Limited (VBNC) had to conduct an environmental assessment and negotiate an impact and benefit agreement (IBA) with the affected communities. Both processes, and the environmental assessment in particular, stand out from other similar projects because of the important role played by indigenous women in them.⁵⁵

From the very beginning of the environmental assessment process, indigenous women organized themselves to take part in public hearings, in particular through the Postville Women's Group (PWG), Tongamiut Inuit Annait (TIA), and the Ad Hoc Committee on Aboriginal Women and Mining in Labrador (Ad Hoc Committee). These groups received funding from the Canadian Environmental Assessment Agency to conduct studies and carry out mobilization activities.⁵⁶ According to Archibald and Crnkovich, "[t]he decision to participate in these hearings was a direct result of being able to come together in a workshop with other women. Individually, the women were daunted by the idea of responding to the VBNC's EIS [environmental impact study]."⁵⁷

After working together for a few months, two reports were prepared by the women, including one by PWG and the other by TIA and the Ad Hoc Committee jointly. These reports contained several identical points⁵⁸ and led to the development of an employment plan for the women. Furthermore, although the groups did not directly take part in negotiations related to the IBA, the women still played a key role in defining the agenda for the negotiations. In addition, the Inuit chose a female negotiating chief, which allowed the negotiated agreement for Voisey's Bay to include provisions specifically pertaining to women, despite resistance on the part of the mining company.⁵⁹

⁵⁴ Linda Archibald and Mary Crnkovich, "If gender mattered: a case study of Inuit women, land claims and the Voisey's Bay nickel project," *Status of Women Canada*, November 1999, pp. 1-2.

⁵⁵ David John Cox, "Environmental Impact Assessments and Impact Benefit Agreements: The Participation of Aboriginal Women at Voisey's Bay Mine," *McMaster University*, March 2013, pp. 2-3.

⁵⁶ *Ibid.*, p. 24.

⁵⁷ Linda Archibald and Mary Crnkovich, "If gender mattered: a case study of Inuit women, land claims and the Voisey's Bay nickel project," *Status of Women Canada*, November 1999, p. 27.

⁵⁸ David John Cox, "Environmental Impact Assessments and Impact Benefit Agreements: The Participation of Aboriginal Women at Voisey's Bay Mine," *McMaster University*, March 2013, p. 25.

⁵⁹ Ciaran O'Faircheallaigh, "Women's absence, women's power: indigenous women and negotiations with mining companies in Australia and Canada" (2013) 36 *Ethnic and Racial Studies* 1789, p. 1798-1799.

However, despite the participation and significant influence of the women's groups, many of their concerns were not taken into account. The reports produced highlighted many preoccupations, namely pertaining to land use, culture, violence against women, healthcare services, and the environment. However, only the recommendations related to employment were incorporated.⁶⁰ Since the proponent managed to limit the women's interests to an employment plan, this example shows that it is imperative to make proponents aware of women's non-financial concerns and to consider the power dynamics present in such a context – not only within a community, but also between the parties.

Despite its shortcomings, however, the Voisey's Bay Mine experience shows that when indigenous women have the opportunity to take part in such projects, they *do* influence the process and outcome. The contributions and differing approaches of Inuit and Innu women also show that women from each indigenous community have concerns, interests and ways of working that are specific to them. Whereas some may prefer participating in a formal process, others may prefer a community-based and less rigid approach. The planning and definition of the terms of engagement for participating in the negotiation process must therefore also be the subject of consultations.⁶¹

Lastly, it should be noted that, in most cases, it will be necessary to provide financial support in order to make the involvement of women possible. Such financial support must include mechanisms aimed at improving capacities and, if appropriate, facilitate cooperation amongst women from various communities so that they can benefit from their respective experiences.

2. Broadening the horizons: incorporating indigenous legal traditions and international law

Modernization of the NEB can only be achieved by adopting a forward-looking perspective, that incorporates indigenous legal traditions as one of the positive sources of Canadian law (section 2.1), and promotes the full compliance with and implementation of Canada's international obligations towards indigenous women (section 2.2).

2.1. Indigenous legal traditions

2.1.1. Legal status of indigenous laws and traditions

Indigenous legal traditions in Quebec and Canada are rich and varied. Largely derived from oral sources, these legal traditions are described in traditional narratives, stories, songs, languages, ceremonies and dances. They are therefore unique and different in each community and are evolutionary in nature. Some are practiced fully within the communities, while others have been more heavily affected by colonization – albeit it to different degrees – and need to be revitalized.

⁶⁰ David John Cox, "Environmental Impact Assessments and Impact Benefit Agreements: The Participation of Aboriginal Women at Voisey's Bay Mine," McMaster University, March 2013, p. 25.

⁶¹ Ciaran O'Faircheallaigh, "Women's absence, women's power: indigenous women and negotiations with mining companies in Australia and Canada," (2013) 36 *Ethnic and Racial Studies* 1789.

Indeed, over the last few decades, major efforts have been made to revitalize and apply indigenous legal traditions in various areas and through various means.⁶²

The perspective of indigenous women in this process of revitalizing and implementing indigenous legal traditions is of paramount importance, as evidenced by the efforts to underscore the gendered and pluralistic dimension of legal traditions.⁶³ As has been discussed, and as will be elaborated in more detail below, due to the special place and social roles they have within their respective communities, indigenous women are the holders and guardians of specific ecological and traditional knowledge that is clearly distinguishable from that held by indigenous men.

Indigenous legal traditions consist of fundamental principles, laws and rules on, for instance, belonging and membership, self-determination and governance. They provide concrete tools for solving problems relating to a range of issues, such as the legitimacy of authority, the safety of the community, and the preservation of the land and its resources.⁶⁴ While **certain better-known aspects of indigenous legal traditions – such as traditional or ecological knowledge – are regularly used in impact studies related to NEB-regulated installations and activities, their role remains limited.** They are generally used to design mitigation and compensation measures, and not to determine whether or not the project in question ought to be approved by the NEB in the first place.

Several legal and practical considerations support the full integration of indigenous laws and legal traditions within the regulatory processes affecting indigenous rights and interests.

First, indigenous laws and legal traditions, including the principles related to the management and preservation of land and resources, as well as traditional systems of governance, **form part of the laws of the Canadian Confederation.** They consist of the **basis for recognizing indigenous rights in Canadian law and are crucial to the full enjoyment of indigenous peoples' right to self-governance.**⁶⁵ Furthermore, their existence and legitimacy is now recognized and protected by section 35(1) of the *Constitution Act of 1982*. In this respect, environmental and regulatory processes, including those of the NEB, cannot disregard them or not be subject to them.

Upon arriving in North America, Europeans saw the need to interact and trade with indigenous peoples in accordance with the laws and traditions that governed their societies, including by signing the many treaties that founded Canada as it is known today. Since then, Canadian courts

⁶² Geneviève Motard and Valérie Bergeron Boutin, “Le Québec et les traditions juridiques autochtones: analyse des politiques publiques en matière de négociations territoriales et d’autonomie,” in Patrick Taillon et al., *Un regard québécois sur le droit constitutionnel: Mélanges en l’honneur d’Henri Brun et de Guy Tremblay*, Montréal, Éditions Yvon Blais, 2016, pp. 623-625; Indigenous Law Research Unit (ILRU), online: <<http://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php>>.

⁶³ See, for instance, Emily Snyder, “Gender and Indigenous Law: A report prepared for the University of Victoria Indigenous Law Unit, the Indigenous Bar Association, and the Truth and Reconciliation Commission of Canada” (March 2013); Indigenous Law Research Unit (ILRU), “Gender Inside Indigenous Law Toolkit” (2017), online: <<http://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Toolkit%2001.01.16.pdf>>.

⁶⁴ Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61 McGill LJ 725, pp. 727-728.

⁶⁵ Peter W. Hutchins et al., “The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine,” (1995) 29 U.B.C. L. Rev. 251, p. 263.

have not only recognized and applied indigenous customs, practices and legal traditions in various spheres of public and private life⁶⁶, but they have also adopted the doctrine of continuity. According to this doctrine, indigenous interests and customary laws are presumed to have survived the assertion of sovereignty by the British Crown, and were absorbed into common law as rights, except to the extent that they were incompatible with Crown sovereignty, or were voluntarily ceded by treaty or otherwise extinguished by the government.⁶⁷ Hence, according to the Supreme Court of Canada, “Aboriginal rights are based on aboriginal practices, customs and traditions, not those of newcomers.”⁶⁸

The Supreme Court of Canada has ruled that subsection 35(1) of the *Constitution Act of 1982* limits the sovereignty of the provincial and federal governments so as to protect against any unjustified infringement⁶⁹ all the practices, traditions and customs which, since the time prior to contact, are an “integral part of the distinctive culture” of an indigenous people.⁷⁰

The indigenous laws or customs that are constitutionally protected can be related to family life and to the social, cultural or religious institutions of an indigenous people, but they first and foremost pertain to the rules regarding possession of the land and the use and preservation of natural resources.⁷¹ Therefore, since every society has its own values, laws and rules for sharing resources, as well as its own principles and forms of governance, **these indigenous legal traditions are also enshrined in the Constitution through subsection 35(1) as an aboriginal or treaty rights.**⁷²

This indigenous normativity, recognized in Canadian law, can thus no longer continue to be disregarded in environmental and regulatory processes, including those of the NEB. The time has come to give a place to indigenous laws and traditions specifically relating to the land and its resources. Furthermore, given their lively and evolving nature, indigenous laws and legal traditions have, from a practical standpoint, the **advantage of including territorial conceptions, land tenure systems, and the current and actual concerns of indigenous peoples in relation to a given development project**, rather than limiting themselves to historical facts associated with their use of and traditional activities on the land.⁷³

⁶⁶ *Connolly v. Woolrich and Johnstone*, [1867] 17 R.J.R.Q. 75, confirmed in *Johnstone v. Connolly*, [1869] 17 R.J.R.Q. 266; *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.).

⁶⁷ *Mitchell v. M.N.R.*, [2001] 1 SCR 911, par. 10.

⁶⁸ *Ibid.* at para 24; see also *R. v. Van der Peet*, [1996] 2 SCR 507, para 263-264, where then Justice McLachlin qualifies as a “golden thread” the recognition by the common law of the ancestral laws and customs of the indigenous peoples who occupied the land prior to European settlement.

⁶⁹ *R. v. Sparrow*, [1990] 1 SCR 1075.

⁷⁰ *R. v. Van der Peet*, [1996] 2 SCR 507, para 51.

⁷¹ Ghislain Otis, “La protection constitutionnelle de la pluralité juridique: le cas de l’adoption coutumière autochtone,” (2011) 41 R.G.D. Québec 567, p. 579.

⁷² John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash. U. J. L. & Pol’y 167, p. 201 and following; Lisa Chartrand, “Accommodating Indigenous Legal Traditions,” paper presented at the National Aboriginal Law CLE Conference, March 4-5, 2005, online:

<<http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>>.

⁷³ Geneviève Motard and Valérie Bergeron Boutin, “Le Québec et les traditions juridiques autochtones: analyse des politiques publiques en matière de négociations territoriales et d’autonomie,” in Patrick Taillon et al., *Un regard québécois sur le droit constitutionnel: Mélanges en l’honneur d’Henri Brun et de Guy Tremblay*, Montréal, Éditions Yvon Blais, 2016, p. 623.

2.1.2. Indigenous laws and legal traditions: perspective of indigenous women

As with other legal traditions in Canada, that is to say civil and common law, indigenous legal traditions require what Professor John Borrows has called a “translation process” and, in some cases, revitalization.⁷⁴ These laws and traditions are the result of an evolutionary, participatory and decentralized social process to which **all members or groups from an indigenous community contribute, in keeping with their respective roles, functions and social obligations in society.**⁷⁵ These are not isolated standards, beliefs or moral principles but precepts that are part of a set of rules and procedures that have arisen from indigenous practice and territoriality, which vary from one community to another.

Given the sources and structures that result in indigenous laws and legal traditions, **the perspective of indigenous women within each community is an essential component of them.** As we have seen, this perspective is clearly distinguishable from that of men in that women and men had – and still have – different social, environmental and family roles, functions and obligations and, as a result, **fundamentally different experiences and relationships with the land and its resources.**⁷⁶

This explains why, despite their great diversity, indigenous legal traditions generally recognize the crucial role of women and female elders in the preservation and at times the management of the land and certain resources. This recognition is associated, on the one hand, **with the special use women make of the land and its resources within each community and, on the other, with the spiritual and cultural beliefs of the community.** For instance, as mentioned, according to many indigenous cultures, including those in Quebec, women are traditionally considered to be keepers of the water, and female elders are in charge of educating youth on the customs and practices associated with water conservation.⁷⁷

Currently, the predominant discourse on land and resources, and more fundamentally the processes by which indigenous rights related to the land and resources are accorded with legal recognition and protection, embody what Professor Bird Rose calls “**deep colonization.**” **They ignore the power and presence of indigenous women** by according more value to the knowledge of men and the way they use the land. By erasing women in this way, there is now an absence of feminine presence where there once was one.⁷⁸ Thus, because colonial processes of dispossession and dissociation of indigenous peoples from the environmental landscape have led to the

⁷⁴ John Borrows, “Indigenous Legal Traditions in Canada,” (2005) 19 Wash. U. J. L. & Pol’y 167, pp. 191-192.

⁷⁵ Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories,” (2016) 61 McGill LJ 725, pp. 730-740; see also John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education,” (2016) 61 McGill LJ 795.

⁷⁶ Gerdine Van Woudenberg, “Des femmes et de la territorialité: début d’un dialogue sur la nature sexuée des droits des autochtones,” (2004) 34 *Recherches amérindiennes au Québec* 75, p. 78; see also Maureen G. Reed and Shannon Christie, “Environmental geography: we’re not quite home – reviewing the gender gap,” (2009) 33 *Progress in Human Geography* 246, pp. 250-251.

⁷⁷ Native Women’s Association of Canada, “Aboriginal Women and Aboriginal Traditional Knowledge (ATK): Input and Insight on Aboriginal Traditional Knowledge” (2014), pp. 26-27, online: <<https://www.nwac.ca/wp-content/uploads/2015/05/2014-NWAC-Aboriginal-Women-and-Aboriginal-Traditional-Knowledge-Report1.pdf>>

⁷⁸ Deborah Bird Rose, “Land Rights and Deep Colonising: The Erasure of Women,” (1996) 3 *Aboriginal Law Journal* 7, cited in Gerdine Van Woudenberg, “Des femmes et de la territorialité: début d’un dialogue sur la nature sexuée des droits des autochtones” (2004) 34 *Recherches amérindiennes au Québec* 75, p. 76.

marginalization of women and their exclusion from decision-making circles in most indigenous communities,⁷⁹ **decolonization necessarily involves the reintegration of indigenous women, their knowledge and perspectives, and consideration of their specific interests within the current processes involved in regulating development projects, such as those of the NEB.**

In fact, QNW submits that Canada’s commitment to revitalizing the nation-to-nation relationship between the Crown and indigenous peoples requires that measures be put in place that will enable such a reintegration. Such are the demands of the **Call to Action No. 45(iv) of the Truth and Reconciliation Commission**, which requires the Government of Canada to “reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions.”⁸⁰

2.2. Canada’s international commitments towards indigenous women

As a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and other instruments of international law regarding the rights of indigenous peoples, gender equality and environmental protection, the Government of Canada has committed itself to integrating the right of indigenous peoples to self-determination and self-governance in the design and implementation of environmental and regulatory processes, such as those of the NEB. The Government of Canada is also required to ensure that these processes, and their resulting decisions, are free from any discrimination towards indigenous women.

i. *The United Nations Declaration on the Rights of Indigenous Peoples*

The consultation processes undertaken by the Government of Canada, including those conducted by the NEB, should be amended to include the opinion of indigenous peoples in accordance with the principle of free, prior and informed consent (FPIC). This fundamental principle, found in articles 19 and 32 of the Declaration and in the case law of the Inter-American Court of Human Rights, is recognized by the Supreme Court of Canada⁸¹ and constitutes an essential means by which to promote reconciliation. Obtaining such consent is also the only way to truly ensure social acceptance of large-scale projects regulated by the NEB, as well as respect for the rights and interests of indigenous peoples.

Contrary to popular thinking, **FPIC is not a veto**. On the contrary, it takes the form of **collaborative consent resulting from a participatory process** between indigenous peoples and other governments and stakeholders. It consists of **reasoning and public deliberation, which involves an egalitarian dialogue within the community**. In this respect, it would be informative to once again look at indigenous legal traditions to examine how consent is obtained under these

⁷⁹ *Ibid.*, p. 80.

⁸⁰ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal and Kingston, McGill-Queen’s University Press (2015), p. 326, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>

⁸¹ The need to obtain the consent of indigenous peoples in relation to “very serious issues” is an integral part of the duty to consult and accommodate, as defined by the Supreme Court, namely in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para 24.

traditions.⁸² Even though indigenous legal traditions are diverse, there are similarities across the various indigenous cultures that would allow guiding principles and the traditional decision-makers to be identified. One of these unifying principles is that of consensus decision-making, a process whereby the contribution of each group within the society is based on its specific roles and functions.⁸³

As previously seen, indigenous women have traditionally played a key role in decisions regarding the management and preservation of the land and its resources. Therefore, **full participation of indigenous women in any process that concerns their land and its resources is protected by the Declaration and the FPIC principle.**

In addition, according to paragraph 32(2) of the Declaration, the consent of indigenous peoples must be obtained “through their own representative institutions,” which means at the very least adequate representation of indigenous women or their specific interests in these institutions.

The Declaration affirms the civil, political and cultural rights of indigenous peoples, by stipulating in Article 44 that “[a]ll the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.”⁸⁴ Article 22 states that “[p]articular attention shall be paid to the rights and special needs of (...) women” in the implementation of the Declaration, and that states shall take measures to ensure that indigenous women enjoy the “full protection and guarantees against all forms of violence and discrimination.”⁸⁵

QNW believes that the gender-based and disproportionate impacts of large-scale energy development projects to which indigenous women are subjected – as well as the effects the resulting climate change has on them and their relationship with their traditional territory – justifies the implementation of special measures, such as those stated in the Declaration. These measures must be **aimed at addressing the specific concerns of and risks to indigenous women as part of the environmental and socioeconomic impact assessment processes of large-scale projects. This will enable their effective participation or fair representation of their interests in decision-making, and restore the full enjoyment of their right to self-governance.** Some ways in which Canada can meet these objectives will be addressed in the third part of this submission.

ii. Convention on the Elimination of All Forms of Discrimination Against Women

Canada signed the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) in 1981 and its optional protocol in 2002, under which it undertakes to ensure that government action and Canadian legislation are free of any discriminatory impact on women, including indigenous women. The **Beijing Declaration and Platform for Action, adopted at the**

⁸² This idea was proposed by Professor Val Napoleon at the CLE BC Aboriginal Law Conference held on November 25, 2016. See also: Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories,” (2016) 61 McGill LJ 725.

⁸³ John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash. U. J. L. & Pol’y 167, pp. 192-195.

⁸⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, Res. AG 61/295, UN Doc A/RES/61/295 (2007), Art. 44.

⁸⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, Res. AG 61/295, UN Doc A/RES/61/295 (2007), par. 22(1) and (2).

Fourth World Conference on Women in Beijing in 1995⁸⁶, also signed by Canada, defines the specific obligations of states with respect to indigenous women:

- “Ensure opportunities for women, including indigenous women, to participate in environmental decision-making at all levels, including as managers, designers and planners, and as implementers and evaluators of environmental projects”⁸⁷;
- “Integrate gender concerns and perspectives in policies and programmes for sustainable development”⁸⁸;
- “Integrate women, including indigenous women, their perspectives and knowledge, on an equal basis with men in decision-making regarding sustainable resource management”; “ensure adequate research to assess how and to what extent women are particularly susceptible or exposed to environmental degradation and hazards, including...indigenous women”⁸⁹;
- Promote knowledge of the role of indigenous women “in food gathering and production, soil conservation, irrigation, watershed management, sanitation, coastal zone and marine resource management, integrated pest management, land-use planning, forest conservation and community forestry, fisheries, natural disaster prevention, and new and renewable sources of energy, focusing particularly on indigenous women’s knowledge and experience.”⁹⁰

It should also be noted that in its most recent general recommendations adopted in March 2016, the Committee on the Elimination of Discrimination Against Women (CEDAW) stressed the need to involve indigenous women in rural areas in the design and implementation of development projects that affect them.⁹¹

iii. The Paris Agreement and the Convention on Biological Diversity

Insofar as large-scale projects regulated and approved by the NEB have undeniable and often irreversible environmental impacts, some of Canada’s international obligations with respect to environmental protection and the fight against climate change should also be addressed.

⁸⁶ Beijing Declaration and Platform for Action (1995): see Strategic objectives K.1, “Involve women actively in environmental decision-making at all levels” and K.2, “Integrate gender concerns and perspectives in policies and programmes for sustainable development,” pp. 158-162, online: <http://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf>.

⁸⁷ *Ibid*, article 253(a).

⁸⁸ *Ibid*, Strategic objective K.2.

⁸⁹ *Ibid*, articles 256(a) and (c).

⁹⁰ *Ibid*, articles 256(f).

⁹¹ General recommendation no. 34 (2016) on the rights of rural women, CEDAW/C/GC/29, online:

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f34&Lang=en>. The general recommendations by CEDAW constitute authoritative interpretations of the obligations of CEDED states.

Following the negotiations held during the Paris Climate Change Conference of the *United Nations Framework Convention on Climate Change* (UNFCCC), the Paris Agreement was ratified by Canada on October 5, 2016 and came into effect on November 4, 2016. According to Article 7.5 of the Agreement, the “Parties acknowledge that adaptation action should follow a country-driven, **gender-responsive**, participatory and fully transparent approach, **taking into consideration vulnerable groups, communities and ecosystems**, and should be based on and guided by the best available science and, **as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.**”⁹²

The *Convention on Biological Diversity* (CBD), to which Canada is also a party, recognizes in its preamble the “vital role that women play in the conservation and sustainable use of biological diversity” and affirms “the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.”⁹³

According to the **Programme of Work on the Implementation of Article 8(j) and Related Provisions of the CBD**, which requires states to “respect, preserve and maintain” the knowledge, practices and innovations of indigenous communities in the conservation and sustainable use of biological diversity, the Parties to the CBD have agreed to ensure the “[f]ull and effective participation of women of indigenous and local communities in all activities of the programme of work.”⁹⁴ Furthermore, the parties have agreed to develop appropriate mechanisms aimed at ensuring the full, active and effective participation of women in the implementation of the CBD by striving to “[b]uild on the basis of their knowledge.”⁹⁵

These principles are reiterated in the *Guidelines*⁹⁶ for conducting studies on the impacts of development projects on the traditional land of indigenous peoples, adopted by CBD members. These namely stipulate the need to:

- Ensure the full and effective participation of women in decision-making regarding the planning of development projects⁹⁷ and in the development and implementation of policies

⁹² Annex to the Decision of the Conference of Parties, adopted at the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, Paris, November 30 - December 13, 2015: COP 21-Decision 1/CP.21: “Adoption of the Paris Agreement” (January 29, 2016), online:

<http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>.

⁹³ United Nations, *Convention on Biological Diversity*, effective December 29, 1993, online:

<<https://www.cbd.int/doc/legal/cbd-en.pdf>>.

⁹⁴ Decision of the Conference of Parties, adopted at the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, May 15-26, 2000, Nairobi, Kenya: COP 5 Decision V/16, article 8(j) and related provisions, online: <<https://www.cbd.int/decision/cop/default.shtml?id=7158>>.

⁹⁵ *Ibid.*

⁹⁶ Decision of the Conference of Parties adopted at the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity, February 9-20, 2004 - Kuala Lumpur, Malaysia: COP 7 Decision VII/16, Article 8(j) and related provisions, Annex: *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, pp. 7-23, online: <<https://www.cbd.int/decision/cop/default.shtml?id=7753>>.

⁹⁷ *Ibid.*, para 8(c).

on the conservation of biological diversity⁹⁸ as part of the implementation of the principle of free, prior and informed consent.

- Examine, in social impact assessments, “the potential impacts of a proposed development on women in the affected community with due regard to their role as providers of food and nurturers of family, community decision-makers and heads of households, as well as custodians of biodiversity and holders of particular elements of (gender-specific) traditional knowledge, innovations and practices.”⁹⁹

3. Bridging the gap: full participation of indigenous women in consultations and decision-making

The modernization of regulatory and environmental processes requires the **full participation of indigenous women in decision-making regarding the protection, conservation and management of their environment, resources and traditional land**. This can be achieved through means such as:

- **The effective implementation of the inherent right of self-governance** of indigenous peoples in accordance with indigenous legal traditions, international law, and Canadian constitutional principles (section 3.1);
- The inclusion of the unique perspective and specific concerns of indigenous women in environmental impact assessments of development projects currently regulated by the NEB in (section 3.2); and
- The representativeness of NEB members and training for all those involved in its processes on the history of indigenous peoples, as well as the basic principles of indigenous laws and traditions (section 3.3).

3.1. The inherent right of self-governance of indigenous peoples and full participation of women in decision-making processes

The legislative reforms currently considered by Canada, including those pertaining to the modernization of the NEB, must recognize and enable the implementation of the inherent right to self-governance of indigenous peoples in regulatory and environmental processes. This right of self-governance is part of the inherent right of indigenous peoples to self-determination, and implies that **indigenous peoples have the power to make decisions regarding the preservation, conservation, management and development of their traditional lands and resources**. Furthermore, the right of self-governance, like all indigenous constitutional rights, is a communal

⁹⁸ *Ibid*, para 54.

⁹⁹ *Ibid*, para 48.

right,¹⁰⁰ which means that **it is held by indigenous peoples in their capacity as social and political communities**. Hence, the decisions made under the right of self-governance by indigenous decision-making entities must be representative of indigenous communities, including indigenous women. This is an issue of democracy.

If the modernization of regulatory and environmental processes involves the introduction of indigenous legal traditions, **the right of self-governance of indigenous peoples must also be interpreted and implemented in keeping with indigenous legal traditions** and the fundamental principles arising from the Declaration and Canada's other international commitments. It also entails recognizing the roles and place which indigenous women had within traditional governance systems.

It must also be interpreted in accordance with the principles of Canadian constitutional law regarding gender equality. In this respect, section 35(4) of the *Constitution Act 1982* provides that "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."¹⁰¹ Hence, **the right to self-governance, which is protected under section 35(1), is guaranteed equally to women and men**.

Section 15(2) of the *Charter* explicitly recognizes the need to adopt laws, programs and activities intended to improve the condition of disadvantaged individuals or groups in order to address historical disadvantages and attain substantive equality between men and women, among other groups. Although the *Charter* recognizes the need for governments to adopt measures that are differentiated and proactive in order to attain substantive equality, this approach has not been applied with respect to indigenous women and the promotion of their equally protected aboriginal rights. If Canada truly wishes to attain this objective, the next generation of aboriginal rights, including the right to self-determination and self-governance, must be **protected and implemented through policies designed to ensure the equal participation of indigenous women and adequate representation of their interests in any decision-making that affects and concerns them**. It is a question of breathing life into section 35(4) so that aboriginal and treaty rights that are guaranteed equally to women and men truly become so. Only an implementation of the right to self-governance that considers the historical disadvantages experienced by indigenous women will have been done in accordance with Canadian constitutional principles.

The Truth and Reconciliation Commission has defined reconciliation as "an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change."¹⁰²

¹⁰⁰ Kent McNeil, "La compétence du droit inhérent des gouvernements autochtones," National Centre for First Nations Governance, 2007, online: <http://fngovernance.org/ncfng_research/kent_mrneil_fr.pdf>.

¹⁰¹ *Constitution Act of 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, sect. 35(4).

¹⁰² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal and Kingston, McGill-Queen's University Press (2015), p. 19, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>

As has been discussed, indigenous women are often left out of decision-making with respect to their land and resources. In an effort to take into account the historical disadvantages of indigenous women as a result of, namely, federal government policies, the Government of Canada should also **implement mechanisms within regulatory and environmental processes such as those conducted by the NEB with a view of ensuring the full participation of indigenous women and the fair representation of their specific interests.** The creation of such mechanisms must be done in collaboration with indigenous women and their representatives, and QNW would be open to participating in such efforts.

Furthermore, to enable the participation of indigenous women in regulatory and environmental processes, **the Government of Canada should provide financial support and human resources to help strengthen the capacity of organizations, groups and persons representing the specific interests of indigenous women to participate** within these processes.

Regardless of the form the participation of indigenous peoples will take in regulatory and environmental processes, the representativeness of indigenous women in such processes must be ensured. For instance, in the event that an indigenous advisory committee tasked with conducting or reviewing assessments of project impacts on the rights and interests of indigenous peoples is set up in parallel to the NEB – as has been suggested by several stakeholders over the course of these NEB modernization consultations – it is critical that adequate representation by indigenous women and effective inclusion of their specific interests be ensured. One option would be to involve organizations that represent indigenous women and provide them with the financial support needed to strengthen their capacity.

3.2. The inclusion of specific impacts and the perspective of indigenous women in environmental and socio-economic impact assessments

Currently, **NEB regulations, policies and guidance notes contain no requirements as to the assessment and consideration of the specific impacts of projects on indigenous women.** The NEB's processes and decisions do not take this reality into account at all.¹⁰³

However, a gender-based and intersectional analysis method known as Gender-Based Analysis (GBA) is currently used by the federal and provincial governments to assess the possible impacts of policies, programs, and initiatives on various groups while taking into account gender and other factors such as age, education, language, geography, culture and income. Since 2011, at the request of NWAC and Pauktuutit, the need for GBA during consultations with indigenous communities

¹⁰³ National Energy Board, "Regulations, Guidance Notes and Related Documents under the *National Energy Board Act*" (last update: February 23, 2017), online: <<https://www.neb-one.gc.ca/bts/ctr/g/gnnb/index-eng.html>>. This observation is based on our knowledge and analysis of several large pipeline projects that have been recently approved or are being studied by the NEB. Any exception to this current practice is therefore marginal.

was included in the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*.¹⁰⁴ However, neither the *National Energy Board Act*, the *Canadian Environmental Assessment Act*, nor their respective enforcement policies make it an obligation. Note, also, that in Newfoundland and Labrador, GBA is mandatory in environmental assessments, but only with a view of ensuring that women have equal access to employment in all resource-development projects.¹⁰⁵

Several stakeholders in the present NEB modernization process have raised important concerns about the environmental assessments carried out as part of NEB processes, as well as the decisions made by the NEB that have an impact on indigenous lands and rights. **QNW supports and shares these concerns.** However, regardless of the process or entity in charge of reviewing impact assessments in relation to indigenous communities, **appropriate mechanisms must still be implemented to ensure the specific impacts of development projects on indigenous women are evaluated and taken into consideration.**

For instance, Canada must, **jointly with indigenous women, adapt the current GBA model to indigenous realities in order to use it as an analytical tool** to assess the impacts of large-scale development projects regulated by the NEB. To ensure that the perspective of indigenous women is truly considered, this tool **must make the active participation of indigenous women – or the organizations that represent their interests – mandatory when carrying out environmental and socio-economic impact assessments.** In this respect, the federal government must provide indigenous women or their representative organizations with the required resources and capacities so that they may carry out appropriate studies on the impacts suffered by women and participate fully in these processes.

Furthermore, environmental assessments must take into account the **unique perspective of indigenous women, which stems from the special relationship they have with the land, their traditional knowledge and the role they play in the transmission of traditional knowledge to future generations.** The exclusion of indigenous women from the public sphere such as the courts or studies on traditional land use, has rendered their traditional knowledge invisible. Concrete and specific measures must therefore be put in place to enable their participation.

The participation of indigenous women in environmental and socio-economic impact assessments would also put them in a better position to be involved in decision-making and in the negotiation of agreements with proponents and the government, which, as reported in several studies, are all too often conducted by men without any special attention given to the specific interests and needs of women.¹⁰⁶

¹⁰⁴“Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult” (March 2011), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>.

¹⁰⁵ Barbara Clow et al., “Gender-based analysis meets environmental assessment: Aligning policy mechanisms to address the resource development in Canada’s North,” FemNorthNet/Canadian Research Institute for the Advancement of Women (2016), online: <<http://fnn.criaw-icref.ca/images/userfiles/files/GBAMeetsEnviroAssessPP.pdf>>.

¹⁰⁶ Ciaran O’Faircheallaigh, “Indigenous Women and Mining Agreement Negotiations: Australia and Canada,” in Kuntala Lahiri-Dutt (Ed.), *Gendering the field, Towards Sustainable Livelihoods for Mining Communities*, Asia-Pacific Environment Monograph, 2011, p. 110.

However, it is important to remember that **the concerns of indigenous women with respect to large-scale projects regulated and approved by the NEB can go beyond the negative impacts which NEB processes seek to assess, mitigate and compensate.** The more general impact of these projects is the destruction of non-renewable resources which “breaks down the lifelong relationships which indigenous women have with the land, water, air, animals, plants and all living organisms.”¹⁰⁷ What is needed, then, is a transformation of the paradigm centered on economic growth within which natural resources are exploited today, toward a model that adopts and respects the principles that are fundamental to indigenous cultures such as respect, reciprocity, balance, harmony and protecting the interests of the next seven generations.

3.3. Representativeness and training of NEB members and officials

QNW fully supports and shares the concerns of other indigenous stakeholders with respect to the **lack of independence and expertise on the part of the NEB on indigenous rights and issues.** Several people have proposed setting up a parallel indigenous advisory committee to compensate for this shortcoming, while others have maintained that environmental assessments should be conducted by the Canadian Environmental Assessment Agency.

That being so, QNW maintains that if and insofar as the NEB continues to be in charge of making any decisions whatsoever with respect to indigenous lands and resources, it is up to the federal government to **ensure better representation of indigenous women within NEB membership** to compensate for the historical disadvantage experienced by them and to make sure that their perspective is taken into account. One way to ensure this representativeness is to allow indigenous governments, jointly with groups representing indigenous women, to take part in appointing or recommending a sufficient number of members to ensure that at least one member appointed or recommended by indigenous peoples takes part in the assessment, approval, and monitoring of projects affecting indigenous peoples’ land.

Furthermore, in accordance with **Call to Action No. 57 of the Truth and Reconciliation Commission of Canada**, it is imperative that all persons involved in regulatory and environmental processes, whether indigenous or not, be at least “[educated] on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal Rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.”¹⁰⁸

¹⁰⁷ Translation of an excerpt from a discussion with Viviane Michel, president of Québec Native Women Inc., March 27, 2017.

¹⁰⁸ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Montreal and Kingston, McGill-Queen’s University Press (2015), p. 219, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>

Furthermore, NEB members and officials in charge of relations with indigenous peoples regarding environmental assessments, as well as mitigation and monitoring measures, should, whether they are indigenous or not, receive **adequate training on indigenous laws and traditions** along with the various issues that the various indigenous communities face to revitalize them. This training should also focus on **the place and roles attributed to indigenous women within indigenous legal traditions**, as well as the **specific impacts and risks large-scale development projects can have on them**.

Recommendations

QNW recommends that the National Energy Board Modernization Expert Panel bring the fundamental issues raised in this submission to the attention of the Government of Canada. Given the NEB's special status and mandate under the *National Energy Board Act* and its independence from the federal government as a quasi-judicial tribunal, we believe that the effective implementation of the measures recommended by QNW **requires substantial changes to the legislation to ensure compliance of NEB processes and functions with the *Constitution Act of 1982*, indigenous laws and legal traditions, and the principles of international law**.

More specifically, QNW is recommending that the Expert Panel propose **a fundamental and comprehensive review of the regulatory and environmental processes currently conducted by the NEB**, namely by implementing measures aimed at:

➤ *Self-governance and indigenous legal traditions*

1. Consider the decisions of indigenous peoples in accordance with the **principle of free, prior and informed consent**, which requires the full participation of indigenous women in decision-making processes;
2. Ensure that all development projects and related activities on traditional indigenous land respect **the principles of sustainable development** and be designed in accordance with indigenous principles, namely, respect, reciprocity, balance, harmony, cooperation, gratitude and the appreciation of the interrelatedness of all creatures.
3. Support and finance the **revitalization of indigenous legal traditions related to the management of natural resources**, and provide for specific mechanisms that would enable them to be integrated into the processes currently conducted by NEB, jointly with indigenous peoples, especially indigenous women;
4. Recognize the **central role played by indigenous women in decision-making related to the land and its resources** in keeping with indigenous legal traditions by including the voices of indigenous women in the environmental and regulatory processes currently conducted by the NEB;

➤ *Participation and representation of indigenous women during consultations*

5. Implement, jointly with the organizations representing indigenous women such as QNW or the AFNQL council of elected women, specific mechanisms to **ensure the full participation of indigenous women throughout the consultation process with indigenous communities in relation to NEB-regulated projects**, namely as these pertain to project management, design, planning, execution, assessment and monitoring;
6. Implement, jointly with the organizations representing indigenous women such as QNW or the AFNQL council of elected women, specific mechanisms to **ensure that the specific concerns and interests of indigenous women are adequately considered throughout the consultation process** with indigenous communities in relation to NEB-regulated projects, namely with respect to project management, design, planning, execution, assessment and monitoring;

➤ *Impact assessment*

7. Provide **sufficient and realistic resources and financing** to organizations representing indigenous women such as QNW or the AFNQL council of elected women so that they may effectively **represent the specific concerns and interests of indigenous women** within the processes currently conducted by the NEB;
8. Support and finance the realization, by organizations that represent indigenous women such as QNW or the AFNQL council of elected women, of **comprehensive studies to document and assess the specific impacts of NEB-regulated projects on indigenous women** to begin filling the gap in analytical and statistical data in this area;
9. Make it mandatory to include **gender-based analysis that is adapted to indigenous realities as part of every environmental and socio-economic impact assessment** that is conducted within the context of NEB-regulated projects. In this respect, the GBA framework already used by the federal government could be adapted, jointly with QNW or the AFNQL council of elected women, and serve as a tool to assess the specific impacts of these projects on indigenous women;

➤ *Appointment of NEB members*

10. If, and to the extent that the NEB will continue to be in charge of making decisions affecting indigenous lands and resources, ensure better representation of indigenous women within NEB membership by enabling indigenous peoples, jointly with groups that represent indigenous women, to take part in the appointment process to ensure that **at least one member that is appointed or recommended by indigenous peoples can take part in the assessment, approval and monitoring of all projects** affecting indigenous peoples' land;

➤ *Training of NEB members and personnel*

11. Provide all persons involved in the processes conducted by the NEB with **adequate skills-based training on the history and legal traditions of indigenous peoples**, aimed at enhancing intercultural aptitudes, respect for human rights, and the fight against racism and discrimination; and
12. Provide all NEB members and employees responsible for relations with indigenous peoples, including environmental assessments, and mitigation and monitoring measures, with **adequate training so that they may better appreciate the place and role of women within indigenous legal traditions**, as well as the **specific impacts that NEB-regulated projects may have on them**.

QNW remains available to take part in all required follow-ups and exchanges with the Expert Panel, Natural Resources Canada, or any other government department in charge of the modernization of the NEB in order to develop specific mechanisms and processes aimed at implementing the various measures recommended above.